

# Two Prorogations in Less Than a Year

## The first prorogation of Parliament, December 4, 2008

On any given political issue, the majority of Canadians polled generally say they are only slightly aware of the issue and its implications. But it is fair to say that in late 2008 when Stephen Harper first postponed a confidence vote in his government and then asked Governor-General Michaëlle Jean to shut down Parliament in order to avoid the vote entirely, the vast majority of Canadian were paying attention.

It was high drama, as high drama as Canadian politics gets, and it was all rooted in Harper's personality and his ruthless approach to politics. Every few months, it seems, the prime minister loses control of the message and does something that reminds people of who he really is. That happened when he announced that as part of his 2009 budget he was going to repeal the legislation that provided government funding for political parties running in the federal arena. The funding was put in place as part of Jean Chrétien's radical reform of elections spending laws that banned both corporations and unions from contributing to federal political parties. In exchange for this lost funding, which was seen as giving interest groups too much power over elections and democracy, the government would provide \$1.75 (indexed to inflation) annually for each vote that a party received in the previous election.

Harper calculated that the Conservatives with their huge party membership did not need the money. More to the point, both the Liberals and the NDP depended on it – the Liberals in particular were deep in debt. It was a ruthless and transparent manoeuvre designed to crush the opposition before the next

election was even called. And it was extremely cynical – he had never criticized the program publicly and nowhere in the party's policies was it even mentioned. And Harper, though he had spent years railing against limits on corporate spending, had actually toughened up the spending law passed by the Chrétien Liberals.

Harper's strategic genius let him down this time. He assumed that the move to cancel government funding of elections – contained in his new budget – would be passed by the opposition because none of the parties would dare precipitate another election (just three months after the last one) by voting against the budget – the only way to defeat the measure. He apparently never imagined that the opposition parties would respond the way they did with a plan of their own to bring down his government on a motion of non-confidence.

There didn't have to be an election – there could be a new government made up a different configuration of MPs in the existing House of Commons. The three leaders held a news conference to announce their plan to replace the Harper government with a Liberal/NDP coalition, which would be supported on a limited number of issues by the Bloc Québécois. For once, it seemed, the opposition could act with even greater boldness than the prime minister. But it wasn't enough.

When Harper's strategizing fails him, his ruthlessness and boldness are called upon to rescue him. First, Harper postponed the confidence vote. Then he did what no other prime minister in Canadian history (and possible British parliamentary history) has ever done: he went to the governor-general and asked her to prorogue Parliament simply to avoid a confi-

dence vote. There was no other explanation offered. In what will go down in the history books as one of the most controversial, and ill-considered decisions by a Governor General, Michaëlle Jean complied. Parliament would be shut down for three months. Harper had saved his government.

With Stéphane Dion as Liberal Party leader there is no doubt the coalition government would have presented itself to the same Governor General and she would have been bound by parliamentary rules and convention to accept it. But once Parliament was shut down, the coalition began to falter. Opinion polls were opposed to it by a wide margin – but mostly, it was revealed later, because Canadians did not want Dion, who had just been decisively rejected by them in an election, to get the PM's office by other means. Michael Ignatieff, the leader-apparent of the Liberals after Dion stepped down, was cool to the idea of a coalition and firmly rejected it after being appointed leader in January 2009.

There was no doubt in anyone's mind what Harper did and why. His minister of democratic reform, Steven Fletcher, made it official when he declared that prorogation "is a valuable parliamentary convention and it prevented the catastrophic coalition of the Bloc, the Liberals, and the NDP." But one question remains and it is as important as Harper's decision to ask for prorogation: was Michaëlle Jean following constitutional law by agreeing to Harper's request? If she was, then the prime minister seems alone in his responsibility for cynically thwarting democracy and setting a precedent (which he, of course, was the first to take advantage of a year later).

But if she was wrong, then the precedent is conceivably even more damaging because it has her seal of approval, when it shouldn't have, and actually sets a constitutional precedent, not just a political one. In other words, if it can be shown that she should have refused, then the fact that she did not represents new constitutional law: proroguing to avoid a parliamentary vote of confidence is now acceptable. Harper's damage to democracy would then be much greater than even acknowledged.

Some pundits and commentators, many defenders of the PM in general, made the claim that Jean had no choice: she is bound by convention to take the advice of the prime minister and not become engaged in the politics of Parliament. But this view does not stand up to scrutiny. Andrew Heard, associate professor of political science at Simon Fraser University, argues persuasively that the Governor General should have refused Harper's request and asked the coalition to form a government.

First, there is the convention that Governor Generals should not intervene in politics, but, in Heard's words, "...must allow ample room to let the elected politicians try and resolve crises

between themselves." But Heard points out that, given the literally unprecedented manoeuvre by Harper, Jean could not avoid getting involved in politics: "...the Governor General's decision was actually going to be a substantial intervention in the political process regardless of whether she granted prorogation or not. Indeed her decision to grant Mr. Harper's request has in fact prevented our elected members of parliament from resolving the issue in a timely fashion."

There are several constitutional principles to which Jean should have availed herself to defend parliamentary democracy. First, she had access to the fact that using prorogation in this manner is highly questionable constitutionally. Second, says Heard, "Only the elected members of the House can determine who has the right to govern in a minority situation." By asking the Governor General to shut down Parliament, Harper was asking Jean to determine who had the right to govern – subverting the role of the House of Commons. She could have refused.

It is the Governor General's explicit role to "...protect the state from serious abuses of power by the government for which there is no judicial remedy." That is almost an exact definition of what Harper's request meant – it was a virtually historic, unprecedented abuse of power and Jean should have "protected the state" from the abuse by saying no.

Heard further points out that the Governor General is bound to act on any constitutional advice "...offered by a prime minister *who enjoys the confidence of the House of Commons* [my italics]." But that is just the point: Harper clearly did not have the confidence of the House. Not only was the request arguably unconstitutional, "The prime minister's authority was also greatly undermined by the existence of a signed agreement for an alternative government supported by the majority of MPs..."

Heard further argued that "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 18 months." She was well within her constitutional powers and convention to reject Harper's request and invite the coalition to form a government.

With this precedent, any prime minister in the future can demand prorogation whenever he or she thinks they may lose a vote of confidence – and they can prorogue for periods much longer than a couple of months. Says Heard: "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 danger of being suspended until the prime minister believes the House has been tamed.”

## **The second prorogation of Parliament, December 30, 2009**

It did not take long for the prime minister to take advantage of the precedent set, at his behest, by the Governor General. Just over a year later, after facing weeks of mostly bad press over the Afghan detainee torture issue and relentless questioning by opposition members of the International Affairs committee, Harper casually shut down Parliament once again. The government was losing control of the situation, something Harper is unaccustomed to. The government's strategy of attacking the character of an extremely credible witness with impeccable credentials had backfired – two-thirds of Canadian polled believed diplomat Richard Colvin and not Foreign Minister Peter McKay or other government spokesmen. And more than 100 former diplomats, many of them ambassadors, signed a letter criticizing the government for its vicious attacks on a public employee who was just doing his job.

The opposition knew it was closing in on possibly explosive information as the government refused to hand over uncensored documents directly related to Colvin's testimony – documents that had been released earlier but with huge swaths blacked out. Harper must have known that refusing to comply, as he did, would quickly lead to charges of contempt of Parliament over which he would have little or no control. In addition, the committee would have begun calling Conservative cabinet ministers to testify, something Harper was not willing to risk: they could not refuse to testify and could conceivably have been forced to testify under oath.

For a man accustomed to controlling everything, it was a situation he could not strategize out of. So, in the middle of the Christmas-New Year's break, on December 30, 2009, he again asked Governor General Michaëlle Jean to shut down Parliament. This time he didn't even bother with the niceties of parliamentary protocol by formally making the request in person – he asked for prorogation by phone, a transgression that C.E.S. Franks, a professor at Queen's University, called “an affront to the dignity of the office of Governor General.” Nevertheless, Jean again gave Harper what he wanted.

There was an additional bonus to the second prorogation for the prime minister, it facilitated Harper's campaign to take control of the Senate. In 2009, he appointed more senators in one year than any prime minister in Canadian history. And in January 2010, he appointed five more, giving him a plurality in the Senate. By proroguing Parliament, Harper also

dissolved the existing Senate Standing Committees, formed when the Liberals were in charge. He could now start afresh – establishing new committees, with Conservatives in the majority and, given the heated partisan atmosphere surrounding their appointments, ready to rubber stamp anything Harper sends their way.

By now, most Canadians are familiar with the details of the shutdown, and the extremely weak excuse Harper gave for shutting the doors of Parliament. Claiming that he needed time to “recalibrate” his government's policy dealing with the ongoing problems in the economy, Harper said little about the 36 pieces of legislation that died with prorogation. It seemed to put the lie to his repeated accusations against the opposition that they were frustrating and delaying the government's legislative agenda. The 36 bills, all of which would have to be restarted from scratch, including bills considered priorities for Harper that dealt with getting “tough on crime,” represented half of all the work carried out by Parliament since the 2008 election.

According to Scott A. Ross, a Liberal blogger whose musings appear in *The National Post* newspaper, the cost of proroguing Parliament this time (assuming that only five of the 36 bills being considered would actually have become law), including paying MPs and senators for accomplishing nothing and the cost of producing the bills that won't become law, was \$130,407,733.

It is rare that anything like a consensus develops on political issues in Canada, especially amongst the pundits, editorialists and academics routinely commenting on events. But the second prorogation by Harper set alarm bells ringing cross the country, and drew out scores of concerned members of the usually quiescent elite in Canada. It was clear to virtually every commentator that Harper had calculated his move to avoid tough questioning from the International Affairs committee on the government's complicity in torture in Afghanistan. By shutting down Parliament, prorogation also shuts down the Senate, and all the committees of both houses. All the committees must be reconstituted after Parliament resumes sitting, meaning that the prime minister could delay appointing a chair to the offending committee for a long time. The “recalibration” was treated as a joke. Harper was so contemptuous of parliamentary rules he could not even bother to develop a believable cover story.

More than 175 professors of political science signed a letter denouncing the prorogation. Written by Daniel Weinstock, who holds a Canada research chair in ethics and political philosophy at the University of Montreal, the letter said, in part: “Given the short-term, tactical, and partisan purposes served by prorogation, and given the absence of any plausible public purpose served by it, we conclude that the prime minister has violated the trust of Parliament and of the Canadian people.

“We emphasize, moreover, that the violation of this trust strikes at the heart of our system of government, which relies upon the use of discretionary powers for the public good rather than merely for partisan purposes. How do we make sure it serves the public good? By requiring our governments to face Parliament and justify their actions, in the face of vigorous questioning.” The letter appeared in many daily papers across the country.

The shamelessness of the move even attracted attention in other countries, a rare event for politics in Canada, with the arch-conservative business magazine, *The Economist*, publishing a scathing editorial entitled “Harper goes prorogue” attacking the prime minister: “Never mind what his spin doctors say: Mr. Harper’s move looks like naked self interest,” said the editorial. It ridiculed the “recalibration” argument, saying Harper’s government “cannot apparently cope with Parliament’s deliberations while dealing with the country’s economic troubles and the challenge of hosting the Winter Olympic Games.” The magazine had endorsed Harper in the 2006 and 2008 elections.

Even columnist John Ibbitson, normally an eager fan of Harper’s policies, could barely contain himself, writing: “No other legislature among what Winston Churchill called the English-speaking peoples would tolerate such treatment.” Even *The Globe and Mail* editorial board, which overlooks most of Harper’s outrages, was shocked and stated in an editorial: “Canadians are right to wonder how the prime minister’s insulting prorogation ploy fits with the Conservative commitment to restore public trust in government.”

One of the benefits of Harper’s four-year reign, for those supporting his conservative policies, was that Canadians were becoming less and less engaged, and more and more disillusioned with federal politics. But the second shutdown of Parliament threatened to change all that. What started out as a simple Facebook page expressing outrage, turned virtually overnight into Canadians Against the Prorogation of Parliament – an internet protest that eventually garnered over 220,000 names. It also spawned an on-the-ground movement which, in the space of two weeks, organized demonstrations in 61 communities on January 23, 2010, the Saturday before Parliament had been originally scheduled to resume. Some 25,000 people braved winter weather to denounce the government and demand democracy. The movement is not going away.