

Prorogation—Prime ministers must not become kings

FROM HENRY VIII TO
STEPHEN HARPER

Although Peter Mansbridge may still have trouble pronouncing it, and many Canadians may not be able to spell it, “prorogation” has become a new word in the political lexicon of virtually all Canadians. For many, “prorogation” may be a new word, even though it refers to a practice dating back to the reign of King Henry VIII, who invented “prorogation” as a way of sending Parliament away without dissolving it.

In modern times, prorogation is used to break up parliaments expected to last three years or more into sessions. Parliament is prorogued when most of a session’s work is done, and there is a recognized need for a seasonal break and for a new session of Parliament to begin after the break, with a Speech from the Throne setting out a new government legislative agenda. The word is unfamiliar to most Canadians and indeed to most citizens in other Westminster parliamentary countries because its normal use is routine and uncontroversial.

The prorogations of the Parliament of Canada in 2008 and 2009 were far from routine. Indeed, it is as if the prime minister returned to the ways of prorogation’s royal inventor and used prorogation to send away a Parliament that had become too pesky. The first came just two weeks after the opening of Parliament following the October 2008 election. The second came over a year into the session but with much of the government’s legislative agenda, including crime bills that the government claimed were urgently needed, still before Parliament. In both cases, Prime Minister Stephen Harper’s aim in advising Governor General Michaëlle Jean to prorogue parliament was to avoid the government’s accountability to Parliament.

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The December 2008 prorogation enabled the Harper government to avoid a scheduled vote of non-confidence, which there was every reason to believe would carry. The 2009 prorogation was to avoid the scrutiny of a House Committee inquiring into the handling of Afghan detainees.

THE CONSTITUTIONAL ISSUES

Under the Canadian Constitution and all of those based on the Westminster model, the power to prorogue Parliament along with the power to summon and dissolve Parliament rests with the Crown. King George VI’s 1947 letters patent made it clear that in Canada the governor general will exercise these Crown powers. Constitutionally, the controversy over prorogation raises the issue of

whether the governor general reserves any discretionary power in exercising the power to prorogue Parliament.

In Canada’s system of parliamentary government, as it has evolved over a century and a half, constitutional convention requires that the governor general normally exercise the legal powers vested in the Crown, on the advice of ministers responsible to parliament. However, there is a strong case for arguing that, in certain exceptional circumstances, the Governor General, as the representative of the Crown, must hold in reserve a discretionary power to refuse a prime minister’s advice. The principle governing the use of such a reserve power of the Crown is that its use is necessary to prevent the undermining of responsible parliamentary government.

If the governor general’s role in prorogation is reduced to that of a clerk without any discretion to refuse a prime minister’s “advice,” then we move very close to a system of prime ministerial rather than parliamentary government. A prime minister who can shut down Parliament at any time would be a modern version of an absolute monarch. This would be disturbing even if the prime minister’s party had a majority in the House of Commons. However, when the government lacks a majority in the House of Commons and its licence to govern depends on commanding the confidence of the elected chamber of Parliament, giving the prime minister a blank cheque to close down Parliament would seem incompatible with parliamentary democracy.

SMALL RESERVE OF POWER

Constitutional experts agree that the governor general reserves the power to reject a prime minister’s advice to pro-

rogue Parliament. In December 2008, however, they were divided on whether, in the circumstances that prevailed at the time, the reserve power should have been exercised. For some, those circumstances—the fear that a refusal would plunge Canada into a huge political crisis just when it was in the midst of an economic crisis, and the faith that, in the meantime, Harper would work with the official opposition on a new budgetary approach to the fiscal crisis—argued in favour of granting the prorogation.

On the other side were those who believed as a matter of principle that evasion of a vote of non-confidence called for rejection of the prime minister's advice, regardless of any adverse practical consequences. The constitutional case for rejecting prime ministerial advice in December 2009 may have been less compelling. Nevertheless, this prorogation aroused a great deal of disapproval at the level of public opinion and is credited with costing the Harper Conservatives 10 to 12 points of popular support.

LACK OF CONSENSUS ON THE RULES

On March 17, 2010, the House of Commons passed a motion, moved by NDP leader Jack Layton, requiring that the prime minister seek the consent of the House of Commons before advising a prorogation of more than seven days. The Layton motion, because the Conservatives opposed it, lacks the political consensus needed for a binding constitutional convention. Constitutional conventions are the rules of behaviour accepted as obligatory by *all* those concerned in the working of the Constitution. Without such a consensus, the governor general is put in the position of refereeing a game in which the players do not agree on the rules.


It is high time that Canada's parliamentarians took a leaf out of New Zealand's book and codified key constitutional conventions in something like that country's Cabinet Manual. In the United Kingdom, then Prime Minister Gordon Brown asked the Cabinet Secretary to carry out such a codification, in anticipa-

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tion of an election that was expected to—and did—produce a “hung parliament.” The draft manual was submitted to a select committee of Parliament in February 2010. This process resulted in a public commitment of all parties to agree upon practices that ensure that the Queen will not be forced to take sides in a partisan controversy.

It is the height of irresponsibility on the part of our parliamentary leaders to make no concerted attempt to resolve differences over fundamental constitutional conventions of parliamentary democracy. Prorogation is by no means the only matter on which consensus is lacking. The 2008 parliamentary crisis indicated that Prime Minister Harper and

the opposition parties are at odds over whether the governor general must accede to the “advice” of a prime minister to dissolve Parliament when the government is defeated on a confidence vote shortly after an election. They are also at odds over the legitimacy of an incumbent government being replaced by a coalition not approved in advance by the electorate. These are not small questions and they are very likely to arise if the next election produces another hung Parliament.

Failure to deal with this matter, and deal with it soon, will make Canada the laughing stock of the parliamentary world and move our country back to a monarchy—the Kingdom of Stephen. 

The global meltdown

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A LARGER DEFICIT THAN ADMITTED

The government projects Canadian real GDP growth to average 3 percent annually for 2011 through 2013, which, on the face of it, seems a reasonable assumption. The Parliamentary Budget Officer, however, has concluded that even this kind of normal growth would leave a significant budget deficit in the fiscal books. One of the most important reasons for these continuing deficits is the reduction in the GST rate from 7 percent to 5 percent in 2007 and 2008. These tax cuts occurred at the peak of the last boom and, of course, have already resulted in significant revenue losses, roughly \$10 billion annually.

The Harper government is now wrestling with a structural budget deficit of roughly 1 percent of potential GDP in five years—still low by many global standards.

But there will be no budget balance without severe cutbacks in program spending unless taxes are increased—which the Conservatives say they will never do.

GETTING THE PRIORITIES WRONG

After admonishing the other leaders at the G20 and G8 summits to reduce deficits and lower expenses, the Conservative government announced that Canada would spend \$9 to \$16 billion or more on unneeded new fighter jets. One really wonders what the leaders of the other G20 countries, which in many cases were reducing social expenditures, would think of Canada's ludicrous expenditure on military aircraft at a time of retrenchment in their economies.

It is an easy prediction that the Conservatives' budget numbers will be drastically revised over time. 