

POINTS OF VIEW POINTS DE VUE

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The Governor General's Decision to Prorogue Parliament: Parliamentary Democracy Defended or Endangered?

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I. INTRODUCTION

We are fortunate that real crises are few and far between in Canadian politics. We have a fundamentally stable system of government, and most political leaders both understand and play by the rules most of the time. As a result, it is something of a shock when a real crisis erupts and fundamental differences unfold over basic constitutional rules. Canada's parliamentary system has been under increasing strain for several years, but matters came to a head in late 2008. While Governor General Michaëlle Jean's controversial decision to grant Prime Minister Stephen Harper's request to prorogue Parliament was the high point of this crisis, there is so much more about this episode that needs to be understood. And it is crucial for us to really understand this affair because the ramifications of the 2008 crisis are profound and enduring. One reason the events erupted so quickly into a crisis is that they dealt with the unwritten rules of the constitution, which are seldom discussed in depth even at the best of times and, as a result, are subject to misinterpretation and misrepresentation in times of conflict. The tension was compounded by the unprecedented nature of much of what transpired. Without clear and easy parallels to similar crises in the past, the public and their advisors in the media were left confused as to what was or was not the proper course of action. Nevertheless, there were clear constitutional principles at play that would have been able to give better direction to the Governor General and the Prime Minister if they had been heeded.

An examination of the 2008 crisis is needed both to put events into perspective and to discern lessons for the future. Although the events were relatively simple, their context touched on deep and conflicting aspects of our constitution. The meaning of elections, the role of Parliament in deciding who governs, the legitimacy of Québec separatists

in national politics, the right of the prime minister to lead the political system, and the powers of the governor general were all pitted against each other and called into question at some point. With such a potent concoction, it is little wonder that matters boiled over. This study will try to unravel the main issues involved and explain the constitutional rules which apply.

For some, the Governor General did the right thing in acting on the Prime Minister's advice to prorogue Parliament. She correctly ensured that there would be a cooling off period before a new confidence vote is held, and she prevented hasty actions by opposition parties to hijack Parliament and install themselves in cabinet, when the Conservative Party of Canada had been empowered by the last election to form the government. For others, however, the Governor General inappropriately suspended Parliament and set a dangerous precedent for the future. Now prime ministers can avoid defeat on impending confidence votes simply by proroguing Parliament, only to return months later when they feel they have the situation under better control. The result is a severe blow to the principle of responsible government and Parliament's ability to decide which party or parties has its confidence as the government of the day. Such widely divergent views attest to strongly held beliefs on each side that abuses of power were being perpetrated by the other.

A clear review of the events as they unfolded is useful to refresh our memories about what exactly transpired and in what order. This review is provided in Part II. Then, the relevant constitutional rules will be reviewed. In order to better analyze the relevant constitutional rules and the outcome of the 2008 constitutional crisis, a fuller understanding is needed of the nature of election outcomes, the essence of parliamentary democracy, the significance of the principle of responsible

government, and of how governments are formed. These matters are examined in Part III. In Part IV, the analysis turns to the role of the governor general in a Parliamentary system, and continues, in Part V, with an assessment of Governor General Jean's decision to prorogue Parliament. The concluding Part VI summarizes the constitutional principles which justify the argument that the Governor General had a duty to refuse the Prime Minister's advice to prorogue Parliament.

II. A CHRONOLOGY

The order of events that unfolded is clear, but the significance attached to them might be debated. The 2008 election was held on October 14 and resulted in no one party gaining control of the House of Commons. The Conservative Party won more seats than any of the other parties, 143 of a possible 308, on the strength of almost 38 percent of the vote. This represented a gain of nineteen seats and 1.3 percent of the vote, despite a drop of over 165,000 votes from 2006, because overall turnout was lower. The Conservatives were twelve votes short of the 155 needed for a majority in the Commons. The Liberal Party of Canada finished second with seventy-seven seats and 26 percent of the vote. This was a loss of twenty-six seats and 4 percentage points in the vote for the Liberals, as well as an absolute loss of over 850,000 votes. The Bloc Québécois lost two seats and a half percentage of the national vote total, ending up with forty-nine seats and 10 percent of the vote. The New Democratic Party (NDP) gained eight seats and just under a percentage point of the vote to finish with thirty-seven seats and just over 18 percent of the vote.¹ The Liberals were widely viewed as the losers in this election, as they won their smallest share of the national vote since Confederation. Lib-

eral Party leader Stéphane Dion announced within days of the election that he would resign as leader, but would stay in office until a leadership convention to be held in May 2009 produced a replacement. Harper remained as Prime Minister, and there was no serious discussion that he should do otherwise. He advised the Governor General to summon Parliament to meet on November 17. Because the Governor General was on an official tour of Eastern Europe at the time, Chief Justice Beverly McLachlin of the Supreme Court of Canada, in her capacity as Deputy of the Governor General, read the speech from the throne on November 18. The government's motion in reply to the speech from the throne was debated over the course of the next few days. The Liberals successfully sponsored an amendment that was adopted on November 25, which read:

and we urge Your Excellency's advisors to respect the results of the election in which more than 60 percent of voters supported Members of Parliament in the opposition;

to bear in mind that people express their wishes as much through the opposition as through the government;

to recognize that Canadians rightfully expect the House of Commons they just elected to function in a less partisan, more constructive and collaborative manner, with the first responsibility for setting a better tone being that of the government which requires the government to be more forthcoming than it has been up to now; and

to that end, given the crucial nature of the up-coming economic and fiscal update, to provide representatives of opposition parties with a detailed briefing by appropriate senior officials at least three hours in advance of the public presentation of the update, so all Members of Parliament can be properly equipped to deal with the serious economic difficulties confronting Canadians.²

1 Andrew Heard, "2008 Election Results," online: Elections <<http://www.sfu.ca/~aheard/elections/results.html>>.

2 *House of Commons Journals*, 40th Parl. 1st sess.,

This amendment was not considered to be a test of confidence and debate on the main government motion continued. On the afternoon of Thursday, November 27, Minister of Finance Jim Flaherty presented an economic statement to the House of Commons. This statement was immediately condemned by the leaders of all three of the opposition parties, who together announced that they would vote against the measures contained in the economic statement. Two principle concerns were the lack of a stimulus plan to address the unfolding global economic problems, and the plan to eliminate the quarterly financial subsidies that political parties receive (based on the number of votes each received in the previous election). Immediately following the speeches on the economic statement, the House voted on the final motion in reply to the speech from the throne, which served as the first substantive test of confidence in the government since Parliament resumed after the October general election; this motion passed on a voice vote.

The government announced that the following Monday, December 1 would be allotted as an opposition day, and that a “ways and means” vote would be held to formally proceed with measures contained in the economic statement. This set the stage for two confidence motions to be voted on that Monday. Harper indicated that the ways and means motion was a confidence measure; this is normally the case since voting against it would prevent the introduction of key financial legislation. Because it was the first day allotted to the opposition, the Liberal Party would also be able to set the agenda and propose motions to be voted on that day. Dion tabled a motion that would have been an explicit test of confidence in the government:

That, in light of the Conservatives’ failure to recognize the seriousness of Canada’s economic situation, and its failure in particular to present any credible plan to stimulate the Canadian economy and to help workers and businesses in hard-pressed sectors such as manufacturing, the automotive industry and forestry, this House has lost confidence in this government, and is of the opinion that a viable alternative government can be formed within the present House of Commons.³

Thus, the stage was set for the apparent defeat of the government on December 1. It is noteworthy that Dion’s proposed motion not only stated that the House had lost confidence in the government, but that a viable alternative government could be formed.

The government had begun to look for room for compromise on Friday, November 28, when it mentioned that the controversial proposal to eliminate party subsidies would not be a part of the ways and means motion the following Monday, December 1. This gave some hope that the opposition might vote for the ways and means motion to allow proposed changes to the Registered Retirement Savings Plan to proceed. However, the opposition parties all responded with statements that they would still vote no confidence in the government, principally because it had failed to provide an economic stimulus package; the door was open, however, to vote in favour of the ways and means motion, while also supporting Dion’s confidence motion. In the face of this concerted opposition stand, Harper announced the next day, Saturday, November 29, that the allotted opposition day and the ways and means vote would not be held on Monday as originally planned, but would be postponed until the following Monday, De-

No. 06 (25 Nov 2008) at 38, online: Parliament of Canada <<http://www2.parl.gc.ca/content/hoc/House/401/Journals/006/Journal006.PDF>>.

3 *House of Commons Order Paper and Notice Paper*, 40th Parl. 1st sess., No. 10 (1 Dec 2008) at 18, online: Parliament of Canada <<http://www2.parl.gc.ca/content/hoc/House/401/NoticeOrder/010/ordpaper010.PDF>>.

ember 8. The government is able to do this, even when in a minority position, because it alone controls the order paper and can re-schedule most votes almost at will.⁴

Late on Sunday, November 30, opposition parties confirmed with various media outlets that they had reached a formal agreement to form a coalition government to replace the Conservative Party. The following day, Monday, December 1, the leaders of the Liberals, NDP, and the Bloc Québécois held a joint news conference to announce the agreements, which they signed, to create a coalition government composed of Liberal and NDP cabinet ministers; this coalition cabinet agreement would initially last two years but could be extended. The Bloc agreed to support this coalition cabinet in all confidence votes for an eighteen-month period, which could be lengthened.⁵ These agreements were then approved by the three party caucuses. Dion would be the prime minister of this government, but he would step aside and be replaced by whoever won the Liberal leadership convention in May 2009.

The government responded with a public relations campaign attacking the proposed

coalition on several fronts. First, various spokespersons referred to the opposition trying to steal the government and overturn the results of the October election. The opposition leaders were said to have denied the possibility of a coalition during the election campaign; thus, they could only legitimately form a coalition government if they went back to the people in a fresh election and campaigned on that promise. The rhetoric got quite inflammatory, with such statements as Conservative Member of Parliament Patrick Brown referring to “this coup d’état, this non-election, this takeover of democracy.”⁶ Second, an emotional attack was made on the role of the Bloc Québécois. The proposed coalition was said to endanger the country, since it was to be propped up by a group of separatists dedicated to breaking it up. Both messages of this public relations campaign appeared to resonate among many in the public, particularly in the West.

The Governor General, meanwhile, was still out of the country on her tour of Eastern Europe. Dion and NDP leader Jack Layton both wrote to her on Monday, December 1 to convey their intention to vote no confidence in the government and to form a coalition government with the support of the Bloc.⁷ Although she received no advice from the Prime Minister to do so, the Governor General decided to cut short her trip and return to Ottawa on Wednesday, December 3, and arranged to meet with the Prime Minister the next day. On that Wednesday evening,

4 The prime constraint is that a certain number of opposition days have to be held with a particular calendar period and prior to certain financial votes. The government can choose on which specific days those events take place. Curiously, this gives the government the power to choose the timing of many votes of confidence, which it can do to its advantage.

5 For details of the Liberal-NDP coalition agreement, see “An Accord on a Cooperative Government to Address the Present Economic Crisis,” online: Liberal Party of Canada <http://www.liberal.ca/pdf/docs/081201_Accord_en_signed.pdf>; for the Liberal-NDP-Bloc agreement, see “A Policy Accord to Address the Present Economic Crisis,” online: Liberal Party of Canada <http://www.liberal.ca/pdf/docs/081201_Policy_Frame_en_signed.pdf>.

6 *House of Commons Debates*, No. 010 (1 December 2008) at 438 (Mr Patrick Brown), online: Parliament of Canada <<http://www2.parl.gc.ca/content/hoc/House/401/Debates/010/HAN010-E.PDF>>.

7 The letters have been made available from the Liberal Party website: “Opposition Parties Sign Agreement to Form Alternative Government,” online: Liberal Party of Canada <http://www.liberal.ca/story_15508_e.aspx>.

the Prime Minister and the three opposition party leaders each made televised speeches to the nation. The next day, the three opposition leaders sent essentially identical petitions to the Governor General, signed by 161 opposition MPs from the Liberal, NDP, and Bloc Québécois caucuses, accompanied by a covering letter from Dion. In this letter Jean was informed of their intent to vote in favour of Dion's no confidence motion, then scheduled to be dealt with on the following Monday, December 8; the motion also supported an alternative government and was reproduced in the petition.⁸ Harper met with Jean on the morning of Thursday, December 4 for over two hours. During this meeting, he advised her to prorogue Parliament and to set its recall for January 26, 2009. She agreed to his request and signed the proclamation, ending the first session of the fortieth Parliament. Harper then announced to the press that he would schedule a full budget to be presented on January 27. Many believed that the postponed question of confidence would be settled by the budget speech set for January 27.

8 All three petitions and the covering letter are available from the Liberal Party website: "Opposition Parties Deliver Petitions to Governor General," online: Liberal Party of Canada <http://www.liberal.ca/story_15520_e.aspx>. Each of the petitions read:

We the majority of the members of Canada's House of Commons, humbly inform you that we would vote in favour of the motion proposed by the Official Opposition and that reads as follows:

That, in light of the Conservatives' failure to recognize the seriousness of Canada's economic situation, and its failure in particular to present any credible plan to stimulate the Canadian economy and to help workers and businesses in hard-pressed sectors such as manufacturing, the automotive industry and forestry, this House has lost confidence in this government, and is of the opinion that a viable alternative government can be formed within the present House of Commons.

But this is an erroneous assumption since the delivery of the speech is a completely separate event from any votes related to the budget. The government is in complete control of the timing of votes on both the budget and the new speech from the throne. There can be, in fact, no assurance of when the government would actually face a confidence vote in the new session.

The fundamental question to emerge from these events concerns the Governor General's decision to prorogue Parliament. Did she defend or endanger parliamentary democracy by suspending Parliament? A proper answer to this question requires a fuller understanding of the constitutional rules involved, as well as of the nature of parliamentary democracy itself.

III. THE CONSTITUTION AND PARLIAMENTARY GOVERNMENT

Unfortunately, the law of the constitution is of little help here. Canada's foundational constitutional document, the *Constitution Act, 1867*, was deliberately skeletal. It was simply assumed that the most important aspects of Canada's new political institutions would unquestionably function along the lines of Britain's. The preamble to the 1867 Act noted that the confederating provinces wished to be united into one dominion "with a Constitution similar in Principle to that of the United Kingdom." The basic organization and operation of parliamentary democracy was virtually ignored in the rest of the Act. For example, there was not a single mention of the office of prime minister. Furthermore, the defining principle of parliamentary government, that the prime minister and cabinet must retain the confidence of the House of Commons, is also never mentioned. Instead, the legal provisions of our constitution mirror the British laws providing for monarchic government, with the governor general acting in

the Queen's name to direct the whole system of government. He or she can hire and fire ministers in the privy council at will, appoint senators and judges, and refuse to sign into law any bill passed by the two houses of Parliament for any reason. The governor general's consent is also required for Parliament to consider major money bills. Canada's founders were so sure of the British parliamentary system that there was no need to spell it out in law. In this respect, our legal framework is similar to Britain's. In both countries, the monarchic legal framework is transformed into a real democracy through unwritten rules called constitutional conventions.

Constitutional conventions are vital to the Canadian constitution, as they are to the British and other Commonwealth constitutions. Conventions are informal rules that ensure the constitution operates in some way other than the bare letter of the law provides. In Canada's case, conventions transform the monarchic legal framework into a modern parliamentary democracy. Conventions arise in order to protect basic principles of the constitution, and it is the need to give life to these principles that creates the obligation to obey conventions. Two of the most important constitutional conventions dictate that the government must maintain the confidence of the elected members of Parliament, and that the governor general must act on any constitutionally valid advice given by the prime minister and cabinet. These conventions protect the principles of responsible government and democracy respectively. The 2008 constitutional crisis brought these two conventions to the forefront. These conventions and other relevant constitutional principles will be examined in greater detail when we come to examine the Governor General's decision to prorogue Parliament. But first we need to understand the connection between national elections, the formation of governments, and the role of Parliament.

Elections and parliamentary government

Canada's long experience with majority governments at both the provincial and national levels during the twentieth century has created some political beliefs that fit majority government situations, but obscure the reality of the parliamentary system. In common parlance one party "wins" an election and thus has the right to govern. This is effectively the case when one party wins a majority of seats in the legislature. However, this is a misperception of parliamentary government, and it is compounded by many who erroneously suppose that we actually vote directly for a prime minister. An Ipsos poll conducted in December 2008 for the Dominion Institute found 51 percent of Canadians believe this to be true.⁹ The prevalence of majority governments at the provincial level has no doubt fuelled and reinforced this perception. In Alberta, for example, one party or another has won a majority of seats in the legislature in every one of the twenty-seven general elections held since the province was created in 1905. In Alberta, every election has meant in a very practical sense that the people have directly chosen their premier and government. Such a record, however, obscures a fundamental fact of all parliamentary governments based on the British model: the people elect legislatures not governments. This fact becomes visible and relevant when no party wins a majority of seats in the legislature. To appreciate this we need to understand the nature of national elections. The national election held in October 2008 was "national" only in the sense that 308 local elections were held simultaneously across the country. While we have a national *campaign*, there is actually no national *elec-*

9 The Dominion Institute, "In Wake of Constitutional Crisis, Dominion Institute Survey Demonstrates that Canadians Lack Basic Understanding of our Country's Parliamentary System," online: <<http://www.dominion.ca/release15122008.pdf>>.

tion. Votes are only counted in each local constituency and the count effects the outcome only in that riding. Only a tiny fraction of the electorate is able to vote directly for or against the leader of a political party. In the 2008 federal election, only 53,000 citizens in Calgary Southwest voted directly for or against Stephen Harper, while only 44,000 voters in Montreal's Saint Lambert riding voted for or against Stéphane Dion. No one in the whole country got to choose between the two party leaders. The vast majority of Canadian voters can only choose among the individual local candidates representing the political parties in their own riding. The political party with the right to govern the country after a general election is the party (or parties) which can win — and maintain — the confidence of those 308 newly elected members of Parliament (MPs). When one party wins a majority of seats, as the Liberals did most recently in 2000, then it is a foregone conclusion that the party has the right to govern; with its majority of MPs, that party will undoubtedly win the confidence of the House of Commons and the government will be sustained by it for the foreseeable future. However, when no party wins a majority of seats, as was the case in the 2004, 2006, and 2008 federal elections, then the situation is quite different. And it is vital to understand those circumstances in order to appreciate how unfounded can be the misperception of our parliamentary democracy.

When no one party wins a majority of seats in the House of Commons, the current prime minister has a right to remain in office to meet Parliament. This right is actually a very limited one, as it is only a right to meet Parliament and not a *carte blanche* to carry on governing into the future. The incumbent prime minister simply has a right to see if his or her party can win the confidence of a majority of the newly elected members of Parliament. The incumbent does also have another option: to decide that his or her party has suffered a moral defeat and that the mood of the

people expressed in the election favours allowing another party to form a government. Thus, Paul Martin announced he would resign as prime minister after the January 2006 election; Pierre Trudeau did the same thing after the 1979 election. In those circumstances, the governor general calls upon the leader of the opposition party with the most seats to form a government. It is important to note, however, that whether the incumbent remains in office or a new prime minister is appointed, the government only has a right to meet Parliament and try to win its confidence. It is a common perception, but a false one nonetheless, that the government meeting the new Parliament has somehow “won” the election and therefore has a democratic right to continue governing. The right to govern in a parliamentary system can only come from having met and won the confidence of a majority of the elected members of Parliament. If the government (new or old) meets Parliament and fails to win its confidence after an election, it must resign and allow another party the opportunity to form a government. Without the confidence of the House of Commons, the prime minister and cabinet have no right to govern at all.

Even some academics fail to appreciate that elections in a parliamentary system are only one step in the democratic process of selecting a government. Which party has the right to govern after an election is ultimately determined by the new members of the House of Commons. They are the freshly elected representatives of the citizens of Canada, and it is their judgment that determines who has a legitimate right to govern. This is the most basic and defining feature of parliamentary government.

Principle of responsible government

After an election, the first opportunity for the House of Commons to express its confidence in the government comes with

the speech from the throne. On the first or second day after Parliament reconvenes, the governor general reads a speech to a joint session of the House of Commons and Senate, which has been prepared by the government as a broad overview of the policies it intends to pursue. Over the course of the next week or two, the members of the House of Commons then debate this speech and vote on a motion in reply to the speech, which is introduced by the government. This motion is usually the very first test of confidence for the government because it signifies whether the members of the House of Commons are pleased with its policy plans. If this motion is defeated or amended in ways that clearly express a lack of support for the government, then it is said to have lost the confidence of the House. This is a logical outcome because a rejection of the government's general policy plans can only mean that the House lacks confidence in it. If the motion in reply to the speech from the throne passes unscathed or is altered with amendments acceptable to the government, then the prime minister and cabinet have won their first major test and have a right to continue governing until the next test of confidence.

The need for an incumbent or new government to meet the newly elected members of Parliament and to win their confidence is not simply an archaic or pedantic tradition. It goes to the very heart of representative democracy and the principle of majority rule. This rule is the bedrock of democracy, and it provides the bridge between elections and the parliamentary institutions through which we are governed. With Canada's modern party system and the single member plurality electoral system, the wishes of individual voters are only imperfectly translated into the number of seats each party wins in the House of Commons. Bearing in mind that there is no truly national election, but rather 308 simultaneous local elections, the proportion of votes each party receives across the country

often bears little relation to the number of seats they win in the House. This situation arises because in each of the 308 elections, a candidate only has to win one vote more than any other competitor in order to be declared elected; votes cast for losing candidates may be a part of the total votes a party receives across the nation, but they cannot contribute to that party's share of the seats in the House. Because we have a competitive multiparty system in national politics, most winning candidates win without actually getting a majority of the votes in their local constituency contest. In the 2008 elections, only 115 of the 308 winning candidates were supported by a majority of the voters casting ballots. The lowest level of support for a winning candidate was 29.2 percent of the vote for a Bloc Québécois candidate; the next lowest was 32.2 percent for a Conservative candidate in Ontario.¹⁰ With five major parties competing and winning seats in the 2008 election, it is little wonder that no one party won the support of a majority of Canadians. The Conservatives won the largest share of the vote nationally with 38 percent, but the effects of the electoral system translated this into 46 percent of the seats in the House of Commons. The previous two elections also returned minority Parliaments, with the Liberals winning 43 percent of the seats based on 37 percent of the vote in 2004, and the Conservatives winning 40 percent of the seats with 36 percent of the votes in 2006.¹¹ The rule that the government needs to win the support of a majority of newly elected members of Parliament appears very sensible in this light. Fundamental democratic legitimacy comes from ensuring that a gov-

10 Elections Canada, "Report of Candidates Who Received the Most Votes on Election Night," online in Excel format: <<http://enr.elections.ca/DownloadElectedCandidates.aspx?lang=1>>.

11 Andrew Heard, "Canadian Election Results by Party, 1867-2008," online: Elections <<http://www.sfu.ca/~aheard/elections/1867-present.html>>.

ernment can only pass laws that are approved by a majority of our elected representatives. It would be fundamentally antidemocratic to simply let the largest party rule the country as it wished, despite the fact that it won neither a majority of votes in the general election nor a majority of seats in the Commons. The group that gets to form the government must be able to command the support of the majority of our elected representatives.

The necessity to win the confidence of the elected members of Parliament does not stop with the first vote of confidence after an election. In a parliamentary system the government must continue to maintain that confidence throughout the life of the legislature. Parliamentary government is defined by this principle of responsible government, and the government is continuously responsible to the elected members of the legislature. One distinct advantage of the parliamentary system is that governments must continue to justify and account for their actions to their elected legislatures in order to maintain the support of the people's elected representatives. If at any time the government loses a clear vote of confidence, it must either resign to allow a new government to be formed or call fresh elections.

This feature of parliamentary government is in stark contrast to the U.S. presidential system, where the president and his cabinet do not need to have the approval of Congress to exercise executive authority. Presidents are essentially safe in office for the duration of their four-year term; they can be removed from office only if they are impeached for having committed a serious crime. U.S. presidents cannot be removed from office within that four-year period no matter how serious are their lapses in judgment, how poor or oppressive are their policy proposals, or how immoral or offensive is their behaviour, so long as they do not commit a serious crime. No U.S. president has been removed from office

in over 200 years through impeachment, although Richard Nixon resigned in 1974 prior to an almost certain impeachment. In Canada, five governments have fallen since 1926 because they lost the confidence of the House of Commons; these defeats seem amply justified since only one of those five governments managed to win the ensuing elections.¹²

Just which party should form the government after an election, and how that government should be formed, depends entirely upon the circumstances of the election, the share of the seats won by each party, and the relationships among the parties. The current prime minister, the opposition leaders, and the governor general all play a role at times in the process of government formation. To assess the controversy generated by the potential Liberal-NDP coalition, we need to first consider structures of party government and their relationship to the choice of prime minister to form a government.

Principles of government formation

The complexity of the choice of party or parties to form a government varies tremendously according to whether or not there is a party with a majority of seats in the elected legislature. It also varies according to the relationships among the parties if there is no majority. As mentioned earlier, the situation is clear and straightforward when one party wins a majority of seats because the leader of that party must be allowed to form the government. If another party was in power at the time of the election, then the incumbent prime minister must resign. On the other hand, if no party wins a majority of seats, then sev-

12 These parliamentary defeats were suffered by the governments of Arthur Meighan in 1926, John Diefenbaker in 1963, Pierre Trudeau in 1974, Joe Clark in 1979, and Paul Martin in 2005; Pierre Trudeau is the only prime minister to be re-elected after losing a vote of confidence.

eral different options are available. A minority government can be formed in which only one party fills all the seats in cabinet; this is the most usual option followed in Canadian federal and provincial politics. The minority government may be able to rely on an alliance with a particular opposition party, and thus depend on its support at confidence votes and for other votes on the government's major pieces of legislation. For example, the Liberals and the Progressive Conservatives have essentially propped up each other up in three minority governments in Nova Scotia since 1998. This type of support is usually arranged informally, but might also be explicitly set down in a written agreement. For instance, the Liberal minority government that took power in Ontario in 1985 was supported by a written agreement with the NDP. This agreement provided NDP support for the government for two years, in exchange for specific policy commitments. A minority government may also be lucky enough that one of the opposition parties with enough seats to combine with another opposition party to form a majority has internal problems that ensure it will not bring down the government for a period of time. Stephen Harper's 2006-08 government, for example, was able to rely on Liberal Party support during most of this time because the Liberals were primarily concerned with their leadership race, and subsequently hobbled by the financial and factional scars left by that race. Alternatively, a minority government might try to play different opposition parties off against each other and negotiate support on a case by case basis with different parties; this was the strategy followed by Lester Pearson from 1963 to 1968, during two minority Parliaments in which he only needed a handful of opposition votes to reach a majority, although the NDP was the most frequent supporter. A third option is the formation of a true coalition government in which more than one party has seats in the cabinet. Although coalition cabinets have

been rare in Canada, they are the norm in most parliamentary democracies around the world. In countries with proportional representation electoral systems, it is extremely rare for one party to win a majority of the votes because modern democracies usually entail a competitive multiparty system that reflects the diversity of the population. As a result, it is normal for parties to enter into coalitions with each other in order to form a government with a legislative majority. Coalition formation varies from one country to another, with potential partners sometimes stating their preferences about who they would or would not support during elections, and at other times leaving their potential interparty bargaining until after an election.

Considerable research and academic debate has been expended on which of these models of government is likely to produce a more stable or efficient government. Intuitively, one can suggest that a majority government is more likely to be stable and efficient than a minority or coalition government. Thanks to party discipline, a majority cabinet should be able to get its agenda passed through the legislature efficiently and survive in office, either until fresh elections are required or until the prime minister judges fresh elections would probably return the cabinet to power with a fresh majority. Indeed, Canadian experience shows that minority governments seldom last longer than two years, while majority governments tend to last about four years. However, the experience with minority and coalition governments in other western democracies reveals a much more complex picture. A great many factors influence the duration of a government; these factors will vary from time to time and from one country to another. Italy is often caricatured as the prime example of the instability of coalition cabinets, with over sixty governments formed since the Second World War. However, other countries with coalition governments show incredible stability. The European country with the lon-

gest surviving governments is Luxembourg, which has had coalition governments ever since the Second World War; its governments have lasted significantly longer, on average, than those in Britain, even though majority governments are the norm in the United Kingdom.¹³ Germany is another example of a very stable political system despite having coalition governments for most of the post-war period.

Canadians have been generally sceptical of coalition governments, perhaps because they have been so rare, and have preferred minority governments when no party has won a majority. Although one has to go as far back as the First World War to find the most recent coalition cabinet at the federal level, there have been several at the provincial level. Saskatchewan had a coalition cabinet for three years starting in 1999, as did British Columbia between 1941 and 1952, while Manitoba was ruled by coalition governments in the 1930s and 40s. There have been many more minority governments at both the federal and provincial levels. Half of the federal elections held since 1957 have resulted in minority governments. Even when Canadians anticipate minority governments, they do not tend to favour formal alliances between ruling and opposition parties. An Ekos poll conducted just before the October 2008 election found only 30 percent of Canadians supported a formal agreement among parties, while the vast majority preferred a minority government to negotiate with different parties on an issue by issue basis.¹⁴ This distrust of a formal agreement to support a minority government is somewhat curious, since an agreement should permit greater stability and

certainty for the government.

Which party gets to form the government after an election where no party wins a majority is another fundamental question, but fortunately there are fairly clear answers in such a case. The decision rests initially with the incumbent prime minister. As noted earlier, the current prime minister has a choice between remaining in office to try to win the confidence of the House of Commons or resigning in favour of the leader of the largest opposition party. Some commentators have suggested that the prime minister should resign if his or her party does not win the most seats in an election. There is only one instance in Canadian federal politics of a prime minister remaining in office when the ruling party did not finish first; William Lyon Mackenzie King stayed in office after the 1925 election reduced the Liberal Party from majority status to second place. In principle, however, it seems better not to accept this pattern as an automatic rule. It is entirely possible for an incumbent government with the second highest number of seats to still be able to command a majority with the support of other parties, as was the case for Mackenzie King. Particularly if there is publicly expressed, third-party support for the incumbent government, it appears senseless to insist that another party should be appointed to power simply because it got the most seats; no new prime minister should be appointed to power when there is no practical likelihood that he or she could command a majority in the newly elected House of Commons.

IV. THE ROLE OF THE GOVERNOR GENERAL

The governor general usually has only a limited role to play in the formation of a government after an election. If the ruling party wins a majority, there is no change for the governor general to make. If another party wins a majority of seats, then the current

13 Paul Warwick, *Government Survival in Parliamentary Democracies* (New York: Cambridge University Press, 1994) at 6.

14 Ekos, "Canadian Attitudes to Coalition," online: <<http://www.ekoselection.com/index.php/2008/10/attitudes-to-coalitions-alliances>>.

prime minister will resign and the governor general simply appoints the leader of the new majority party. If no party wins a majority, then the governor general essentially takes her cue from the current prime minister. There is nothing for her to do if the prime minister wishes to meet Parliament. Only if the current prime minister resigns would the governor general have to consider whom to appoint as a replacement. In most situations the choice is quite clear: the leader of the largest opposition party. Nevertheless, we have to be mindful of the unforeseen in politics. It is possible that the ruling party might be reduced to third or even last place, as happened to the Progressive Conservative Party in 1993, or two opposition parties might have the same number of seats, with each claiming the right to form the government. In such scenarios, the governor general may have to consult with all the party leaders to find out which party would have the best chance of winning a parliamentary majority. One would hope that the party leaders could engage in these negotiations themselves and present the governor general with a proposal for a government backed by a majority of members of Parliament. It is vital to reiterate here, however, that whether it is the incumbent prime minister or a newly appointed one, the government still has to meet Parliament and win its confidence before it has a right to continue governing. The ultimate hurdle for a government, and the ultimate source of its legitimacy in a parliamentary democracy, lies in it winning the confidence of the House of Commons.

The governor general has a potentially much more difficult role to play once a government meets Parliament and runs into trouble. It is in this circumstance that the 2008 crisis erupted. Normally, the governor general simply provides formal ratification for the decisions made by the prime minister and cabinet. Technically, the government only “advises” the governor general, but in

reality this advice is really a series of instructions that the governor general is bound to act upon. On rare occasions, however, the governor general may have to exercise the reserve powers, or personal prerogatives, of the office. In exercising these reserve powers, the governor general is empowered to make her own decisions and exercise the powers according to her own discretion, rather than acting on the advice of cabinet ministers. The governor general has the power to dismiss the prime minister and appoint a new one. She also may order the dissolution of Parliament and fresh elections to be held. In addition, the governor general may refuse to act on the advice of the prime minister and cabinet, particularly if the prime minister calls for an election to be held within a few months of a previous one.

These reserve powers are the practical reason why the role of head of state (Queen or governor general) is separated from the head of government (prime minister) in all parliamentary systems. The office of governor general (and lieutenant governor at the provincial level) exists in order to ensure the proper functioning of parliamentary government. In some ways, the head of state acts like a referee to ensure the political actors play according to the rules, so that the business of government can continue.

At the most basic level, the governor general's job is to ensure that there is a prime minister and cabinet to run the affairs of state, as well as a functioning Parliament to pass laws and hold the government responsible for its actions. For some scholars, this is the extent of the governor general's powers. Henri Brun, for example, believes that the governor general should only act to defend the country against a veritable coup d'état when a prime minister refuses to resign after clearly being defeated in an election where another party wins a majority, or in a clear vote of confidence in

Parliament.¹⁵ Patrick Monahan believes that the courts can and should deal with unconstitutional actions, while the normal political processes, including the government's accountability to Parliament or to the people at election time, are adequate to deal with other alleged abuses of power.¹⁶ It is important to note, however, that the law of the constitution is virtually silent on the basic functioning of parliamentary democracy, and is thus beyond the powers of the courts to regulate; the only formal provisions of the constitution relevant to parliamentary democracy relate to the right to vote, the necessity to hold a session of Parliament once a year, and an election every five years.¹⁷ "Unconstitutional" action comprises much more than what is against the law of the constitution. Actions that violate fundamental constitutional conventions are every bit as unconstitutional as those actions that violate constitutional laws. Thus, it would be legal for the prime minister to advise successive elections until the opposition parties become bankrupt and incapable of contesting an election in any meaningful way. The prime minister could demand that the governor general suspend Parliament every time it appeared that the opposition might defeat one of its measures. There is little in law to prevent the prime minister from phoning up judges and instructing them on how to decide cases before them. The governor general is the last bulwark against abuse of power by the government, particularly for those actions that are not subject to judicial review.

Many scholars envision a broader range of possible circumstances in which the re-

serve powers may be legitimately exercised, particularly if the prime minister advises some unconstitutional course of action that cannot be prevented or remedied by court action. In this view, the reserve powers should not be categorically limited, since they may be needed to deal with quite unforeseen developments; flexibility is the best protection against future, unknown crises. There is controversy about what the limits are on the governor general's personal prerogative powers, and this controversy is exacerbated by the fact that the principle of responsible government and the governor general's reserve powers are largely matters of constitutional convention, and so are not written down as part of the law of the constitution. Even so, these principles are fairly clear, and they can offer direction for the proper course of action when they are considered and applied to the circumstances at hand.

V. ASSESSING THE DECISION TO PROROGUE PARLIAMENT

With the benefit of this discussion about the nature of elections, the principle of responsible government, the formation of governments, and the role of the governor general, we can now turn our attention to the 2008 constitutional crisis. The Governor General reached a very difficult and historic decision in agreeing to the Prime Minister's request to prorogue Parliament on December 4, 2008. A difficult decision implies that there were good reasons to decide either way, and there are several reasons to defend the decision to prorogue.

There is little guidance to be had from historic precedent, as no prime minister in Canada has asked for prorogation in the face of an almost certain defeat on a confidence vote. Prorogation is normally granted after many months of parliamentary business have elapsed. There are only two other instances of Parliament's suspension only a few weeks into

15 Henri Brun, "Michaëlle Jean n'a pas le choix," online : *La Presse* <<http://www.cyberpresse.ca/opinions/forums/la-presse/200812/04/01-807213-michaelle-jean-na-pas-le-choix.php>>.

16 Patrick Monahan, *Constitutional Law*, 3d ed. (Toronto: Irwin Law, 2002) at 76-9.

17 These stipulations are found in sections 3 to 5 of the *Canadian Charter of Rights and Freedoms*.

a session following a general election. In 1988, Parliament was prorogued after only eleven sitting days, but the prorogation period actually covered seventy-eight days, since it overlapped with the Christmas break. Prorogation came after only fourteen calendar days and twelve sitting days in the first session after the 1930 federal election. In both 1988 and 1930, however, the government had a solid majority in the House of Commons, and there was no question that prorogation would permit the government to avoid defeat. This was not quite the case when Prime Minister Sir John A. Macdonald asked for prorogation during the controversy that had erupted over the Pacific (customs) scandal in 1873; but again, in 1873 there was no specific confidence vote being avoided. The closest we come to a similar scenario is the famous King-Byng episode in 1926, when Prime Minister Mackenzie King asked Governor General Lord Byng of Vimy for dissolution just days before a vote was due on a confidence motion relating to a scandal. At the time, it seemed almost certain that Mackenzie King's minority government would be defeated by the combined opposition parties. Lord Byng refused dissolution on the grounds that the government should not have tried to avoid censure in the House, and also because he believed that an alternative government could be formed by Arthur Meighan's Conservative Party. Mackenzie King resigned and Meighan led a short-lived government before being defeated on a confidence motion, and again in the subsequent general election. A heated debate has raged in the decades since over the propriety of Governor General Byng's decision. The difficulty in trying to apply this 1926 precedent is that the circumstances of government formation, and the particulars of the defeat of the Meighan government, are unique to the time and cannot be easily compared with the contemporary situation. In the absence of a clear precedent on which to base a decision, constitutional principles play a key role in providing

insight into what obligations are involved.

Several constitutional principles are relevant to the decision to prorogue parliament in 2008. Conflicting considerations come from the application of these principles; nevertheless, when all are weighed together some clear conclusions are evident.

First and foremost, the Governor General has a duty to intervene in the political process as little as possible. She is an appointed official, and so the Governor General must allow ample room to let the elected politicians try and resolve a crisis among themselves. They alone are directly accountable to the electorate and should be given considerable latitude. In this light, the Governor General should avoid substituting her judgment for those of the politicians. One could say then that the decision to prorogue was really Stephen Harper's, not Michaëlle Jean's. However, that may be an over simplification. As the public commentary of most constitutional authorities and political actors at the time revealed, there was a general acceptance that the Governor General had a personal decision to make, and she would be acting within her constitutional powers to refuse or grant prorogation. Being a personal decision, the Governor General's choice was destined to be a substantial intervention in the political process regardless of whether or not she granted prorogation. In fact, her decision to grant Harper's request prevented the elected members of Parliament from resolving the issue in a timely fashion. The Governor General was clearly informed by the opposition parties of their intent to vote no confidence in the government on December 8, and to form an alternative government. Indeed, the morning of her meeting with the Prime Minister, the Governor General received petitions signed by the caucus members of all three opposition parties clearly stating that they intended to vote no confidence in the current government and instead support a Liberal-NDP coalition

cabinet. Thus, she chose to acquiesce to the decision of a prime minister leading a minority party that would otherwise have faced certain defeat. Alternatively, the Governor General could have facilitated the stated intentions of the majority of MPs whose parties had been supported by a majority of voters in an election held only seven weeks before. The question then arises whether the Governor General had a higher obligation to follow the advice of the Prime Minister rather than the opposition majority.

The governor general is indeed normally bound to act on any constitutional advice offered by a prime minister who commands the confidence of a majority in the House of Commons. This convention protects the principles of responsible government and parliamentary democracy. Since the Conservative government won the confidence votes held on the speech from the throne just one week prior, Harper could apparently address the Governor General with authority. In normal times, there would be no question that the Governor General should have granted early prorogation, just as her predecessors had done three times in the past. However, these were not normal times, and the circumstances raise serious doubts about both the constitutionality of the advice offered by the Prime Minister, and his authority to offer that advice.

The Prime Minister's request to prorogue Parliament to avoid defeat on a vote of confidence is of questionable constitutionality. Scholars around the Commonwealth have decried such a tactic. A similar event had not happened in modern, stable parliamentary democracies because prime ministers have understood that it is their duty to face Parliament; a prime minister rejecting this duty in Canada is unprecedented in modern times. It has happened in moments of turmoil in unstable political systems, as it did in Sri Lanka in 2001. The ability to simply shut down Parliament to avoid losing office

is fundamentally antidemocratic and a mark of authoritarian governments that abuse their powers to stay in office. Indeed, Canadian constitutional practice has so valued the necessity of a prime minister facing Parliament and settling questions of confidence that the rules had required a prime minister to settle the matter within as short a time as possible. The necessity to resolve a test of confidence quickly has generally been ascribed to the example of Lester Pearson, who moved and won a confidence motion the week following the defeat of a tax bill in 1968, at a time when many from his party were absent from Ottawa. When Paul Martin's government faced a serious challenge in May 2005, with the passage of a motion that all the opposition parties agreed was a vote of confidence, there was very strong pressure on Martin to resolve the issue definitively within a very short period of time. In the end, he agreed to hold a definitive confidence vote ten days later, which he won by one vote after Belinda Stornach crossed the floor and joined the Liberal Party. The lesson from the precedents, then, is that matters of confidence must be resolved as quickly as possible.

The necessity to determine Parliament's confidence in a government is all the more important in the early weeks following an election in which no party won a majority of the seats in the House of Commons. Only the elected members of the House can determine which party has the right to govern in a minority situation. The incumbent prime minister has a right to meet Parliament after an election, but that is all. The prime minister must win and maintain the confidence of Parliament in order to continue governing, but the Governor General has prevented a newly elected Parliament from expressing its judgment on the Prime Minister and cabinet. Indeed, when it was shut down the House of Commons was fully engaged in its proper role of determining which group really held its confidence to govern after the October election.

The fact that the government had won its vote of confidence on the speech from the throne the week before did not establish its unquestionable right to govern, especially since the government's motion on the address in reply was successfully amended with very important caveats relating to the authority of the opposition parties to speak for a majority of Canadians. The government delivered its economic statement on the very same day that the speech from the throne was approved. This economic address was the first major piece of government business to be proposed in the new Parliament, and it was immediately rejected by all three party leaders in the House. Their instant rejection of the measure and the subsequent agreements they signed demonstrably undermined the authority of the government.¹⁸

18 Perhaps the fundamental mistake the opposition parties made came with the final vote on the address in reply to the speech from the throne. It is a real curiosity that the opposition leaders announced their intention to vote against the government's economic statement on the afternoon of November 27, and then minutes later allowed the government to win a crucial test of confidence with the address in reply. In hindsight, much of this crisis would have been averted if the opposition had simply acted on their intent to vote against the economic statement by defeating the address in reply, which would have been an unquestionable loss of confidence and the government would have had to resign. Since the change of office would not have been instantaneous in any event, they would have still had the coming weekend to work out the details of the coalition they eventually agreed upon. Alternatively, the opposition could have boycotted the vote on the address in reply if they felt the need to buy time before actually defeating the government. If government members had been the only ones voting in favour of the throne speech, the Prime Minister would have been deprived of the legitimacy he later drew from advising the Governor General as a Prime Minister who had won the confidence of the full House.

The particular confidence vote annulled by prorogation was all the more crucial since the government had previously delayed it by one week. The government had already benefited from an acceptable grace period with a one-week delay in the confidence vote, but it then had a duty to resolve the issue. In the context of the timing of the crisis — the very opening weeks of a new minority Parliament — any vote of confidence becomes crucial as the House decides which party has their confidence. Furthermore, the opposition parties used this delay to agree to a new government that would be supported by a majority of members of Parliament. A signed agreement ensured that all of the opposition parties with a majority of members in the House would support a coalition government for at least eighteen months. A documented, alternative government reinforced the Governor General's duty to ensure that that MPs could vote on the scheduled confidence motion. This impending confidence vote, the week-long delay, and the existence of an alternative government greatly undermined the Prime Minister's authority to advise prorogation.

It is important to note that the Prime Minister is not the Governor General's exclusive advisor. He is her *prime* minister, and the only one who can present binding advice. However, the Governor General can, and should, consult other advisors. She has the benefit of her own personal secretary, the clerk of the privy council, and any other constitutional authority she might privately engage; indeed media reports revealed that the former Dean of Osgoode Hall Law School, Peter Hogg, was present in Rideau Hall to advise the Governor General during her conversation with the Prime Minister on the morning of December 4.¹⁹ When there is a

19 Michael Valpy, "GG Made Harper Work for Prorogue," online: *Globe and Mail* <<http://www.theglobeandmail.com/servlet/story/RTGAM.20081205.wgg06/BNSStory/National>>.

question of Parliament's intent to support the government, or the slightest possibility that an alternative government might be considered, the Governor General also has a duty to acquaint herself with the views of the opposition leaders.

The existence of an alternative government is crucial to the governor general's ability to refuse the prime minister's advice, or to insist that the prime minister do any specific thing (such as agree to an election). A fundamental constitutional convention requires that a prime minister must accept political responsibility for the governor general's exercise of any of her prerogative powers, including the reserve powers. Although there are certain circumstances in which the governor general may use her discretion, there must still be a prime minister accountable to the House of Commons in place after that decision is made to accept political responsibility. If the current prime minister will not agree, then the governor general must appoint another who will.

Since there is some expectation that a prime minister will resign if the governor general refuses his or her advice, the governor general cannot refuse advice without being certain in advance that another individual will accept appointment as prime minister afterwards. By agreeing to become the new prime minister, that individual must necessarily defend the governor general's decision to the public at large. In this case, the opposition parties had clearly told the Governor General that they were prepared to support a new prime minister; she had the signatures of a majority of MPs as proof of this commitment.

One other relevant consideration regarding the formation of the alternative coalition government is whether it was constitutionally appropriate to rely on a signed agreement with the Bloc Québécois. Public fears about the

role of the Bloc were fanned directly by the government's public relations campaign, and it appears that this message resonated with a number of Canadians. A Leger Poll conducted on December 2 and 3 found that 49 percent of Canadians were "very concerned" about the role of the Bloc, and a further 19 percent were "somewhat concerned."²⁰ However, these concerns are essentially political in the broad sense, rather than constitutional, and appear to be largely overblown. Bloc MPs have been winning elections to Parliament for over fifteen years, served constructively as the Official Opposition from 1993-97, and were part of negotiations with the Conservative Party over support for a possible alternative government in 2004 and 2005. Furthermore, the Bloc's willingness to support the proposed coalition government for at least eighteen months seems to clearly commit the party to stabilizing Canada's system of government rather than empowering it to undermine national unity. It would also have been highly inappropriate for Governor General Jean to have discounted an alternative government by asserting that one party caucus could never participate as any other in the affairs of state; that would have been an insupportable intervention into partisan affairs.

Those supporting the Governor General's decision to prorogue Parliament have rightly pointed out that she must also consider the likelihood that an alternative government would be able to function for any meaningful time if it were to take office. They point out that Stéphane Dion was a lame duck leader going into this affair, pressured by his own party to resign after the election, and that his personal authority was further undermined by a disastrous performance in the televised address the night before Harper met with Jean. Furthermore, there was evidence that

20 Leger Marketing, "National Opinion Poll," online: <<http://www.legermarketing.com/documents/pol/081241ENG.pdf>>.

the anti-Bloc campaign was making inroads into public consciousness, and that some NDP and Liberal backbenchers were increasingly uncomfortable with the backlash they would face from their voters in the next election, were the coalition to be asked to form a government. While there is merit in these considerations after the fact, one has to consider the balance of evidence available at the time about the current Conservative government's prospects for survival, as opposed to those of the coalition. At the time, the only thing that was certain was that the government only had the support of 143 of a possible 308 votes in the House of Commons. In contrast, the potential coalition government was supported by a signed agreement among all three opposition leaders, and a majority of MPs had signed petitions that stated their lack of confidence in the current government, as well as their support for the coalition. In this light, the incumbent government's prospects should have appeared to be nil in comparison to those of the coalition.

Other doctrines guiding the work of governors general arise from their duty to ensure that the basic principles of parliamentary democracy are allowed to function. The first and most important principle of parliamentary democracy is that the government of the day must win and maintain the confidence of the House of Commons. Thus, a governor general has a central duty to ensure that there is a government in office which commands the confidence of the House of Commons. This duty is particularly important in the early months following a general election that returns a House of Commons divided among minority parties. By suspending Parliament, the Governor General prevented it from fulfilling its duty.

In our parliamentary system, the governor general also exists to provide a last bastion against abuses of power by the government. Such protection is all the more important for

matters for which there is no recourse to the courts. The basic functioning of responsible government and the operations of Parliament are not subject to judicial review; the governor general alone stands as a bulwark against certain constitutional abuses.

Finally, the governor general also has a duty to not to undermine the very office she occupies. There were clear indications that the Conservative Party would have unleashed a harsh campaign criticizing the Governor General if she had refused prorogation and subsequently appointed the coalition to power. It is likely that she would have been attacked with the same two-pronged message used against the opposition parties. First, as an appointed official who had rejected the advice of the duly elected prime minister, she would have been accused of undermining democracy. Second, as a Liberal appointee who had staged a palace coup and installed the Liberal Party in power, she would have been condemned for ignoring that party's disastrous showing in the election, not to mention the extent to which its leader had become discredited. In short, she would have been blamed for forcing from office a prime minister whose party had "won" the recent election. The Governor General could have been further vilified for being married to a Québec nationalist, underlining the message that the new government was providing opportunities for separatists to break apart the country. Public rallies and a media blitz would have likely spread considerable anger aimed at the Governor General. Nevertheless, the Governor General has a higher duty to defend the principles of parliamentary democracy and to prevent fundamental abuses of power where possible. It is a given that there will be profound controversy generated whenever any governor general is forced to stand up to a prime minister determined to wield power at the expense of basic constitutional principles such as responsible government. Although no governor general should generate

unnecessary controversy, each should refuse to consider her own position when our democratic institutions and principles are at stake. The alternative is to risk caving in to abusive governments simply to avoid controversy and public protest. The responsibility for defending the governor general's actions to the public lies squarely on the shoulders of any new government that might be appointed.

VI. JUSTIFYING A DUTY TO REFUSE PROROGATION

The combination of these factors produce a powerful argument that the Governor General had a duty to refuse the Prime Minister's advice to prorogue Parliament. This conclusion is underlined by the following summary of principles and their application to the decision to prorogue:

- *The governor general has a broad duty to let the normal political actors and processes resolve political problems.* Without the prorogation of Parliament, elected politicians would have resolved the issue on December 8. The political resolution of the problem has now been delayed for a couple of months. Although the government promised to deliver the budget on January 27, there is no deadline for holding the actual votes on either the budget or the new speech from the throne.
- *The governor general has a duty to act on any constitutional advice offered by a prime minister who enjoys the confidence of the House of Commons.* But the advice to prorogue Parliament is arguably unconstitutional. The Prime Minister's authority to advise the Governor General was undermined by the existence of a signed agreement for an alternative government supported by the majority of MPs, only two weeks into a newly elected Parliament.
- *Serious doubts about Parliament's confidence in the government must normally be settled*

in relatively short order. Precedents suggest that between a week and ten days is an appropriate length of time. In 2008, the government had already exhausted this window, and there was no certainty about when a confidence vote would be held on the resumption of Parliament.

- *The governor general can only refuse advice if she can appoint an alternative government.* Opposition leaders had written to the Governor General several days ahead of her meeting with the Prime Minister. She was clearly informed that the majority of MPs intended to vote no confidence in the current government, and of their commitment to support an alternative government for a minimum of eighteen months. Based on the petitions signed by a majority of MPs, the prospects for that alternative government seemed far higher than for the current government.
- *The head of state in a parliamentary democracy exists to protect it from serious abuse by a government in situation where there is no judicial remedy.* In principle, it is quite clearly an abuse of power for a government to suspend Parliament for two months when faced with imminent defeat. The abuse was all the more striking in this case because Parliament was prorogued just three weeks into the first session, after an election had returned only minority parties.
- *The governor general should put the fate of democratic principles and institutions above any worries about possible controversy generated by those she is preventing from abusing their powers.* Abusive governments will not acquiesce quietly to being forced from office, and a governor general must be prepared for ensuing protests. The new prime minister and supporters would have a duty to defend the Governor General's actions to the public.

A fundamental litmus test for any impor-

tant decision by a governor general is the kind of precedent it sets for the future. By granting prorogation, the Governor General not only allowed the current Prime Minister to escape almost certain defeat in a confidence motion, but she also set the stage for every future prime minister to follow suit.

With this precedent, any prime minister can demand that the governor general suspend Parliament whenever he or she believes a successful vote of no confidence is imminent. And since the constitution only requires that Parliament meet once within a twelve-month period, the “time out” bought by prorogation can be a significantly long period indeed. Even once Parliament reassembles, there is no guarantee that the government will actually face another vote of confidence at a particular time, since the scheduling of most votes is the prerogative of the government. This precedent is a damaging and dangerous consequence of the Governor General’s decision. If this precedent stands, no future House of Commons can dare stand up to a prime minister without putting the House in danger of being suspended until the prime minister believes it has been tamed.

Other considerations, such as the benefits of a prolonged cooling off period, the lack of an electoral mandate for a coalition, or the role of the Bloc Québécois are absolutely none of the Governor General’s concern when making a decision on constitutional grounds. They are purely political matters that must be left to members of Parliament to sort out in their own time and in their own way. Indeed, it would be highly improper for the Governor General to base her decision on such political factors.

Since the Governor General prorogued Parliament, a number of commentators have expressed some relief over her decision, even if they are also concerned about the precedent it sets. A lack of public support for both pro-

rogation and the invitation of the coalition to form a government have also been widely alluded to as a justification for the Governor General’s decision. However, public opinion is not as clear as some assume, and many have based their judgment of her decision to prorogue Parliament on basic misperceptions of how parliamentary government works, particularly in a minority situation. An Ipsos poll conducted just prior to the Governor General’s decision found that 68 percent of Canadians supported the suspension of Parliament.²¹ However, two polls conducted once the decision to prorogue Parliament was known reveal a much narrower split in public opinion. An Ekos poll conducted on December 4, the day of the decision, found 45 percent in favour of prorogation and 43 percent opposed.²² An Angus Reid Poll conducted over the next four days found 51 percent in favour and 41 against prorogation.²³ Two important points need to be made about these poll results. First, the suspension of Parliament was not the clear choice of a strong majority of Canadians, once prorogation had occurred. Second, the level of support recorded for prorogation is largely due to the support of Conservative voters. In the Ekos poll, 80 percent of Conservative supporters agreed with the Governor General’s decision, compared to less than 25 percent of those supporting the three main opposition parties. Such a clear

21 Ipsos, “Majority (68%) Of Canadians From Every Part Of Country Supports Governor General’s Decision To Prorogue Parliament,” online: <http://www.ipsosna.com/news/client/act_dsp_pdf.cfm?name=mr081204-6a.pdf&cid=4201>.

22 Ekos, “Poll Results: A Deeply Divided Public Ponders Prorogation,” online: <<http://www.ekoselection.com/wp-content/uploads/poll-results-dec-5-final.pdf>>.

23 Angus Reid, “Half of Canadians Think Governor General Made the Right Decision,” online: <http://www.angusreidstrategies.com/uploads/pages/pdfs/2008.12.08_Jean.pdf>.

partisan split suggests that popular support for prorogation hardly represents a national consensus.

On balance, it appears that the Governor General failed to defend Canadian parliamentary democracy and opened the door to repeated abuses of power by future prime ministers. Our newly elected MPs were about to pronounce authoritatively on which parties would have their confidence to govern, but they were prevented from doing so by the Prime Minister's request to prorogue Parliament. We elect Parliaments not governments in Canada, and Parliament must be free to determine who governs after an election. The threat of a vote of no confidence in the government is the only real lever the individual elected members of Parliament have against the weight of cabinet. A dangerous precedent was set with the prorogation of Parliament to avoid a confidence vote, and it risks depriving Parliament of its only major defence against subjugation to the whims of the prime minister and cabinet. Future prime ministers now know they can shut down Parliament whenever they are threatened with defeat.