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The Governor General's Decision to Prorogue Parliament: A Chronology & Assessment

Andrew Heard*

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.

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.

Chronology

The order of events that unfolded is clear, but the significance attached to them might be debated. The 2008 election was held on 14 October 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. Liberal 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 17 November. 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 18 November. 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 25 November, 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 upcoming 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

This amendment was not considered to be a test of confidence and debate on the main government motion continued. On the afternoon of Thursday, 27 November, 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, 1 December 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 1 December. 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, 28 November, 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, 1 December. 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, 29 November, 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, 8 December. The government is able to do this, even when in a minority position, because it alone controls the order paper and can reschedule most votes almost at will.⁴

Late on Sunday, 30 November, 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, 1 December, 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, 1 December 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, 3 December, and arranged to meet with the Prime Minister the next day. On that Wednesday evening, 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, 8 December; the motion also supported an alternative government and was reproduced in the petition.⁸ Harper met with Jean on the morning of Thursday, 4 December for over two hours. During this meeting, he advised her to prorogue Parliament and to set its recall for 26 January 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 27 January. Many believed that the postponed question of confidence would be settled by the budget speech set for 27 January. 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?

Assessing the Decision to Prorogue Parliament

The Governor General reached a very difficult and historic decision in agreeing to the Prime Minister's request to prorogue Parliament on 4 December 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 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 8 December, 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 Stronach 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.⁹

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 4 December.¹⁰ When there is a 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 2 and 3 December found that 49 percent of Canadians were "very concerned" about the role of the Bloc, and a further 19 percent

were "somewhat concerned."¹¹ 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 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.

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 8 December. The political resolution of the*

problem has now been delayed for a couple of months. Although the government promised to deliver the budget on 27 January, 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 important 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 prorogation 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.¹² 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 4 December, the day of the decision, found 45 percent in favour of prorogation and 43 percent opposed.¹³ An Angus Reid Poll conducted over the next four days found 51 percent in favour and 41 against prorogation.¹⁴ 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 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.

Notes

- * Associate Professor, Department of Political Science, Simon Fraser University. This article is an excerpt from Andrew Heard, "The Governor General's Decision to Prorogue Parliament: Parliamentary Democracy Defended or Endangered?" *Points of View* (No. 7, 2009).
- 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., 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>>.
- 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_PolicyAccord_en_signed.pdf>.

- 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>.
 - 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.
 - 9 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 27 November, 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 govern-
 - ment. 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.
 - 10 Michael Valpy, “GG Made Harper Work for Prorogue,” online: *Globe and Mail* <<http://www.theglobeandmail.com/servlet/story/RTGAM.20081205.wgg06/BNStory/National>>.
 - 11 Leger Marketing, “National Opinion Poll,” online: <<http://www.legermarketing.com/documents/pol/081241ENG.pdf>>.
 - 12 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&id=4201>.
 - 13 Ekos, “Poll Results: A Deeply Divided Public Ponders Prorogation,” online: <<http://www.ekoselection.com/wp-content/uploads/poll-results-dec-5-final.pdf>>.
 - 14 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>.

The Turmoil Surrounding the Prorogation of Canada's 40th Parliament & the Crown

Kenneth Munro*

The prorogation of the first session of Canada's fortieth Parliament awakened Canadians to the intricacies of their political system and it brought the Canadian Crown to the fore of our history once more. Acceding to her Prime Minister's advice on that cold, dreary, snow-covered morning of 4 December 2008, the Governor General, Michaëlle Jean, sparked the interest of Canadians in their monarchical institutions. A docile and politically bored population refused in large numbers to cast their ballots in a general election in October. Less than two months later, the prorogation of the first session of their new Parliament sparked a new-fired enthusiasm for politics, and throughout the country Canadians became constitutional experts overnight. They voiced their opinions on talk shows, at work and at leisure, in bars and over formal dinners, suddenly manifesting astonishing skill at discussing the strengths and weaknesses of their system of government with particular emphasis on the Maple Crown. Many based their opinions about the Crown on whether or not they liked the Prime Minister. Only a handful focused on the essential issue of the prorogation: was Prime Minister Stephen Harper abusing the prerogative and reserve powers of the Crown for partisan political advantage? This issue was raised by David Smith over a decade ago in his book *The Invisible Crown*¹ and it remains an unresolved question for constitutional observers today.

In discussing the question of prorogation, two aspects of our constitution come into play.

The first is the exercise of the governor general's prerogative powers; the second is our parliamentary system of responsible government. The governor general represents the Queen and exercises all of her powers derived from statute and common law² within our federal sphere of jurisdiction. Parliament has conferred wide powers on our Crown to administer and to legislate. Since these are delegated powers, they are subject to change by Parliament.³ But the governor general also exercises prerogative and reserve powers in her capacity as the Queen's representative. Prerogative powers are those upon which she must seek advice, while reserve powers are those she can exercise alone, without advice. Some of the governor general's prerogative powers have been restricted in Canada by statute or by order-in-council. Order-in-council P.C. 3374, given royal assent on 25 October 1935, enhanced the powers of the prime minister vis-à-vis his cabinet colleagues and governor general. Among other things, this order-in-council provided that *only* the prime minister could recommend dissolution and convocation of Parliament. As John Diefenbaker said, this order-in-council changed, in effect, the prime minister's role from one of *primus inter pares* (first among equals) to one of *primus sine paribus* (first without equals).⁴

The actions of Stephen Harper in December bring to the fore a pressing concern with respect to the Monarchy in Canada: preventing the prime minister and premiers from abusing

the Crown's reserve powers. When granted to Canada in 1848, responsible government implied that the governor general "would act on the advice of his ministers under normal circumstances."⁵ Under the 1935 order-in-council, the prime minister has assumed far more power since only he or she can offer the governor general advice on a myriad of issues. Normally, the governor general must act solely on the advice of his or her Canadian first minister. At the same time, one of the key roles of the governor general is to safeguard the constitution. One of the dilemmas faced by the governor general is to resolve any conflict between her duty to act on the advice of her prime minister and her duty to safeguard the constitution. A danger to our monarchical system and to our unwritten or conventional constitution arises when a prime minister advises the governor general to use the royal prerogative for partisan political advantage. Last December, did the Governor General adequately resolve the requirement to accept her Prime Minister's advice on the one hand, and the need to protect the constitution on the other?

The Governor General received her Prime Minister at Government House when it appeared that he would face certain defeat in the House of Commons on 8 December 2008. At this two-hour meeting, Stephen Harper asked for, and was granted, a prorogation of the first session of the fortieth Parliament, despite the fact she had just opened it on 19 November. Before the visit of her Prime Minister, Michaëlle Jean had received a memo, signed by all opposition members, which proposed a coalition between the Liberal Party of Canada and New Democratic Party (NDP) supported by the Bloc Québécois. The Governor General faced a dilemma: her Prime Minister wanted to prorogue the session of Parliament which had just begun and which was very likely to see the government fall on a vote of non-confidence, and the opposition parties claimed they could provide her with a new prime minister to carry on the affairs of state, a necessity if she were to reject the advice of her Prime Minister. On the one hand, the Prime Minister appeared to many to be abusing the royal prerogative for political gain; on the other hand, polls indicated that there

was not overwhelming support for the coalition and because the coalition partners required the support of a regionally based party to govern, there was concern it would not hold together.

Faced with this reality, the Governor General had little choice in the matter. Barbara Messamore has made this point with utmost clarity: "Only in the most extraordinary circumstances would the governor-general be warranted in refusing the advice of the prime minister."⁶ As Messamore indicated, Stephen Harper was entitled to buy time "to see if he can garner sufficient support and to test the ability of the coalition to maintain the allegiance of enough Liberal, NDP and Bloc members."⁷ Under our constitution, the governor general must accept the advice of the prime minister in such matters. If she were to refuse Harper's request for a prorogation, the Governor General would have had to find another prime minister to take responsibility for her actions. Observing public opinion which appeared divided, she was evidently not about to trust the reliability of the proposed coalition supported by the Bloc as an alternative to the existing Harper government. In addition, her advisors undoubtedly reminded her of precedents.

Early in the post-Confederation period, such a precedent occurred. Less than a year after the October 1872 general election, Prime Minister John A. Macdonald asked Governor General Lord Dufferin for prorogation in the midst of the Pacific Scandal. The Liberals revealed that both Macdonald and Cartier had received campaign funds for that election from Sir Hugh Allan, president of the Canada Pacific Company. He hoped to secure the charter to build the transcontinental railway through these bribes. Fearing loss on a non-confidence vote, Macdonald asked Dufferin to prorogue the session of Parliament rather than allow a vote on adjournment. Some Conservatives signed a memorandum pledging their support for a Liberal ministry under Alexander Mackenzie. Dufferin faced similar gratuitous advice as did Michaëlle Jean in December: warnings about dangers to the constitution if the Governor General were to accept the advice of the Prime Minister. After agonizing reflection, Dufferin granted Macdonald

prorogation. In the end, Parliament reconvened in October and Macdonald, faced with certain defeat on a non-confidence vote, resigned.⁸ Although Stephen Harper has not been accused of any wrongdoing, the 1873 request by Macdonald is similar to Harper's: the Governor General can only refuse prime ministerial advice on the rarest of occasions.

Besides this precedent from the nineteenth century, Michaëlle Jean's advisors undoubtedly also reminded her of the 1926 constitutional crisis. In that year, the Governor General, Lord Byng, denied the request of his Liberal prime minister, William Lyon Mackenzie King, to dissolve Parliament so that he could avoid a motion of non-confidence in the House and call an election. Mackenzie King had made the request because the Liberals, caught up in a customs department scandal, faced certain defeat. Under our system of responsible government, the prime minister has the right to make such a request. Controversy quickly erupted, however, when the Governor General, using the reserve powers of the Crown, refused King's request since an election had occurred just nine months previously, and the Conservatives under Arthur Meighen held more seats in the House of Commons than King's Liberals. Mackenzie King resigned without advising the Governor General on the choice of a successor. Fortunately for the Governor General, Meighen agreed to become prime minister based on written support from Progressives in the House of Commons, and thus took responsibility for the Governor General's actions. King won the subsequent election, calling into question the Governor General's disregard of his advice. Indeed, the effect of the "King-Byng" affair on Canadians' perception of the legitimacy of the reserve powers of the Crown remains with us. Whether Harper goes down to defeat after a new session begins on 26 January 2009 or remains as leader of the government, members of the House of Commons will decide and not the Governor General. This is the preferable outcome to this political hiccup.

In my view, it is a mistake for a prime minister to place a governor general in a position which invites controversy over the use of the

reserve power of the Crown for partisan advantage. Throughout our history, and particularly in recent times, there are disquieting signs that the reserve powers of the Crown can be used by power-lusting prime ministers and premiers for their own partisan advantage. Consequently, the governor general and lieutenant governors must be very wary and wise in using the royal prerogative to protect the constitution. This undertaking is not easy under our system of responsible government in Canada, but in this instance, our Governor General walked the constitutional tightrope well in accepting her Prime Minister's advice while protecting the constitution at the same time.

Notes

- * Ken Munro, Department of History and Classics, University of Alberta.
- 1 David E. Smith, *The Invisible Crown: The First Principle of Canadian Government* (Toronto: University of Toronto Press, 1995) at 57.
- 2 James R. Mallory, *The Structure of Canadian Government*, revised ed. (Toronto: Gage Educational Publishing Company, 1984) at 34.
- 3 *Ibid.*
- 4 John G. Diefenbaker, *One Canada: Memoirs of the Right Honourable John G. Diefenbaker, The Years of Achievement 1957-1962* (Toronto: Macmillan of Canada, 1976) at 50.
- 5 Barbara J. Messamore, *Canada's Governors General, 1847-1878: Biography and Constitutional Evolution* (Toronto: University of Toronto Press, 2006) at 25.
- 6 Barbara J. Messamore, "Prorogation, then and now" *National Post* (8 December 2008) A11.
- 7 *Ibid.*
- 8 Donald Creighton, *John A. Macdonald: the old Chieftain* (Toronto: Macmillan, 1965) at 178.

The Constitutionality of Prorogation

Eric Adams*

Friar: I hear thou must and nothing may prorogue it / On Thursday next be married to this county

Juliet: Tell me not, friar, that thou hears't of this / Unless thou tell me how I may prevent it.¹

At 10:20 a.m. on 4 December 2008 — some forty minutes after Prime Minister Stephen Harper entered Rideau Hall to request that the Governor General, Michaëlle Jean, prorogue Canada's fortieth Parliament — the media reported an exciting development: the front doors opened. Reporters began to speculate that the meeting had been decisive, and an anxious nation awaited the Prime Minister's appearance to announce the Governor General's decision. But then, other than the descent of a few errant snowflakes, nothing happened. "It's been 6 minutes since you reported the front door opened — what's going on over there?" a desperate commentator pleaded on the *National Post's* live blog.² For over thirty minutes the doors remained curiously ajar, and then — at 11:01 a.m. — they closed. When the Prime Minister finally did emerge nearly an hour after that, having spent a total of two and a half hours inside Rideau Hall, he informed Canadians that the Governor General had agreed to follow his advice and prorogue (or suspend) Parliament until 26 January 2009.

We do not know what transpired during the Prime Minister's meeting with the Governor General. Nevertheless, I argue that there is constitutional significance in one of the things we do know — the length of time the Prime Minister spent in Rideau Hall. The key, in my view, is not that the Governor General decided one way or the other, but that she exercised *discretion* in making her decision. The Governor General had, in other words, a choice to make. We can take comfort in the merit of her decision, but so

should we also recognize the importance of the moment of decision itself. To be sure, the constitutional events of December 2008 revealed stark levels of constitutional misunderstanding among the Canadian public and, perhaps more disturbingly, media, opinion makers, and politicians. Bombarded, as we are, by the political culture of the United States (especially in an election year in that country), civic confusion concerning the differences between parliamentary democracy and the American presidential system should not be surprising. Canadians are still growing accustomed to repeated minority governments at the national level and the constitutional nuances that follow from that reality: votes of confidence that matter, shifting parliamentary alliances and coalitions, and an increased role for the Governor General in ensuring compliance with the constitution. The events of December 2008 helped to clarify more than obfuscate Canada's constitutional conventions. In addition, these encounters with, and disagreements about, our constitutional traditions, conventions, and norms continue the ongoing process of fashioning a vibrant and reflexive democratic constitutionalism. In other words, constitutional crises can be good for us.

Let me begin by sketching the constitutional laws and conventions governing the Governor General's decision to prorogue Parliament. Our constitutional tradition, as is well known, combines formally justiciable constitutional laws with politically derived, unwritten constitutional conventions. As a matter of constitutional law, the *Constitution Act, 1867* provides that "Executive Government and Authority of and over Canada . . . [vests] in the Queen" just as it also contemplates that much of that authority will be executed by the Governor General "acting on behalf and in the Name of the Queen."³ It is the Governor General, according to the

Constitution, who will select the “Queen’s Privy Council for Canada,”²⁴ appoint Senators, Lieutenant Governors, and Judges of the Superior Courts,⁵ and summon and dissolve the House of Commons.⁶ The specific power to prorogue Parliament is unmentioned in the Constitution, but it was well understood by the framers to fall within the prerogative of the Crown. As Blackstone had explained, “[a] prorogation is the continuance of the parliament from one session to another, as an adjournment is the continuation of the session from day to day. This is done by the royal authority.”⁷ Indeed, as the Crown’s *Letters Patent Constituting the Office of Governor General of Canada* make clear, the Governor General will “exercise all powers lawfully belonging to Us in respect of summoning, proroguing or dissolving the Parliament of Canada.”⁸ In short, the Governor General alone possesses the constitutional power to prorogue Parliament.

Of course, those discretionary prerogative powers have long been circumscribed by a combination of legislation, orders-in-council, and constitutional convention. “In legal theory,” Eugene Forsey points out, “the discretion of the Crown is absolute ... but the actual exercise of the power is everywhere regulated by conventions.”⁹ Such conventions are unwritten and informal rules which emerge from political practice.¹⁰ With the legitimacy bestowed by reason and time, they solidify into traditions the breach of which can lead to political and constitutional crisis. Some of the most vital features of our constitutional system exist only as convention. The *Constitution Act, 1867*, for example, carries no provisions relating to the prime minister, cabinet, political parties, or the practices of responsible government. It was nonetheless understood by all at Confederation that the Governor General would, in the normal course of politics, follow the advice of the duly elected ministers of government in exercising his or her constitutional functions.¹¹ “Whatever the constitutional rights of the crown,” W.P.M. Kennedy writes, “they can be exercised in Canada, but through responsible ministers, as this is the method by which these rights find expression wherever responsible government exists.”¹² In this way, the exercise of executive power under

the constitution remains firmly attached to and circumscribed by democratic ideals.

Notwithstanding their significant role in shaping constitutional practice, constitutional conventions, by their nature, create scope for legal uncertainty. Their status as unwritten rules of practice gives them flexibility and nuance, but also renders their content ill-defined and contestable. For this reason, A.V. Dicey famously dismissed the subject of conventions as “not one of law but of politics, [which] need trouble no lawyer or the class of any professor of law.”¹³ Canadian lawyers and professors of law do not have that luxury. The Supreme Court of Canada has long recognized that Canada’s constitution is necessarily comprised of both written and *unwritten* elements, which includes constitutional conventions.¹⁴ The Court’s recognition of a constitutional convention requiring substantial provincial consent to amend the *Constitution Act, 1867* paved the way, for example, for the final round of negotiations and compromises that led to the passage of the *Constitution Act, 1982*.¹⁵ Of course, like Dicey, the Court maintains that constitutional conventions, unlike constitutional laws, are political in the sense that they are not enforceable by the judiciary. Instead, “the sanctions of convention rest with institutions of government other than courts, such as the Governor General or the Lieutenant Governor, or the Houses of Parliament, or with public opinion and ultimately, with the electorate.”¹⁶ As a result, conventions continue to animate the crucial workings of government, but they are not subject to judicial review in the strict sense. If the courts play a more influential role in recognizing and giving expression to their content than Dicey imagined, it is still the public which determines the consequences of breaches of constitutional convention.

What about the Governor General’s decision to prorogue Parliament in December 2008? Did she appropriately follow constitutional convention in accepting the advice of her prime minister, or did she transgress a deeper set of constitutional values in allowing herself to be manipulated by the Prime Minister’s partisan machinations? In this case, the elastic nature of conventions is neatly demonstrated by the fact

that scholars and pundits from either perspective have claimed with equal vigour to have the authority of constitutional convention on their side. Critics argue that by acceding to the request to prorogue, the Governor General has set a dangerous precedent whereby any government in danger of losing a vote of confidence can simply pull the plug on Parliament, evade the judgment of the House of Commons, and wield power in defiance of the fundamental convention of responsible government: that our political executive enjoys the confidence of a majority of our elected parliamentarians.¹⁷ Indeed, the precedent would be troubling if that is what it represents. I do not think that it does.

Let me return to those opened and closed doors of Rideau Hall. We can reasonably infer, given the length of the meeting, that the Governor General did not agree to the Prime Minister's request as a matter of obligatory or ceremonial formality. In other words, the Governor General could have said no, and probably should have, had the Prime Minister not also committed to reconvening Parliament in six weeks to deliver a budget and face a vote of confidence. Constitutionally, the House of Commons must meet at least once every twelve months; the Prime Minister could have requested a parliamentary suspension of much longer duration.¹⁸ In these circumstances, it was entirely appropriate for the Governor General to take into account the relatively short period of the requested prorogation. If the majority of members of the House of Commons had continued to have no confidence in Mr. Harper's government, they would have had the opportunity to express that view in January 2009. We should assume that these factors weighed in the calculus of the Governor General's decision to prorogue Parliament. That decision was the correct one, not because the coalition was illegitimate or undemocratic (both specious and ill-founded accusations), but because it respected the request of a prime minister who had won a confidence vote a week earlier and who had agreed to return to face the Commons after a six-week delay.

The most significant aspect of the Governor General's decision, however, was that she took time to consider her options. By *deliberating*,

the Governor General protected the most important elements of the prerogative power — the ability to refuse unconstitutional requests and to act without partisan interest to protect the constitution. The precedent that has been set, in other words, is an artful and judicious one: it reaffirms the Governor General's role in protecting the fundamental conventions of the constitution, while it simultaneously respects the ideals of responsible government and shields the Crown from the firestorm that would have erupted had she refused the Prime Minister's request. This is not to say that the Governor General must always select the road of least controversy. Indeed, in those rare instances in which the Governor General must refuse the unconstitutional advice of her ministers, there will always be political controversy. This is the nature of politics. Because politics, in a sense, creates the conventions which guide the Governor General's decisions, she is not at liberty to disregard political reactions insofar as they elucidate the conventions at issue. But it is crucial to remember that constitutional conventions and constitutional politics are not one and the same. It is the constitution — its rules and conventions — that must inform the Governor General's decisions, not the messy partisan politics that will attach itself to, and may indeed be the cause of, any contentious constitutional dispute.

What is the use, you might ask, of constitutional conventions if they deliver less than certain answers at the moments when they are needed most? Indeed, there have long been calls — and we are hearing them again — to codify constitutional conventions into positive law and to formalize the rules under which the Governor General operates. There are good reasons, beyond the allure of tradition, for keeping our constitutional conventions as they are — unwritten, flexible, and the subject of occasional controversy and disagreement. The ability to adapt to new circumstances has long recognized as one of the benefits of the common law. Unwritten constitutional conventions similarly enable the Governor General to respond to new and unanticipated situations moored to principle but not constrained by prescribed text. Moreover, it is in such moments of constitution-

al debate about our conventions that we help to shape fundamental aspects of our constitutional law without recourse to courts and judges. Our reactions as politicians, scholars, and citizens to political controversy confirm or reorient the conventions that guide constitutional practice. While the December crisis gave rise to inflamed rhetoric about illegitimate and undemocratic political coups, so too did it create the space for others to challenge those assertions, and articulate the deeper constitutional norms which govern Canada's parliamentary tradition.

Like the famous King-Byng dispute before it, the constitutional meaning attached to Harper-Jean will take shape over time. That, in itself, signals a healthy virtue of Canadian constitutionalism. Ultimately, for better or worse, we live with the constitutional conventions we create for ourselves.

Notes

- * Eric Adams, Faculty of Law, University of Alberta. I thank Greg Clarke at the Centre for Constitutional Studies for several stimulating conversations during the constitutional events of December 2008, and for organizing the panel at which this paper was first delivered.
- 1 *Romeo and Juliet*, IV, i.
 - 2 See "Live Blog: Mr. Harper Gets His Christmas Wish as Parliament Suspended" (4 December 2008) *National Post* <online: <http://network.nationalpost.com/np/blogs/posted/archive/2008/12/04/live-blog-mr-harper-goes-to-rideau-hall.aspx>>.
 - 3 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 9, 10, reprinted in R.S.C. 1985, App. II, No. 5 (CanLII).
 - 4 *Ibid.* at section 11.
 - 5 *Ibid.* at sections 34, 58, and 96.
 - 6 *Ibid.* at sections 38 and 50.
 - 7 Wayne Morrison, ed., *Blackstone's Commentaries on the Laws of England* (London: Cavendish, 2001) at 138. And, of course, as the preamble to the *Constitution Act, 1867* announces, the uniting provinces desired "a Constitution similar in Principle to that of the United Kingdom."
 - 8 *Letters Patent Constituting the Office of Governor General of Canada* (Imperial Order-in-Council, proclaimed in force 1 October 1947) at section VI. The provision is unaltered from previous versions in 1931, 1905, and 1878. See *Letters-Patent*

- Constituting the Office of Governor-General of the Dominion of Canada, 1878* in W.P.M. Kennedy, ed., *Documents of the Canadian Constitution, 1959-1915* (Toronto: Oxford University Press, 1918) at 696.
- 9 Eugene A. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (Toronto: Oxford University Press, 1968) at 3.
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La « crise de la prorogation » vue du Québec

Frédéric Boily*

Introduction

Tout le monde a été surpris par la vitesse avec laquelle les événements politiques se sont déroulés, en décembre dernier. Bien malin celui qui aurait pu deviner, seulement une semaine avant que le premier ministre ne demande la prorogation du Parlement, qu'une coalition se serait formée entre le Parti libéral du Canada, avec à sa tête un Stéphane Dion rejeté par son propre parti, et le Nouveau Parti démocratique, qui continue de stagner dans les élections en recueillant moins de 20 pour cent des suffrages exprimés. Et, au surplus, que cette coalition fasse alliance avec le Bloc Québécois pour renverser le gouvernement à l'aide d'un vote de non-confiance lors du jour de l'opposition. Pour tout dire, aujourd'hui encore le côté irréel de la chose n'est pas totalement disparu.

Comme ailleurs au pays, les événements de cette palpitante semaine ont fasciné la population québécoise. L'attention médiatique s'est en effet presque entièrement centrée sur ces événements si bien que les derniers moments de la campagne électorale provinciale alors en cours sont passés presque inaperçus, éclipsés par les rumeurs et autres conjectures qui ont marqué cette semaine. Chose certaine, la crise a suscité plus d'une réaction.

C'est ainsi que nous examinerons, dans la première partie, la façon dont les événements ont été perçus par les acteurs politiques, les journaux et les experts constitutionnels ainsi que par la population elle-même. Dans la seconde partie, nous nous demanderons comment expliquer cette crise qui a profondément secoué le Parlement en décembre 2008. Peut-on déceler une certaine logique qui nous aide à compren-

dre ce qui s'est passé ? Il s'agira de montrer que les germes de la crise étaient là depuis un moment déjà et que, si la crise n'était pas destinée à survenir, on pouvait raisonnablement croire que quelque chose finirait par arriver.

La crise vue du Québec

« Minority governments are usually more sensitive to public opinion than majority governments. They are also easier to hold accountable¹ ».

La crise, et c'est la première chose à noter, est survenue au Québec dans un contexte particulier, celui d'une campagne électorale qui tirait à sa fin. Comme je l'ai déjà mentionné, les médias ont presque délaissé la couverture de la campagne électorale provinciale et ce, d'autant plus facilement que la campagne était l'une des plus ternes des dernières décennies et que, jusque-là, elle suscitait bien peu d'enthousiasme auprès des électeurs. C'est pourquoi nous allons d'abord analyser la façon dont les acteurs politiques, qui étaient dans un contexte de lutte électorale, ont réagi à cette crise.

Les acteurs politiques : entre l'embarras et la réjouissance

Pour la chef du Parti Québécois, l'appui du Bloc Québécois à la coalition représentait une épine aux pieds de sa formation politique parce qu'il n'était pas simple de justifier l'appui, pendant dix-huit mois, à une coalition dirigée par le père d'une loi honnie par les nationalistes (la loi sur la clarté référendaire). Surtout, les soubresauts de la crise venaient miner un des arguments de la campagne péquiste, celui voulant que les gouvernements de coalition sont bons

puisqu'ils obligent les gouvernements à tenir compte des vœux de l'opposition, ce qu'ils ne font pas lorsqu'ils sont majoritaires. Ainsi, les électeurs n'avaient pas à craindre, au contraire disait-on, de voter pour le Parti Québécois car ce serait une bonne chose s'il devait résulter un gouvernement minoritaire de l'élection.

Le mouvement nationaliste a toutefois su récupérer à son avantage ces événements. Ainsi, des ténors souverainistes ont donné leur appui au Bloc Québécois, que l'on pense à Bernard Landry, Jean-François Lisée ou Yves Michaud, en affirmant notamment que le Bloc Québécois pourrait mieux veiller aux intérêts du Québec et qu'il était nécessaire de barrer la route aux politiques économiques du Parti conservateur du Canada, jugées désastreuses. Certains nationalistes s'en réjouissaient presque ouvertement. Par exemple, l'ancien chef du Parti Québécois, Bernard Landry, va dire que la crise permettra aux Québécois de voir « l'absurdité du système monarchique ». D'autres vont plus loin encore en espérant une réaction négative du Canada anglais, laquelle pourrait attiser la flamme souverainiste. Ainsi, Marc Laviolette et Pierre Dubuc vont affirmer qu'« il n'est pas exclu que nous assistions éventuellement à un ressac anti-Québec dans le reste du Canada. Dans ces circonstances, la crise pourrait facilement mener à une montée de l'effervescence nationaliste du Québec comme au lendemain de l'échec de l'entente du Lac Meech² ». Pauline Marois a donc pu, au milieu de la semaine, décrire Stephen Harper comme un « baveux qui écrase le Québec ».

Par ailleurs, d'autres nationalistes, passablement moins enthousiastes, ont émis quelques réserves. Le chef du Parti indépendantiste (petite formation politique qui n'a obtenu que 0,13 pour cent des voix à l'élection de décembre 2008) s'est dit ahuri de voir Gilles Duceppe permettre à Stéphane Dion de devenir premier ministre du Canada³. Mathieu Bock-Côté, jeune intellectuel nationaliste et conservateur (au sens philosophique du terme), dans une lettre au journal *Le Devoir*, s'est étonné que les bloquistes puissent faire alliance avec les libéraux et, qui plus est, avec le père de la clarté référendaire. Bock-Côté va surtout insister sur le fait que Gilles Du-

ceppe, obnubilé par la lutte contre la droite, va faire alliance avec deux partis — l'un défenseur de la « philosophie trudeauiste », l'autre adepte du « zèle centralisateur » – contre celui dont le « provincialisme » converge jusqu'à un certain point avec le projet national québécois. Bref, c'est le monde à l'envers et comme il va l'écrire, non sans un brin d'ironie malicieuse, « [d]ésormais, qui vote Bloc vote Dion.⁴ » Jacques Brassard, ancien ministre des Affaires intergouvernementales, qui a par ailleurs polémique avec Stéphane Dion lorsque ce dernier occupait la même fonction au sein du cabinet de Jean Chrétien, va lui aussi mettre en doute la sagesse, d'un point de vue souverainiste, d'une telle coalition. « C'est une mauvaise idée », va tout simplement dire celui-ci⁵.

Quant au chef libéral, Jean Charest, de prime abord la situation pouvait lui apparaître bénéfique. Les événements renforçaient son argument voulant que les gouvernements minoritaires se révèlent une fort mauvaise chose, notamment en temps de crise. Jean Charest semblait avoir raison de dire qu'il ne faut qu'une « paire de mains sur le volant » de la voiture de l'État, une expression qu'il a répété *ad nauseam* durant la campagne. Dans un premier temps cependant, Jean Charest est resté muet ou presque. On craignait probablement, du côté libéral, que les sorties de Stephen Harper et de ses ministres contre les « séparatistes » ne galvanisent le vote péquiste. Au milieu de la semaine, Jean Charest va sortir de son mutisme pour dire que lui aussi avait déjà été victime du même traitement, c'est-à-dire que Jean Chrétien lui avait reproché de pactiser avec le Bloc Québécois lorsqu'il avait refusé, comme chef du Parti conservateur, d'endosser la démarche concernant la loi sur la clarté référendaire. Le chef libéral va notamment s'inquiéter du « sentiment de *Quebec bashing* » qui, selon lui, avait cours au Canada anglais, tout en défendant la légitimité du Bloc Québécois⁶.

Du côté de l'Action démocratique du Québec (ADQ) de Mario Dumont, nous nous apercevons, avec un peu de recul, que la crise ne pouvait avoir que des effets négatifs. D'une part, la crise empêchait les adéquistes de dire qu'un gouvernement minoritaire était pré-

féritable à l'élection d'un gouvernement majoritaire libéral. D'autre part, la crise distrayait les électeurs déjà bien peu mobilisés par la campagne électorale. Dans ce contexte, le chef adéquate pouvait difficilement tirer profit des événements en cours. Celui-ci s'est contenté de demander à Stephen Harper d'écouter les partis d'opposition, tout en critiquant le Bloc Québécois, non pas de participer à la coalition, mais de ne pas être, en bonne et due forme, partie prenante de la coalition, qu'il se cantonnait plutôt dans les « limbes politiques⁷ ».

Au début de la crise, les acteurs politiques ne savaient donc pas comment réagir et, à la fin, seul le Parti Québécois paraît en avoir réellement profité dans la mesure où la crise a entraîné une certaine mobilisation des électeurs péquistes la journée de l'élection.

La crise au miroir des journaux

La perception des journalistes et autres observateurs de la politique œuvrant dans les médias ne différait pas sur tous les points de celle du Canada anglais. D'abord, le blâme a presque unanimement été jeté sur Stephen Harper. Ainsi, au cours des premiers jours de la crise, la première explication émise fut que l'entière responsabilité de cette crise était imputable à l'entêtement, maintenant légendaire, de Stephen Harper. Aveuglé par la partisanerie politique et idéologique, ne pensant qu'à marquer des points aux dépens de l'opposition, le chef conservateur y est allé, par l'entremise de son ministre des Finances, d'un énoncé économique agrémenté de « pilules empoisonnées », comme celle de mettre fin au mode de financement des partis ou encore de suspendre le droit de grève des fonctionnaires.

Que ce soit dans le quotidien nationaliste *Le Devoir* ou dans des journaux plus fédéralistes comme *Le Soleil* ou *La Presse*, l'irresponsabilité de Stephen Harper a plus ou moins été le seul facteur mis en cause. Citons comme exemple André Pratte, éditorialiste au journal *La Presse* et ouvertement fédéraliste qui, dès le début, rejette sur le premier ministre la responsabilité de la crise tout en l'enjoignant de faire quelque chose pour dénouer l'impasse : « Seul responsable de cette crise, le premier ministre Ste-

phen Harper doit prendre l'initiative du compromis ». Tout ce qu'il a inclus dans l'énoncé économique constituait une « gigantesque erreur de jugement⁸ ». Même son de cloche du côté du quotidien nationaliste *Le Devoir*, où les éditorialistes vont aussi dénoncer l'irresponsabilité de Stephen Harper, notamment Jean-Robert Sansfaçon qui va accuser le premier ministre d'être un incendiaire : « Celui qui s'est présenté pendant la dernière campagne électorale comme un homme d'ouverture se révèle être un politicien vengeur, et depuis mardi, le chef d'un parti de pyromanes⁹ ». Pyromanes parce que les conservateurs cherchent à mettre le feu dans la poudrière de l'unité nationale.

Ainsi, les observateurs agréaient l'idée que l'opposition avait eu raison de se sentir piquée au vif en voyant leur survie financière compromise et que l'on ne pouvait guère reprocher aux partis d'opposition d'avoir trouvé là une occasion de mettre de côté leurs nombreux (et importants) différends pour proposer une solution aux Canadiens, un gouvernement moins idéologique et plus progressiste. Bref, Stephen Harper était perçu comme l'unique responsable de son malheur, qu'il n'avait que lui-même à blâmer. Ses supposés talents de stratège et de tacticien faisaient alors bien piètre figure.

Lorsque la crise s'est approfondie, des lignes de fracture sont apparues. En effet, les événements se précipitant, des positions se sont cristallisées. La pertinence de la coalition a été mise en doute, notamment après la présentation du message à la nation de Stephen Harper et de celui, raté, de Stéphane Dion. Certains journalistes, dans *La Presse* particulièrement, ont commencé à critiquer plus durement la coalition en montrant, comme va le faire l'éditorialiste André Pratte, que cette dernière ne propose rien de novateur en matière d'investissement en comparaison de ce que les conservateurs ont eux aussi promis. Le programme de la coalition est une sorte de bric-à-brac idéologique, certainement pas supérieur à ce que les conservateurs ont eux-mêmes proposé. Dans ces conditions, il faut, nous dit Pratte en citant Ed Stelmach : « Arrêtez ces folies et pensez au Canada avant tout!¹⁰ »

Par contre, *Le Devoir* et *Le Soleil* (un quoti-

dien de Québec), se sont montrés plus favorables à la coalition. Reprenant le même raisonnement que son collègue du journal *Le Devoir*, le chroniqueur Raymond Giroux va lui aussi accuser Stephen Harper d'avoir joué au « pyromane ». Le premier ministre du Canada a inventé une crise d'unité nationale, en courant à la chasse aux séparatistes, espérant ainsi amadouer la gouverneure générale et la gagner à sa cause¹¹. En éditorial, Jean-Marc Salvet va soutenir que si Michaëlle Jean obtempère aux vœux du premier ministre et qu'elle accorde la prorogation du Parlement, si ce dernier la lui demande, alors ce ne sera pas la coalition qui va perdre mais le gouvernement¹². Il est légitime, puisqu'il ne s'agit pas d'un régime présidentiel au Canada, qu'une coalition cherche à former le gouvernement. L'éditorialiste reprend l'argumentation largement partagée voulant que la question de la légitimité relève de la confiance dans le gouvernement exprimée par la Chambre. Sans nier cette interprétation, son collègue de *La Presse* va affirmer que la coalition n'avait pas « l'autorité morale » pour prétendre gouverner¹³. La coalition est conforme à la constitution, vont soutenir la majorité des commentateurs, mais selon d'autres elle n'est pas légitime du point de vue démocratique.

Il y avait là une ligne de démarcation nette entre deux positions : d'un côté, ceux qui affirmaient que la coalition ne pouvait prétendre gouverner parce qu'elle n'avait pas la légitimité démocratique requise ou « l'autorité morale » nécessaire; de l'autre, ceux qui soutenaient que là n'était pas la question, la véritable question étant celle de la légalité et de la constitutionnalité de la coalition. Dans ce contexte, que les conservateurs aient été le parti ayant reçu le plus d'appui, en octobre 2008, n'a pas été pris en considération.

Dans tous ces débats, il a paru que l'on se souciait assez peu de l'opinion des électeurs conservateurs de l'Ouest du pays, c'est-à-dire qu'on ne semblait pas vraiment comprendre ce que signifiait pour eux la formation d'un gouvernement de coalition, au surplus appuyé par le Bloc Québécois. En fait, toute réaction contre la coalition, provenant du Canada anglais, semblait être interprétée comme l'opinion des an-

glophones sur le Québec, notamment après que Stephen Harper, à partir du mardi, se soit mis à assaillir les « séparatistes ».

On interprétait cela comme une sorte de « retour du refoulé », comme si le reste du Canada était revenu à ses vieilles habitudes du *Quebec Bashing*. Par exemple, Jean-Robert Sansfaçon du journal *Le Devoir* va écrire qu'il y a véritablement de la « haine » dans l'air : « Il se dégage de l'approche conservatrice des effluves de haine pure à l'endroit des maudits «séparatiss» qui font le choix du Québec avant celui du Canada comme nation pour protéger leur culture et leur identité¹⁴ ». En somme, plusieurs croyaient maintenant savoir ce que les conservateurs pensaient du Québec.

Les constitutionnalistes et l'analyse de la crise

Dans un autre registre, nous avons également assisté à des prises de position de la part des constitutionnalistes qui ont connu, à cette occasion, leur heure de gloire puisqu'ils ont été intensément sollicités pour commenter l'actualité. À la manière des oracles anciens, ils tentaient de percer à jour les intentions de la gouverneure générale. Là aussi, nous avons vu les opinions des experts en matière constitutionnelle se cristalliser autour de deux grandes positions.

En effet, il y avait d'abord ceux dont l'opinion pourrait être décrite comme étant traditionnelle. S'appuyant sur le fameux précédent de 1926, ces constitutionnalistes, comme Eugénie Brouillet et Henri Brun (tous deux de l'Université Laval), affirmaient que la gouverneure générale n'avait pas d'autre choix que d'accepter la prorogation car elle se devait d'obéir aux désirs du premier ministre. Comme va le dire Eugénie Brouillet, « [i]l existe une convention constitutionnelle très claire à l'effet que les pouvoirs aujourd'hui de la lieutenante-gouverneure et de la gouverneure générale [...] doivent être exercés suivant les instructions du premier ministre¹⁵ ». Même son de cloche chez le constitutionnaliste Henri Brun pour qui ce n'est pas à la gouverneure générale de dénouer l'impasse politique qui prévalait alors. À son avis, si la gouverneure générale n'obtempérait pas aux directives du gouvernement élu, le ris-

que serait grand de voir le pays s'enfoncer dans une profonde crise constitutionnelle¹⁶.

D'autres constitutionnalistes cependant, ceux de la seconde position, affirmaient au contraire que la gouverneure générale disposait d'un réel pouvoir discrétionnaire et qu'elle pouvait refuser de proroger le Parlement comme le lui demandait le chef conservateur. Selon eux, elle devait absolument prendre en considération les circonstances particulières entourant la demande de Stephen Harper. Sébastien Grammond, de la Faculté de droit de l'Université d'Ottawa, va dire à la télévision : « Si le premier ministre ne jouit plus de la confiance de la Chambre, à ce moment-là, la gouverneure générale n'est plus obligée de l'écouter, surtout quand il vient d'y avoir une élection¹⁷ ». Selon Hugo Cyr, avocat et professeur à la Faculté de science politique et de droit de l'UQAM, la gouverneure générale pouvait refuser la prorogation et par la suite demander à la coalition libérale et néo-démocrate, après un vote de non-confiance, de former un gouvernement avec l'appui du Bloc¹⁸. Pour ces experts, la question relevait de l'appréciation de la situation : à leurs yeux, le gouvernement, en n'ayant pas la confiance de la Chambre, a aussi perdu toute légitimité. Il fallait donc que la gouverneure générale en prenne acte et qu'elle demande à la coalition de former le gouvernement. Bref, Michaëlle Jean aurait dû refuser la demande de prorogation.

D'un côté, il y avait donc ceux qui pensaient que la convention issue des événements passés entre Mackenzie King et lord Byng obligeait la gouverneure générale à agir comme le lui demandait le premier ministre; de l'autre côté, il y avait ceux qui croyaient que la question de la légitimité se posait par rapport à la situation particulière qui prévalait à ce moment-là. Les seconds ont d'ailleurs fait paraître un texte où ils reprenaient le même argument pour dénoncer la nomination de sénateurs par le premier ministre, ce qui allait survenir quelques jours plus tard. « *The nomination of senators in such circumstances would be illegitimate and, most troublingly, in clear violation of the Canadian constitutional ideals of the rule of law and parliamentary democracy*¹⁹ ». Pour eux, le premier ministre n'avait pas la légitimité légale néces-

saire pour procéder à de telles nominations. En somme, l'opinion des experts en matière constitutionnelle était divisée.

La population québécoise et l'appui à la coalition

De manière générale, comme les sondages d'opinion l'ont montré, la coalition a reçu davantage d'appui au Québec que dans le reste du Canada. Très rapidement le premier sondage, rendu public le lundi matin, a montré que la coalition jouissait d'un appui important au Québec; 76 pour cent des répondants sont favorables à la coalition contre 15 pour cent qui sont favorables à une nouvelle élection (avec 9 pour cent qui ont refusé de se prononcer)²⁰. Cela dit, nous pourrions penser que les citoyens sondés ne préféreraient pas tant une coalition que d'être épargnés une nouvelle élection, celle-ci servant de repoussoir. Notons également que les répondants ne voulaient pas, dans une proportion de 56 pour cent, de Stéphane Dion comme chef de la coalition, ce qui soulève une question importante : de quel appui aurait disposé un gouvernement de coalition mené par Stéphane Dion ? Enfin, mentionnons ce qui n'est pas sans surprendre, que la fameuse proposition concernant l'abolition du financement des partis recevait tout de même l'appui de 42 pour cent des personnes sondées contre 52 pour cent qui s'opposaient à cette abolition.

Nous pouvons toutefois nous interroger sur la réelle validité – non pas au plan technique mais plutôt sur ce qu'il prétend révéler – d'un sondage conçu quasiment au moment même où les événements surviennent et surtout, avant même que ne soit officialisée la coalition, le lundi après-midi. N'est-ce pas accorder trop d'importance à des sondages qui sont réalisés dans l'immédiateté de l'événement ? Voilà qui rappelle la justesse de ce qu'a écrit Fareed Zakaria : « Les instituts de sondage sont les devins d'aujourd'hui; ils interprètent taux et indices avec la gravité qu'affichaient leurs lointains prédécesseurs devant les entrailles de poulets²¹ ». L'impression est qu'un tel sondage participe tout autant à la formation de l'opinion qu'à sa révélation.

Quoi qu'il en soit, un sondage publié cette

fois à la fin de la semaine par Strategic Counsel pour le compte du journal *The Globe and Mail* va montrer que les Québécois appuient toujours la coalition puisque 55 pour cent se déclarent en sa faveur (proportion plus faible que lors du premier sondage) alors que dans le reste du Canada cette proportion est de 32 pour cent seulement. Notons cependant que c'est presque la même proportion de sondés, en Ontario et au Québec, qui appuient fortement la coalition (20 pour cent et 23 pour cent) contre 12 pour cent seulement dans l'Ouest. Cela dit, ceux qui sont fortement opposés à la coalition sont plus nombreux en Ontario qu'au Québec (50 pour cent contre 27 pour cent)²². Il est vrai toutefois que, comme les plus récents sondages l'indiquent, 62 pour cent de la population québécoise continuent de penser que la coalition devrait avoir sa chance contre seulement 30 pour cent qui souhaitent des élections alors que dans l'Ouest, c'est la situation inverse (65 pour cent veulent des élections contre 29 pour cent qui appuient la coalition). Bref, le pays semble divisé en deux camps, le Québec et l'Ouest²³. L'ironie de la chose, c'est que c'est le Québec qui a fait sien les propos de Preston Manning (cité en exergue au début de cette section) alors que l'Ouest du pays s'insurge contre un gouvernement de coalition.

La fortune électorale du Parti conservateur est-elle irrémédiablement compromise au Québec ? Dans un premier temps, l'appui dont les conservateurs disposent auprès des électeurs québécois est demeuré stable et il s'est même légèrement amélioré, après la prorogation, par rapport à ce qu'il était lors des dernières élections. En effet, après avoir recueilli 22 pour cent des suffrages exprimés au Québec lors de la dernière élection, les sondages réalisés après la prorogation montrent encore un appui de 24 pour cent²⁴. Cela dit, l'un des derniers sondages portant sur les intentions de vote, avec Michael Ignatieff à la tête du Parti libéral du Canada, laisserait entrevoir, au Québec, une remontée spectaculaire de cette formation ainsi qu'une baisse importante des conservateurs dans les intentions de vote, sous la barre des 20 pour cent en fait. C'est ainsi que le Parti libéral recueille 39 pour cent des intentions de vote contre 29 pour cent pour le Bloc Québécois. Le Parti conservateur et le Nouveau Parti démocratique ob-

tiennent 17 pour cent et 14 pour cent respectivement de l'appui des électeurs²⁵. Cependant, il se pourrait que ce sondage ne traduise rien de plus qu'un engouement passager pour le nouveau chef libéral. En ce sens, l'avenir paraît encore ouvert pour tous les partis.

Les racines québécoises de la crise

Comment expliquer cette crise ? avon-nous demandé en introduction. Faut-il y voir un phénomène politique apparenté à la combustion spontanée ? C'est-à-dire qu'à un moment donné, les acteurs politiques s'enflammeraient sans autre cause apparente qu'une suite de mauvaises décisions politiques les conduisant à opter pour une stratégie politique que personne n'avait prévue. Avec un peu de recul, il devient évident que cette crise se préparait depuis un certain temps et que, si elle n'était pas destinée à survenir (elle aurait très bien pu ne pas se produire), tôt ou tard il se serait tout de même passé quelque chose de similaire.

D'abord, et on l'oublie, l'idée d'une coalition avait été évoquée de manière plutôt fugace par Jack Layton lors de la campagne électorale de l'automne 2008 mais celle-ci n'avait guère été prise au sérieux. Stéphane Dion avait rejeté l'idée, à l'instar de Gilles Duceppe, et seule Elizabeth May, chef du Parti Vert, s'était montrée ouverte à l'idée²⁶. À vrai dire, tous croyaient que cette proposition de coalition se voulait davantage une façon pour le chef néo-démocrate de rassurer certains électeurs libéraux indécis et de les charmer, afin de les rallier à la cause de son parti, qu'une réelle proposition. Pourtant, la suite des choses nous a montré qu'il était en fait on ne peut plus sérieux dans ses intentions.

Au fond, les rapports entre les conservateurs et les forces politiques québécoises s'étaient dégradés à tel point que l'on pouvait prévoir que, à la suite du résultat électoral des conservateurs au Québec, en octobre 2008, ces derniers, en cherchant de nouvelles avenues pour s'assurer une majorité aux prochaines élections, susciteraient des réactions importantes de la part de leurs adversaires politiques. Bref, la crise a son origine, mais en partie seulement, dans la situation des conservateurs au Québec. Voilà pour-

quoi il ne faut pas trop mettre l'accent sur les facteurs psychologiques censés « expliquer » la crise.

Un faux mystère : la psychologie de Stephen Harper

En effet, tout au long de la crise il y a eu une forte tendance à « psychologiser » la crise, à en chercher les causes dans la seule psychologie de Stephen Harper. Ainsi, certains ont évoqué le fait que cette crise n'aurait pas eu lieu si le premier ministre n'avait pas été un homme si cérébral et s'il avait été en mesure de faire appel à son « intelligence émotionnelle ». Mais voilà, « l'intelligence émotionnelle » de Stephen Harper étant celle d'un enfant de 13 ans, selon la journaliste Lysiane Gagnon, le premier ministre a agi de manière imprudente et, hargneux et brutal, il a voulu envoyer l'opposition aux tapis²⁷.

Or, sans chercher à disculper le premier ministre de ses erreurs, nous pouvons penser que cette façon de voir les choses, sans être totalement fautive, est peut-être un peu trop « psychologisante » et ce, dans le mauvais sens du terme. Il est vrai que nous pouvons trouver que cette crise relève de la responsabilité première du chef conservateur et que s'il avait su faire preuve de prudence, les choses auraient pris une autre tournure. Mais, à trop insister sur ce seul aspect, nous en venons à perdre de vue que la crise ne s'explique pas seulement par les défauts d'ordre psychologique propres au premier ministre, comme son absence de souplesse, son incapacité à négocier et son absence de générosité²⁸, ou encore sa fameuse volonté de tout contrôler, à tel point qu'il est maintenant décrit comme un « *control freak* ».

Sans nullement prendre la défense de Stephen Harper, cette « psychologisation » de la crise nous fait perdre de vue la dynamique politique plus profonde qui a mené à cet affrontement entre le parti au pouvoir et les partis d'opposition. Si cette « psychologisation » paraît quelque peu réductrice, c'est que nous oublions trop rapidement que les défauts prêtés au chef conservateur ne lui sont pas propres et que bien des dirigeants politiques sont atteints des mêmes tares d'ordre comportemental. En effet,

il est loin d'être le seul à se faire reprocher cette tendance à vouloir tout contrôler.

L'entêtement de Jean Chrétien était lui aussi bien connu, au point où un journaliste du quotidien *The Globe and Mail* a dépeint son gouvernement sous le jour d'une *Friendly dictatorship*²⁹. Si Stephen Harper laisse peu de place à ses ministres, Jean Chrétien n'était guère plus enclin à laisser toute latitude aux siens, lui aussi les préférant dociles. On raconte qu'après avoir lu dans un journal les commentaires sans substance de Ralph Goodale sur un sujet délicat, le premier ministre s'était exclamé : « Voilà comment un ministre doit parler!³⁰ » Et que dire des autres chefs politiques ? Tous ou presque se font reprocher, à un moment où l'autre, de n'écouter personne. Bref, le « mal » semble généralisé auprès des chefs des principaux partis politiques canadiens.

À vrai dire, s'il fallait caractériser les premiers ministres récents, disons des années 1980 à aujourd'hui, ils pourraient être classés en deux catégories. Premièrement, il y a ceux qui sont « entêtés et qui n'écoutent personne », hormis quelques individus appartenant à la garde rapprochée du premier ministre, ce que le politologue Donald J. Savoie a nommé le « gouvernement de cour »³¹. Entouré de quelques proches conseillers, ce type de premier ministre—et Jean Chrétien en est le meilleur exemple—mène le gouvernement d'une main de fer. Deuxièmement, il y a les premiers ministres qui sont « entêtés et qui écoutent tout le monde ». Ceux-ci ne sont pas moins entêtés que ceux de la première catégorie mais, plus rusés, ils laissent entendre qu'ils consultent et qu'ils sont à l'écoute des gens. Au contraire des premiers, ils sont prêts à faire bien des détours pour arriver là où ils veulent mais ils tiennent tout autant que les premiers à leurs idées.

En ce sens, bien peu de chefs politiques ne sont pas butés car cela constitue, pourrait-on dire, une condition *sine qua non* de la fonction. Ceux qui ne le sont pas sont rapidement identifiés comme étant indécis ou pire, incapables d'imposer une direction à leur parti politique ou à leur gouvernement (pensons ici à Paul Martin). Ils sont alors vite remplacés par d'autres chefs politiques plus aguerris et plus entêtés.

Notons qu'un des pères de la sociologie politique, Robert Michels, a déjà soulevé la question des tendances oligarchiques des organisations politiques, c'est-à-dire la propension des chefs de formations politiques de droite comme de gauche à monopoliser le pouvoir entre les mains de quelques dirigeants³². L'époque actuelle n'échappe pas à cette tendance, au contraire même. Voilà pourquoi il est indispensable de chercher dans un autre registre que celui des mystères de la psychologie de Stephen Harper les racines de cette crise.

Or, il nous semble que cette crise s'est développée à partir d'un terreau particulier, celui des rapports difficiles entre les conservateurs et les acteurs politiques du Québec, notamment avec le Parti libéral de Jean Charest. En ce sens, la crise a des racines québécoises. Plus précisément, on peut identifier trois moments qui ont marqué ces rapports difficiles entre le Parti conservateur et le Parti libéral du Québec.

Les racines québécoises de la crise : une pièce en trois actes

Le premier acte s'intitule *la percée* (juin 2004 à décembre 2005). Après les élections de 2004, les conservateurs ont procédé à un examen de conscience profond car le pouvoir, sous la forme d'un gouvernement minoritaire, leur avait échappé de peu. Pour eux la question était de redéfinir leur stratégie afin d'effectuer une percée au Québec. Comment faire, pour reprendre une image utilisée par Stephen Harper et Tom Flanagan, pour réconcilier les « trois sœurs conservatrices » ? Il s'agit des conservateurs sociaux de l'Ouest, des conservateurs « *Red Tory* » de l'Ontario et des Maritimes et des conservateurs nationalistes du Québec³³.

Afin de séduire les conservateurs du Québec, Stephen Harper va, pendant la campagne électorale de décembre 2005 et janvier 2006, mettre de l'avant le concept de « fédéralisme d'ouverture » ou *open federalism*. Plus précisément, c'est lors d'un discours à Québec, le 19 décembre 2005, que le futur premier ministre va parler de ce fédéralisme qui impliquerait un retour au « fédéralisme classique » qui restreindrait le pouvoir fédéral de dépenser et où, pour reprendre les paroles de Stephen Harper, « Ot-

tawa fait ce que le gouvernement fédéral est supposé faire³⁴ ». Ce fédéralisme classique supposerait une certaine égalité; la fédération ne serait pas une union où les provinces sont subordonnées au gouvernement fédéral mais une union économique où les provinces sont souveraines dans leurs domaines de compétences. Chose certaine, ce discours a fait grande impression et plusieurs y ont alors vu une des clés du succès, inattendu même pour les conservateurs, dans la région de Québec. Enfin, cette embellie conservatrice dans la région de Québec laissait entrevoir des jours meilleurs pour les formations politiques de Stephen Harper et Jean Charest.

Le deuxième acte est un moment d'attente et c'est celui de *l'espérance* (janvier 2006 à mars 2007). Après les élections, l'impression qui se dégage, c'est que le gouvernement minoritaire de Stephen Harper est destiné à collaborer avec celui de Jean Charest. Car pour obtenir un gouvernement majoritaire, les conservateurs doivent doubler, sinon tripler, le nombre de sièges qu'ils sont parvenus à arracher au Québec; et réciproquement, si le gouvernement libéral de Jean Charest parvient à régler le déséquilibre fiscal, cela constituera un atout majeur pour sa réélection. En somme, les deux gouvernements semblent jouir d'une situation bénéfique à tous.

Toutefois, les choses se sont déroulées autrement et les relations se sont considérablement dégradées, au point où la communication entre les deux gouvernements s'est complètement brouillée. En fin de compte, la situation du gouvernement libéral est devenue extrêmement précaire pendant ce qu'il convient maintenant d'appeler la « querelle » des accommodements raisonnables qui a enflammé l'opinion publique en 2006-2007. À la faveur de cette crise, l'ADQ de Mario Dumont a entrepris la remontée qui va lui permettre de former l'opposition officielle en mars 2007, avant d'être presque entièrement rayé de la carte électorale en décembre 2008.

C'est que la poussée adéquiste, qui s'accroît durant le mois de janvier et février, amène le chef libéral à réagir. Ainsi, lorsqu'à la toute fin de la campagne électorale de mars 2007 le gouvernement conservateur donne plus de 700 millions de dollars au gouvernement libéral pour régler le déséquilibre fiscal, Jean Charest, craignant

grandement pour sa réélection, va accorder des baisses d'impôts plutôt que d'utiliser cette somme pour financer les programmes sociaux, ce qui constituait l'argument clé pour réclamer un règlement du déséquilibre fiscal. À partir de ce moment, Stephen Harper se trouvait dans une position difficile car pour le Canada anglais, le déséquilibre fiscal apparaissait comme une énième manœuvre du Québec pour soutirer de l'argent au gouvernement central.

Ce qui nous amène au troisième acte, celui de la *brouille définitive* (de mars 2007 à la crise de décembre 2008). En effet, après l'élection il apparaissait clairement que le succès de l'ADQ s'expliquait, en partie du moins, du fait que ce parti était parvenu à se présenter comme le défenseur attiré de l'identité québécoise³⁵. Or, pour contrer la perception que Mario Dumont est seul à défendre l'identité du Québec, Jean Charest (tout comme Pauline Marois) va surenchérir sur les adéquistes et leurs thèses. Le chef libéral essaie alors de se présenter comme étant le véritable protecteur de cette identité en s'opposant à Stephen Harper. Dans ce contexte, Jean Charest va chercher à prendre ses distances avec Stephen Harper qui le lui rend bien, ce dernier poussant l'audace jusqu'à rencontrer Mario Dumont dans son comté. La distance entre Jean Charest et Stephen Harper n'a donc pas cessé de se creuser.

Ainsi, lorsque les élections fédérales ont été déclenchées, Jean Charest a rapidement rejoint le camp des « ABC » (*Anything but Conservatives*). Certes, l'opposition de Jean Charest n'a pas été aussi spectaculaire que celle du premier ministre terre-neuvien, mais elle était bien plus dommageable dans la mesure où les conservateurs avaient plus à perdre au Québec. Durant la campagne fédérale de septembre à octobre 2008, Jean Charest va présenter une série de demandes à tous les partis portant sur des sujets délicats et qui tiennent à cœur aux troupes conservatrices. Le gouvernement Charest entrait alors en collision frontale avec les conservateurs sur la quasi-totalité des dossiers importants, ce qui venait donner toute la crédibilité voulue au discours du Bloc Québécois lorsque ce parti affirmait que les intérêts du Québec étaient menacés³⁶. « Je ne cherche pas à diriger le vote » va

dire Jean Charest. Cette affirmation apparaît maintenant bien peu vraisemblable³⁷.

La tactique de confrontation de Jean Charest pouvait d'autant mieux fonctionner que Stephen Harper va lui aussi utiliser une stratégie de confrontation dans la mesure où il va défendre avec acharnement les compressions budgétaires dans le domaine de la culture. Pas étonnant, au soir des élections, que les conservateurs ne fassent pas de gains au Québec et qu'ils soient simplement parvenus à garder, à une exception près, ce qu'ils avaient gagné en 2006. La rupture entre les deux partis est confirmée. Les résultats des élections convainquent les conservateurs d'employer une nouvelle stratégie pour remporter la majorité espérée, c'est-à-dire une stratégie qui ne passe plus par le Québec. Tous les ingrédients sont là, au soir des élections, pour produire une « crise ».

En effet, en faisant des gains importants en Ontario et en Colombie-Britannique, les conservateurs se croient maintenant en mesure d'arracher une majorité sans le Québec. Un pari risqué, certes, mais il semble possible de courtiser, pour reprendre l'expression de Tom Flanagan dans un texte publié dans le journal *The Globe and Mail* peu de temps après les élections, une nouvelle « sœur » : celle des communautés ethnoculturelles qui, dans l'avenir, pourraient se montrer plus favorables à la philosophie conservatrice (avec le thème de la famille, par exemple)³⁸. Autrement dit, si la « sœur québécoise » se montre trop intraitable, essayons d'en courtiser une nouvelle, soit le vote ethnique.

C'est dans ce contexte que survient l'urgence du changement dans le mode de financement des partis car il s'agit là d'un premier pas qui permet la formation d'une majorité conservatrice qui ne passe pas par le Québec. En effet, ce changement vient affaiblir les finances du Bloc Québécois et du Parti libéral du Canada. Par la suite, comme le gouvernement l'a dit dans le discours du Trône, c'est un ajout de députés, au nombre actuel, en provenance de l'Ouest et de l'Ontario, qui constitue une autre pièce visant à dégager une majorité, puisque le poids relatif du Québec s'en trouve ainsi amoindri. En somme, les conservateurs commençaient à dégager la voie qui les mènera, sans le Québec, à un gou-

vernement majoritaire. Ils ignoraient toutefois qu'ils trouveraient sur leur chemin des partis bien décidés à ne pas s'en laisser imposer aussi facilement.

Notes

- * Frédéric Boily, Campus Saint-Jean, University of Alberta.
- 1 Preston Manning, « *All together now: Minority government can be a good thing* » *The Globe and Mail* (8 juin 2004) A25.
- 2 Louise Leduc, « Le Bloc a la bénédiction des bonzes indépendantistes » *La Presse* (3 décembre 2008) A10.
- 3 *Ibid.*
- 4 Mathieu Bock-Côté, « Qui vote Bloc vote Dion » *La Presse* (3 décembre 2008) A37.
- 5 Jean-François Néron, *Le Soleil* (3 décembre 2008) 3.
- 6 Antoine Robitaille et al., « Calmez-vous ! » *Le Devoir* (4 décembre 2008) A4.
- 7 Simon Boivin, « Dumont demande à Harper d'arrêter ce cirque-là » *Le Soleil* (2 décembre 2008) 10.
- 8 André Pratte, « M. Harper doit céder », *La Presse* (30 novembre 2008) A22.
- 9 Jean-Robert Sansfaçon, « Harper, le pyromane » *Le Devoir* (4 décembre 2008) A8.
- 10 André Pratte, « Vaudeville à Ottawa » *La Presse* (2 décembre 2008) A24.
- 11 Raymond Giroux, « Stephen Harper ne regrette rien » *Le Soleil* (4 décembre 2008) 3.
- 12 Jean-Marc Salvé, « Le salut dans la fuite » *Le Soleil* (4 décembre 2008) 32.
- 13 André Pratte, « À l'opposition de réfléchir » *La Presse* (1 décembre 2008) A22.
- 14 Sansfaçon, *supra* note 9.
- 15 *Le Téléjournal/Le Point, SRC télévision* (1 décembre 2008).
- 16 Henri Brun, « Michaëlle Jean n'a pas le choix » *La Presse* (4 décembre 2008) A37.
- 17 *Le Téléjournal/Le Point, supra* note 15.
- 18 Hugo Cyr, « De la confiance parlementaire et de la démocratie » *Le Devoir* (4 décembre 2008) A9.
- 19 « Unconstitutional Senate nominations » *National Post* (17 décembre 2008) A17.
- 20 Joël-Denis Bellavance, « Les Québécois en faveur d'une coalition » *La Presse* (1 décembre 2008) A4.
- 21 Fareed Zakaria, *L'avenir de la liberté. La démocratie illibérale aux États-Unis et dans le monde*, Paris, Odile Jacob, 2003 à la p. 25.
- 22 The Strategic Counsel, « *Harper's Conservatives*

versus Liberal-NDP Coalition: What is the State of Canadian Public Opinion? » (4 décembre 2008), en ligne : <[http://www.thestrategiccounsel.com/our_news/polls/2008-12-04%20globeand-mail%20\(web\).pdf](http://www.thestrategiccounsel.com/our_news/polls/2008-12-04%20globeand-mail%20(web).pdf)>.

- 23 « Sondage Nanos. Les Québécois et les autres Canadiens sont divisés sur l'opportunité d'une coalition » (12 janvier 2009), en ligne : *Le Devoir* <<http://www.ledevoir.com/2009/01/12/226959.html>>.
- 24 « *Why Canadians rejected the coalition* » *Macleans* (29 décembre 2008) 2.
- 25 « Sondage favorable aux libéraux » *La Presse* (10 janvier 2009) A15.
- 26 Voir les articles suivants : Martin Croteau, « Elizabeth May nie avoir appelé au vote stratégique » *La Presse* (27 septembre 2008) A12 ; Martin Ouellet, « Duceppe rejette toute idée de coalition pour battre Harper » *Le Devoir* (7 octobre 2008) A4 ; Manon Cornellier, « Une impensable alliance ? » *Le Devoir* (11 octobre 2008) C1.
- 27 Lysiane Gagnon, « Buté, le monsieur » *La Presse* (4 décembre 2008) A39.
- 28 Craig Offman, « *The Psychology of Stephen Harper: Is the Prime Minister magnanimous enough to be a Statesman?* » *National Post* (6 décembre 2008) A15.
- 29 Plus précisément, il s'agit de l'ouvrage de Jeffrey Simpson, *The Friendly Dictatorship*, Toronto, M&S, 2002.
- 30 Donald J. Savoie, *Governing the Centre: The Concentration of Power in Canadian Politics*, University of Toronto Press, Toronto, 1999 à la p. 239.
- 31 Donald J. Savoie, « *The Rise of Court Government in Canada* » (1999) 4 *Revue canadienne de science politique* 635.
- 32 Robert Michels, *Les partis politiques. Essai sur les tendances oligarchiques des démocraties*, trad. par S. Jankelevitch, Paris, E. Flammarion, 1914.
- 33 Pour plus de détails, voir Frédéric Boily, « Le néoconservatisme au Canada : faut-il craindre l'École de Calgary ? » dans Frédéric Boily, dir., *Stephen Harper. De l'École de Calgary au Parti conservateur : les nouveaux visages du conservatisme canadien*, Québec, PUL, 2007 aux pp. 27-54.
- 34 Ian MacDonald, « *The BNA Act and the Charter: two mints in one* » *Policy options/Options politiques* (décembre 2007-janvier 2008) à la p. 95.
- 35 La montée de l'ADQ et son utilisation de la défense de l'identité québécoise sont traitées plus en profondeur dans mon livre, *Mario Dumont et l'Action démocratique du Québec. Entre populisme et démocratie*, Québec, PUL, 2008 aux pp. 122-131.

- 36 Par exemple, le chef libéral prévient son homologue fédéral qu'il est en désaccord avec des peines de prison plus sévères pour les jeunes contrevenants et avec les coupes en culture, tout comme il s'oppose à une réforme du Sénat et à une refonte du nombre de sièges à la Chambre des communes. Également, le chef libéral veut que l'année de référence pour la diminution des gaz à effet de serre soit 1990 plutôt que 2006, comme l'avancent les conservateurs. En outre, il est demandé que le contrôle des armes à feu soit renforcé (avec un engagement de maintenir le registre) et que le financement, en matière régionale, soit rétabli, ce qui allait à l'encontre de ce qu'avait fait le ministre Jean-Pierre Blackburn.
- 37 Denis Lessard, « Je ne cherche pas à diriger le vote. Jean Charest » *La Presse* (30 septembre 2008) A19.
- 38 Tom Flanagan, « *Courting the Fourth Sister: For Stephen Harper, the ethnic vote is easier to woo than Quebec* » *The Globe and Mail* (14 novembre 2008) A23.

Canada's Neglected Tradition of Coalition Government

James Muir*

On Wednesday, 26 November 2008, I closed the second of two lectures on politics in the 1840s and 1850s for my second-year, pre-Confederation Canadian history students by reiterating the definition of responsible government. I suggested that, at its core, was the principle that the parliamentary executive was responsible to the elected assembly as a whole, and that the governor general (or lieutenant governor) was expected to follow the executive's wishes. This expectation included not calling elections every time a government fell in the assembly, but rather selecting another government that had the support of the already elected members of the assembly.

I continued by noting that the principles of responsible government remain the basis of Canadian democracy, although these principles have little practical effect, except at moments of crisis like the King-Byng affair. I suggested that the students would be unlikely to see the principles in action. By my Friday class, the conclusions I had made two days earlier seemed no longer valid. Indeed, on that morning of 28 November and on the following Monday, 1 December, while I discussed with my classes the lead-up to Confederation from before the Charlottetown conference of 1864 through to 1 July 1867, Canadians were confronted with their Prime Minister postponing a confidence vote in the House of Commons, even as opposition parties were forging a coalition agreement.

At first, the events of late November and early December 2008 excited me as a teacher because they provided me with a contemporary example of responsible government in action: here was a perfect opportunity to understand continuity in political theory and political history. Of course, most of the discussion about

the proposed coalition took place in public, not in classrooms like mine. As the public discourse about the coalition evolved, three distinct threads of debate became apparent: legality, legitimacy, and precedent.

First, there was a great deal of discussion about whether or not it was legal to make the coalition the government without an election. Related to this were two discussions of its legitimacy. One stream portrayed the Liberal-New Democratic Party coalition proposal as anti-democratic because it was not part of either party's election platform, and so had not received popular sanction in the October 2008 general election. A second stream asserted that the inclusion of the Bloc Québécois in the coalition agreement meant that the Liberal Party and New Democratic Party (NDP) were trying to bring separatists into the national government. Finally, public discourse frequently drew from the example of previous coalition governments, including: the NDP-Liberal coalitions in Saskatchewan, 1999-2003, and Ontario, 1985-7; the Liberal-Progressive coalition in the 1920s; and the Union government during the First World War. Lecturing about Confederation convinced me that all three of these threads were faulty.

To demonstrate this, it is necessary to briefly recount one of the germinal events of Confederation.¹ The famous photographs and paintings of Confederation show the Charlottetown conference in the summer in 1864, and its immediate successor at Québec in the autumn. It was at these conferences that the initial agreement among the colonial governments to confederate was reached, and the elemental division between federal and provincial jurisdictions was decided. The Charlottetown conference was originally organized for the At-

lantic colonies alone, but upon request included a delegation from Canada, which brought with it a proposal for the union of all of the central and eastern colonies of British North America. The Canadian delegation represented Canada's new government of June 1864, formed in part to bring about confederation (or some other constitutional change). That government is now often called the "Great Coalition" or "Canadian Coalition," and was a coalition formed under the leadership of John A. Macdonald, Alexander Galt, George-Étienne Cartier, and George Brown (although, nominally, the premier was Étienne Taché).

Coalition government had been routine since the union of Upper and Lower Canada in 1841. The nascent political parties of the colony were often, although not always, divided along the old colonial boundaries. In the twenty-three years leading up to late June 1864 there were seventeen governments, most of which were coalitions of more-or-less like-minded parties from the two halves; generally speaking, these governments shared leadership with one senior minister from each side together performing most of the premier's tasks. There were, however, only seven elections during this period. It is worth quickly running through this history: following the 1841 election in Canada, Lord Sydenham appointed Robert Baldwin and William Draper as leaders of a coalition government. Baldwin resigned prior to the first Parliament. Draper continued on his own until 1842, when he was replaced by Baldwin and Louis-Hippolyte Lafontaine. In 1843, they were replaced by Dominic Daley. An election in 1844 resulted in a Draper-Denis Viger coalition, which was replaced by a Draper-Louis Papineau coalition in 1845. In 1847, Draper resigned to be replaced by Henry Sherwood. After the election that followed, Baldwin and Lafontaine began a new government. They resigned in 1851 and were replaced by a government led by Francis Hincks and Augustin Morin, which was then confirmed by an election. In 1854, another election year, Hincks resigned and was replaced by Alan McNab. Three months later Morin resigned to be replaced by Étienne Taché. McNab resigned in 1856 and was replaced by John A. Macdonald; Taché resigned in 1857

to be replaced by George-Étienne Cartier. The Macdonald-Cartier government was briefly replaced in 1858 by George Brown and A.A. Dorion, but this coalition was quickly brought down and replaced by a new Macdonald-Cartier government that survived the 1858 election, and persisted until after the 1861 election when it was replaced by J.S. Macdonald² and Louis Sicotte. After the 1863 election, Sicotte was replaced by Dorion, and the J.S. Macdonald-Dorion government lasted until March 1864. It was replaced by a new Taché-John A. Macdonald government for two-and-a-half months, which was then replaced by the Great Coalition under Taché. After Taché's death in 1865, a coalition led by John A. Macdonald and Narcisse Belleau governed, without Brown, until 1867.³ Clearly, shifting coalitions and changing governments were regular features of the history of the united Canadas. Elections, more often than not, did not mark significant changes in rule. After 1848, changes in government occurred when the government no longer had the support of the assembly; elections generally served to perpetuate already established coalitions, or to change only one part of the leadership. The history of the united Canadas from 1841 to 1867 shows that, for some time, coalition was not an aberration in Canadian history but rather a regular part of government.

Despite all of the previous coalitions, the Great Coalition of 1864 was peculiar. The make-up of this government should have given pause, I think, to those who asserted that the proposals of November and December 2008 were illegitimate because they were not part of any party's platform or because they involved, in a limited way, Québec nationalists who may be seeking the constitutional reorganization of northern North America. The Great Coalition of June 1864 was special, even given the frequency of coalition government at the time. Macdonald, Galt, and Cartier had all worked together in the past: a ministry connecting Tories from Canada West with Tories and *Bleus* from Canada East was not exceptional. What *was* exceptional was the inclusion of George Brown in the coalition. Brown and Macdonald disliked each other with some intensity. More importantly, their mutual personal feelings of animosity reflected

differences in opinion that were shared by their respective electorates. Brown was a standard-bearer for liberalism in Canada West: first in championing responsible government, and then in pushing for representation by population and the separation of church and state.⁴ Macdonald was less clearly an ideologue (perhaps for no other reason than that Brown's job outside of the assembly was publisher of *The Globe*, while Macdonald was a lawyer), and many of Macdonald's electoral supporters might have accepted some of Brown's positions. Few people who voted for Brown and his allies in the election of 1863, however, would have expected a coalition with Macdonald. His political power relied on the electoral strength of the French Catholic *Bleu* in Canada East, and Macdonald was unprepared to significantly alter constitutional arrangements to limit their electoral power, or to turn their supporters away. All of this would make him anathema to Brown supporters in Canada West. The French-speaking electorate in Canada East would also have wondered about the wisdom of a coalition between the *Bleu* and Brown. Brown's political goals prior to the coalition were, at best, likely to undermine French-Catholic power in the colony; at his worst Brown sounded like a bigot. He was likely as much anathema to Cartier's supporters as Macdonald was to Brown's.

The Great Coalition was formed with the intention of achieving significant change in government. Macdonald favoured a confederation of all of the British colonies. Brown was amenable to this proposition, but failing it, wanted to change the constitution to separate Canada West from Canada East. Cartier would accept either result, so long as any change did not interfere with the political and social rights of the French people in Canada East: essentially, Catholic control of education and other social functions, civil law, and the French language. Of the three, Macdonald was the most committed to confederation of all the colonial leaders, as his continued political relevance relied on some form of federal government extending beyond the Canadas alone.

The Great Coalition of 1864 was made up of political opponents who did not campaign

in any election on the basis of the suggestion that such a coalition was a possibility (the last election had been held many months before the coalition was even formed). The coalition partners included ethnic or regional nationalists in the characters of Cartier and Brown. Moreover, Brown, at least, was a separatist who saw the destruction and reconstruction of the Canadian constitutional order, as it existed in 1864, as the only possible future for British North America.

There was some opposition to the coalition in 1864, just as there was in 2008. The strongest opposition came from the minority within the assembly left out of the coalition: the *Rouge* in Canada East, and J.S. Macdonald and some of his supporters among the Grits of Canada West. Peter Waite notes in his *Life and Times of Confederation*, for example, that *Rouge* papers called Cartier and his *Bleu* colleagues "traitors." The Conservative press in Canada West was likewise perplexed, noting how a few days before:

almost every man, woman and child, knew their political creed by heart, but are now, as it were, brought to a stand still, and all their preconceived ideas of the fitness of things and long settled opinions of men and measures knocked into pi.⁵

Yet Waite records the overwhelming support for the coalition from Reformers and Grits, Conservatives and *Bleus*.⁶ For all of its strangeness, the coalition seems to have been legitimate in the eyes of most Canadians of the time.

Not only was coalition not on the table in the election of 1863, neither it, nor its one big political legacy, Confederation, were ever put to a vote in Canada. The next time the electorate had a vote, it was to elect the first federal government of the new Confederation, and the provincial governments of Ontario and Québec. There was little question in the Canadas about the legitimacy of the coalitions or its creation of Confederation, then or now.

Had the Liberal-NDP coalition of 2008 come to pass, I doubt that it would have led to the political revolution for Canada that resulted from the Great Coalition of 1864. But, as a historian teaching about responsible government,

the Great Coalition, and Confederation, I was disheartened by the absence of almost any attempt to think about, or draw links between, 1864 and 2008.⁶ Failing to consider the Great Coalition of 1864 and the other coalitions between 1841 and 1867 helped to paint the 2008 coalition as illegal, illegitimate, and unprecedented, rather than as a minor replica of the coalition that helped to create modern Canada in the first place.

Notes

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- 1 The history of Confederation has been subject to revisionist critiques in the last fifteen years, and some of what I will present here builds on that recent history. Other elements draw from the older standard telling of the Confederation story. The standard telling can be found in J.M.S. Careless, *Brown of the Globe: Statesman of Confederation, 1860-1880*, vol. 2 (Toronto: Dundurn Press, 1989); D.G. Creighton, *John A. Macdonald: The Young Politician* (Toronto: Macmillan, 1952); and D.G. Creighton, *The Road to Confederation: The Emergence of Canada, 1863-1867* (Toronto: Macmillan, 1963); W.L. Morton, *The Critical Years: The Union of British North America, 1857-1873* (Toronto: McClelland and Stewart, 1964); and P.B. Waite, *The Life and Times of Confederation, 1864-1867: Politics, Newspapers, and the Union of British North America*, 3d ed. (Toronto: Robin Brass Studio, 2001) [*Life and Times*]. For the revisionist account, see especially Ged Martin, *Britain and the Origins of Canadian Confederation 1837-1867* (Vancouver: UBC Press, 1995); Paul Romney, *Getting it Wrong: How Canadians Forgot their Past and Imperilled Confederation* (Toronto: University of Toronto Press, 1999); and Andrew Smith, *British Businessmen and Canadian Confederation: Constitution Making in an Era of Anglo-Globalization* (Montreal: McGill-Queen's University Press, 2008). Christopher Moore's *1867: How the Fathers Made a Deal* (Toronto: McClelland and Stewart, 1997) falls somewhere between the two historiographies and is an excellent and engaging study of a handful of the main political actors.
 - 2 To avoid confusion, when referring to John Sandfield Macdonald I will always identify him as J.S. Macdonald. When I use "Macdonald" alone I will be referring to John A. Macdonald.
 - 3 The basic chronology can be found in Glen Tap-

lin, *Canadian Chronology* (Metuchen New Jersey: The Scarecrow Press, 1970) at 34-7.

- 4 Under the union of Upper and Lower Canada each half of the colony had an equal number of seats in the assembly. By the 1860s the population differences between Canada East and West were significant enough that many in the West felt aggrieved by this situation.
- 5 Waite, *Life and Times*, *supra* note 1 at 47.
- 6 *Ibid.* at 45-9.
- 7 John Turley-Ewart, associate editor of the *Financial Post* and "a PhD in Canadian business and political history" made brief mention of the coalition in "What would Sir John A. do?" *National Post* (4 December 2008) A22, where he comments that: "The Province of Canada was politically dysfunctional by 1864. Francophones feared for their cultural identity; the more numerous Anglophones pressed for more political clout through representation by population. That impasse was overcome when deeply partisan leaders such as John A. Macdonald, George Brown, George-Etienne Cartier and A.A. Dorion had the sense to take a step back from their positions in a time of crisis and work with their opponents for a mutually acceptable outcome." Alas, not only does Dr. Turley-Ewart appear to include (against history and surely his will) Dorion in the coalition, but he concludes his column by suggesting that the lesson of all of this is that the Governor General "leave the choice of who will form the government to Canadians themselves," exactly contrary the very history of the coalition.

The Role of the Federal Court in National Security Issues: Balancing the Charter Against Anti-terrorism Measures

The Hon. Edmond P. Blanchard*

Introduction

I am very pleased to have been invited to the University of Alberta to participate in a collective reflection and debate on “National Security, the Law, and the Federal Courts.” As you are all aware, issues of national security have taken on new life since the inception of the war on terror, but what you may not be aware of is the complexities inherent in adjudicating these issues within the context of a democratic and rights-oriented society. I will do my best to give you a sense of the kinds of issues that come before the Federal Court in this regard, and how national security considerations raised therein must be balanced against the rights of citizens.

The Charter Context

It was not until the early 1960s that Canada truly embraced a philosophy based on rights and freedoms. In 1960, the Diefenbaker government adopted the *Canadian Bill of Rights*.¹ It was not enshrined in the Constitution and its primary value was as an interpretive tool. During the 1960s and 70s, several provincial governments adopted general texts protecting rights and freedoms.² At the same time, commissions of inquiry were established to shed light on the abuses of intelligence services, particularly with respect to the Québec independence movement and various extreme-left splinter groups elsewhere in Canada. It was

then that the importance of striking a balance between national security and rights and freedoms began to become apparent.³ These crises also led to the creation of the Security Intelligence Review Committee (SIRC). This committee oversees the operations of the Canadian Security Intelligence Service (CSIS) to ensure that the intelligence service’s extraordinary powers are exercised in accordance with its legislative authority.

In 1982, the British Parliament adopted the *Canada Act 1982*, and the *Canadian Charter of Rights and Freedoms* came into effect by royal proclamation on 17 April 1982.⁴ The *Charter* had a significant impact on Canadian law, both directly and indirectly, especially as it related to national security. Directly, because it was sometimes interpreted so as to invalidate or limit the scope of provisions that unduly restricted rights and freedoms in the name of national security. This was the case, for example, with *in camera* hearings to deal with sensitive information, traditionally justified under the common law privilege to protect state secrets.⁵ The *Charter* also had indirect effects by fostering a culture of rights and freedoms in Canada that made significant changes to the way Parliament legislated in the area of national security. For instance, in 1984 the security clearance process for government employees was made less discretionary and became a subject of complaint before the SIRC. National security would no longer be the exclusive realm of the executive acting secretly

and without limits; it was instead becoming increasingly open with the addition of various checks and balances.

Canada was one of the first countries to enshrine in its Constitution the fundamental rights that reflect its traditional values. Canadian governments became accustomed to having their legislative texts reviewed by the courts to ensure that they were not exceeding their respective legislative jurisdictions. Protecting individual and collective rights in the Canadian Constitution added a new dimension to the relationship between the legislature and the judiciary.

Canada was also one of the first countries to include in its fundamental law a provision setting certain limits on these rights. Section 1 clearly sets out a general guarantee of the rights and freedoms contained in the *Charter*, but it goes on to state that these rights and freedoms may be circumscribed in the public interest if it can be demonstrated that the limits are justified. This provision, from the outset, embodies the idea that recognized rights and freedoms cannot be considered absolute and may be restricted by law as long as the restriction can be justified in accordance with section 1.

Role of the Courts

The courts are regularly called upon to strike a balance between national interests and security on one hand, and individual and collective rights on the other. In the context of balancing national security with the right to a fair and transparent trial, the Supreme Court, in considering the legality of a judicial investigative hearing conducted in relation to the Air India trial, as authorized by section 83.28 of the *Criminal Code*, stated:

The challenge for democracies in the battle against terrorism is not whether to respond, but rather how to do so. This is because Canadians value the importance of human life and liberty, and the protection of society through respect for the rule of law. Indeed, a democracy cannot exist without the rule of law.

[...]

Consequently, the challenge for a democratic state's answer to terrorism calls for a balancing of what is required for an effective response to terrorism in a way that appropriately recognizes the fundamental values of the rule of law.⁶

Our duty at the Federal Court of Canada is to balance the requirements of national security with the rule of law and protection of individual rights in the context of the following activities amongst others:

- issuing warrants that enable the CSIS to investigate threats to Canada's security;
- considering the reasonableness of certificates declaring that noncitizens are inadmissible for national security reasons and quashing any such certificates that are not found to be reasonable; and
- determining whether information considered sensitive by the government should or should not be disclosed during a trial.

In reviewing these activities, the rights and freedoms most likely to be at stake are the following:

- privacy rights, and more particularly protection against searches, seizures, and investigations, in the context of the fight against terrorism;
- the fundamental freedoms inherent in a democratic society such as freedom of expression, freedom of the press, freedom of conscience and religion, and freedom of association; and
- procedural rights such as the right to be present at one's hearing, the right to know the facts relevant to the proceeding, the right to be heard, and the right to have an unbiased decision maker.

I will now attempt to describe the backdrop set by the constitutional changes adopted in 1982, and the rigour with which the court embraced its responsibilities.

Privacy Rights and the Fight Against Terrorism

In Canada, protection against unreasonable search and seizure is expressly guaranteed in section 8 of the *Charter*. The right to privacy is protected by section 7, but not in the same explicit terms. Although the concept of privacy is hard to define and the existence of a tort of invasion of privacy is debatable,⁷ the right continues to be a cornerstone of our democratic system. In Canada, it is protected by several federal and provincial statutes, in areas such as consumer protection, employment, health, and telecommunications, in both the public and private sectors. It is enshrined as a basic right in Québec's *Charter of Human Rights and Freedoms*.⁸

When the right to privacy is at issue in a national security context, we primarily think of the investigation and information gathering methods employed by intelligence services and the police. Their actions are circumscribed by section 8 of the *Charter*, which protects against unreasonable search and seizure. Criminal warrants must normally be authorized by a judge on the basis of reasonable and probable grounds.

While privacy concerns remain very important in the security context, Canadian courts have generally accepted lower thresholds for issuing warrants in national security investigations. For example, an intelligence officer is not required to specify an offence to justify his application for a warrant; instead he must satisfy the judge of the need to commence an investigation. Section 21 of the *Canadian Security Intelligence Service Act*⁹ states that a judge may issue a warrant if there are “reasonable grounds” to believe “that a warrant under this section is required to enable the Service [CSIS] to investigate a threat to the security of Canada or to perform its duties and functions under [this Act].” Canadian courts have found the standard of “reasonable grounds to believe” to be consistent with the *Charter*¹⁰ in this context.

Not lost on a court issuing warrants under this provision are the following characteristics, which are particular to the fight against terror-

ism, namely:

- the preventive function of intelligence service investigations;
- the length and ongoing nature of these investigations;
- the seriousness of terrorism offences; and
- the nature of the methods used by terrorists.

I hasten to add that a warrant to conduct an intelligence investigation does not give intelligence officers *carte blanche*. The role of the judge remains important, since the onus is on the officers to justify their demands, and judges have the power to, and do, limit the intrusiveness of investigative powers by imposing conditions on the warrants they issue. In certain circumstances, the court will require CSIS to report back to it and keep the court informed of specific developments in the investigation. The SIRC also annually selects a sample of warrants and studies whether the information presented in the application to the court is consistent with the complete information available to CSIS. The SIRC also reviews whether CSIS has acted in accordance with the powers granted to it by the court and reports its findings to Parliament.

I will now briefly address other intelligence service and police practices that judges are beginning to see more frequently, and which also engage the right to privacy. Some have been the subject of public criticism for drifting too far from the standard that violations of privacy must be reasonable, circumscribed, and authorized by a judge. Here are some examples:

- Use of biometric data such as fingerprints and DNA samples by the state. In Canada, the first database was established in 1998. The development of such databases raises the issue of what types of uses are legal and, in particular, to what extent biometric data may be stored and disseminated by the public administration. The Supreme Court of Canada has already indicated that DNA samples may be collected legally

for specific purposes such as the identification of criminals.¹¹ The right to privacy is invoked in this context to limit the dissemination of biometric data.

- Another tool used increasingly frequently in the fight against terrorism is financial transaction monitoring.¹² Those who finance terrorist activity are now subject to the same types of criminal sanctions as those who commit terrorist acts.¹³ From an administrative law perspective, efforts are being made to prevent charitable organizations from financing terrorists or from being used as fundraising conduits for their activities. In Canada, financial institutions are required to report to the administrative authority Financial Transactions and Reports Analysis Centre of Canada (FINTRAC)¹⁴ any financial transactions they have reasonable grounds to suspect are related to a terrorist financing offence. FINTRAC then communicates this information to the authorities. The legal issue is whether an administrative agency may validly obtain private information in the absence of a warrant and upon mere disclosure by financial institutions, which will then be used to prosecute individuals. The jurisdiction of the Federal Court is engaged pursuant to section 30 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.¹⁵
- In Canada, the Minister of National Defence can authorize the Communications Security Establishment Canada (CSEC) to intercept private communications for the purpose of obtaining foreign intelligence. Although it is subject to authorization, the warrant is not issued by a judge but by the minister responsible, making the decision more political in nature.¹⁶ Conceivably, this decision would be subject to judicial review in the Federal Court. Canadian courts, however, have yet to consider the constitutionality of this mechanism.
- As a general rule, telecommunications

monitoring is subject to a warrant with respect to private communications. It is therefore important that the legal characterization of emails and text messages be clarified.¹⁷

- Other practices related to CSIS activities abroad are raising new legal issues. Recently, the Federal Court had to decide whether it had jurisdiction to issue warrants in foreign states.¹⁸ Out of respect for the principles of state sovereignty and comity of nations, the court decided that it lacked such jurisdiction. The court also recognized that Parliament had the power to authorize this type of activity as long as the *Canadian Intelligence Security Service Act* contained an express provision to that effect.
- There is also the issue of the collection and storage by customs officials of certain personal information of passengers arriving in Canada by air. One of the objectives in gathering this information is the identification of criminals, terrorists, and smugglers. In 2002, retired Supreme Court Justice Gérard La Forest prepared a legal opinion for the Privacy Commissioner on this very issue of the constitutionality of the personal data management practices employed by customs officials.¹⁹ He emphasized the intrusive nature of these practices and their potential for violating section 8 of the *Charter*. Following the publication of this opinion, the minister responsible made changes to the database, limiting the types of information collected and the circulation of the data within the government.²⁰
- Finally, as the fight against terrorism intensifies, there is an increasing and justified need for information sharing within the public administration and with foreign governments. This must be done with a full appreciation of privacy rights. We must set clear limits on the dissemination of personal information within our own public administration and beyond our borders. Our objective

of sharing information must not become a pretext to circumvent the normal requirements for issuing warrants or to use personal information for purposes other than those for which they were originally collected.

The Fundamental Freedoms Guaranteed by the *Charter* and the Fight Against Terrorism

In addition to the right to privacy, other fundamental *Charter* freedoms may be affected by some of the tools employed to fight terrorism. These include freedom of the press, freedom of association, and freedom of religion and conscience.

- With respect to freedom of the press, we must ask ourselves to what extent national security considerations can justify the restriction, in certain cases, of public and media access to legal debate, documents, and evidence. In Canadian law, there are many legislative exceptions to the rule of judicial transparency, but they are usually very specific and limited in their application. Our courts have generally upheld these exceptions, while limiting their scope as much as possible to ensure that the public is never excluded unless there are genuine national security considerations involved. Despite these concerns, the courts must bear in mind the need for intelligence services to protect their sources, to respect their information exchange agreements with foreign countries, and not to compromise any security investigations that are being legally conducted.
- The courts may be called upon to consider various anti-terrorist strategies as they relate to freedom of association or freedom of religion and conscience. One example is the list of dangerous entities prepared by the Governor in Council, which arguably may violate freedoms of expression and association.²¹ However, the courts have often reiterated that the

Charter freedoms of association and religion and conscience do not protect the right to associate with organizations that engage in violence.²² To prevent abuse, the list is reviewed every two years, targeted individuals or groups may ask the Minister of Public Safety to review a decision, and judicial review is also available.²³ The consequences for individuals and groups who find themselves on the list can be very serious, as the case of Liban Hussein has made painfully clear. Hussein was suspected by the United States, Canada, and the United Nations of financing terrorism. As soon as his name was placed on the list, it became illegal for anyone to do business with him. He was subsequently delisted by Canada and the United Nations. This illustrates the importance of implementing reliable national security procedures, especially when people's lives and reputations are at stake.

Procedural Guarantees in Criminal and Administrative Hearings and the Fight Against Terrorism

The *Charter* grants individuals extensive procedural guarantees both in administrative justice contexts such as immigration law, and in the criminal justice context. These guarantees can be traced back to Anglo-American common law and are particularly well developed in criminal law. They include, for example, the right to be present at one's hearing, the right to know the evidence against oneself, the right to be heard by the decision maker, and the right to full answer and defence. The ability to exercise these rights generally requires transparency in judicial and administrative processes. Because national security concerns preclude full transparency, procedural guarantees must inevitably take a different form in some cases.

Terrorism trials are especially likely to involve both the superior courts of the provinces and the Federal Court. The Federal Court plays an ancillary but important role. The procedures for managing the disclosure of sensitive infor-

mation set out in the *Canada Evidence Act*²⁴ are carried out in the Federal Court, in separate proceedings, *in camera*, and in the absence of a party who may have an interest in being present (*ex parte* proceedings). This may result in a violation of the participation rights of the accused or other persons with an interest in the related proceedings, in which civil or criminal disclosure rules may require that sensitive information be disclosed. Nevertheless, the courts have held that procedural substitutes may be used to protect the rights of the accused in these situations. These substitutes include increased judicial intervention, the designation of an *amicus* (a friend of the court) to protect the interests of the absent party, rights of appeal, and the right of the accused or interested party to make *ex parte* submissions. The constitutionality of these *Canada Evidence Act* provisions was recently upheld in *Canada (Attorney General) v. Khawaja*.²⁵

In cases involving national security considerations, the courts have demanded some fairly elaborate procedural substitutes to protect the rights of the accused. For example, the security certificate regime allows the Minister of Public Safety and the Minister of Citizenship, Immigration and Multiculturalism to declare a person inadmissible to Canada. This decision is subject to review by the Federal Court, in the absence of the interested person. The person named in the security certificate is entitled to receive a summary of the evidence. Until 2007, the judge hearing the case, with the view of ensuring that the rights of the interested person were respected, played a more active role than usual in proceedings. The decision was final: no appeal was available to the interested person. In 2007, the Supreme Court decided that these guarantees were insufficient. Accordingly, in 2008 Parliament amended the *Immigration and Refugee Protection Act (IRPA)*,²⁶ adding a right of appeal and a right to the assistance of special advocates.

Inspired by the British model, the role of the special advocate in Canada is to defend the interests of the person named in the security certificate. Some are of the opinion that the recent amendments to the *IRPA* do not go far

enough, that they still do not constitute a minimal impairment of rights, that special advocates should be granted more extensive powers and means, should be able to receive instructions freely from the interested party and his or her counsel, and should be able to call witnesses. We can therefore expect further litigation and judgments in the coming months and years with respect to the role and mandate of the special advocate, and the nature and scope of the discretion granted to the judge by the legislature. The amendments sought to strike a balance protecting the rights of individuals subject to security certificates while still addressing national security concerns. It remains to be seen whether this balance will be considered appropriate by the judiciary, and if not, how it may be improved.

Finally, I will touch briefly on the right to full answer and defence, as provided for under section 7 of the *Charter*. This issue has received recent attention by the Supreme Court of Canada in *Canada (Justice) v. Khadr*²⁷ in the context of disclosure. In this case, the Supreme Court held that the *Charter* applied to the Canadian officials during their interviews with Mr. Khadr in Guantanamo Bay. In the context of this case, the *Charter* applied extraterritoriality essentially by reason of the illegality of the process in place in Guantanamo at that time. As a consequence, the Supreme Court found that section 7 of the *Charter* applied so as to require disclosure of information arising from these interviews at issue.

Conclusion

In conclusion, I would like to emphasize the context in which the Federal Court deals with national security issues. The court engages in a complicated and very important balancing between *Charter* rights and freedoms on one hand and the exigencies of national security on the other.

Democracies such as ours do not have the right to forsake their traditional social values and abandon fundamental moral and legal principles for the sake of employing new weapons in the fight against international terrorism.

The basic purpose of any national security policy is to protect us from attacks on our rights and freedoms. To turn our backs on this objective in the name of national security concerns is to abandon the values we hold most dear and to do that which we are trying to prevent. I adopt the following view expressed by the Supreme Court in the *Application under s. 83.28 of the Criminal Code Reference*:

In a democracy, not every response is available to meet the challenge of terrorism. At first blush, this may appear to be a disadvantage, but in reality, it is not. A response to terrorism within the rule of law preserves and enhances the cherished liberties that are essential to democracy.²⁸

The international commitments of our Western democracies also prohibit us from sacrificing rights and freedoms on the altar of national security. In Canada, the *Charter* constitutes an additional protection enabling us to keep our moral and legal values at the forefront of any debate regarding our efforts to fight terrorism. I would also add that it is possible for Western democracies to be fully engaged in the fight against terrorism without giving up our most precious moral and legal values.

Clearly, our adherence to the rule of law and respect for *Charter* rights increases the complexity of terrorism and other national security cases. That said, the *Charter* should not be considered a hindrance in the fight against terrorism. Instead it has served as a guide to the courts and to Parliament in their quest to strike an important and necessary balance between national security and rights and freedoms.

Notes

- * Judge of the Federal Court of Canada and Chief Justice of the Court Martial Appeal Court of Canada. This article is based on a lecture delivered at the Faculty of Law, University of Alberta, on 20 January 2009.
- 1 S.C. 1960, c. 44 (enacted 10 August 1960).
 - 2 For the recent history of Canadian rights and freedoms legislation, see Canada, Department of Justice, *A Canadian Charter of Human Rights* (Ottawa: Information Canada, 1968) at 179-83.
 - 3 See Canada, Security Intelligence Review Com-

- mittee, "The Case for Security Intelligence Review in Canada" in *Reflections: A History of SIRC* (Ottawa: Security Intelligence Review Committee, 2005), online: <<http://www.sirc-sars.gc.ca/opbapb/rfcrfx/sc02a-eng.html>>.
- 4 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].
- 5 In *Toronto Star Newspapers Ltd. v. Canada*, 2007 FC 128 (CanLII), the Chief Justice of the Federal Court decided that certain provisions of the *Evidence Act* violated the freedom of the press and read them down to make them consistent with the *Charter*.
- 6 *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248 at paras. 5 and 7 (CanLII) [*Application under s. 83.28*].
- 7 Colin H.H. McNairn & Alexander K. Scott, *Privacy Law in Canada* (Toronto: Butterworths, 2001) at chapter 3.
- 8 R.S.Q. c. C-12.
- 9 R.S. C. 1985, c. C-23 [*Canadian Intelligence Service Act*].
- 10 In 1987, this standard of proof applicable to warrants for national security investigations was held to be valid under section 8 of the *Charter* by what was then the Federal Court of Canada – Appeal Division. See *Atwal v. R.*, [1988] 1 F.C. 107 at 131-34 [*Atwal*]. In 1984, the Supreme Court recognized that the standard for issuing a mandate might "will be a different one [from the standard applicable in a criminal context]" where "state security is involved." See *Hunter et al. v. Southam Inc.*, 1984 SCC 33, [1984] 2 S.C.R. 145 at para. 43 (CanLII). However, in *Atwal*, Justice Hugessen dissented on this issue. He considered the standard to be unconstitutional on the grounds that the *Canadian Intelligence Service Act* did not "provide any reasonable standard by which the judge may test the need for the warrant" and that, in his opinion, such a standard would allow CSIS to engage in bargaining (at 151-53).
- 11 For a list of cases on this point, see Stanley A. Cohen, *Privacy, Crime and Terror: Legal Rights and Security in a Time of Peril* (Markham: LexisNexis Butterworths, 2005) at 238, footnote 129 [Cohen].
- 12 Prior to 2001, there was the *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, GA Res. 54/109, online: <<http://untreaty.un.org/English/Terrorism/Conv12.pdf>>. The most important resolution since then is probably *United Nations Security Council Resolution 1373 (2001)*, 28 September 2001, online: <<http://daccessdds.un.org/doc/>

UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>.

- 13 See Paul Eden & Thérèse O'Donnell, eds., *September 11, 2001: A Turning Point in International and Domestic Law?* (Ardsey NY: Transnational Publishers, 2005) at 663.
- 14 Financial Transactions and Reports Analysis Centre of Canada, online: < <http://www.fintrac.gc.ca/>>.
- 15 S.C. 2000, c. 17.
- 16 Section 273.65 of the *National Defence Act*, R.S.C. 1985, c. N-5 empowers the Minister of National Defence to authorize the Communications Security Establishment in writing to intercept private communications for the purpose of obtaining foreign intelligence. For the constitutional issues related to this procedure, see Cohen, *supra* note 11 at 228-32.
- 17 On these issues, see Cohen, *supra* note 11 at chapter 10.
- 18 *Canada Security Intelligence Service Act (Re)*, 2008 FC 300 (CanLII) and *Canadian Security Intelligence Service Act (Re)*, 2008 FC 301 (CanLII).
- 19 Justice Gérard La Forest, "Opinion – CCRA Passenger Name Record" (19 November 2002), online: Office of the Privacy Commissioner of Canada <http://www.privcom.gc.ca/media/nr-c/opinion_021122_lf_e.asp>.
- 20 For a thorough analysis of this issue, see *supra* note 11 at 458-71.
- 21 For the cabinet's schedule of listed entities – authorized by section 83.05 of the *Criminal Code*, R.S.C. 1985, c. C.46 – see "Currently Listed Entities," online: Public Safety Canada <<http://www.publicsafety.gc.ca/prg/ns/le/cle-eng.aspx>>.
- 22 See *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 (CanLII) and *Al Yamani v. Canada (Solicitor General)*, 1995 FC 3553, [1996] 1 F.C. 174 (CanLII).
- 23 Cohen, *supra* note 11 at 282.
- 24 Section 38.11 of the *Canada Evidence Act*, R.S. 1985, c. C-5.
- 25 See *Canada (Attorney General) v. Khawaja*, 2007 FC 463 at paras. 39, 40, 43 and 57 (CanLII), affirmed 2007 FCA 388 at paras. 39, 139 and 140 (CanLII), leave to appeal to S.C.C. refused, 2008 SCC 18970 (CanLII).
- 26 S.C. 2001, c. 27 (*IRPA*). Sections 85.1 and 85.2 of the *IRPA* define in part the special advocate's role in *in camera* proceedings. Paragraph 85.2(1) (c) of the *IRPA* grants discretion to the judge to authorize the special advocate to exercise "any other powers that are necessary to protect the interests of the permanent resident or foreign

national." Sections 85.4 and 85.5 of the *IRPA* also grant powers to the judge to authorize certain communications subject to any conditions the judge considers appropriate.

27 2008 SCC 28 (CanLII).

28 *Application under s. 83.28*, *supra* note 6 at para. 7.