

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

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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

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- 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, "Prorgation, 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.