Constitutional Battles between Parliament and the Executive: the Canadian Prorogation Crisis

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Introduction

It is widely agreed that Canadian constitutional law was profoundly transformed by the adoption of the *Constitution Act, 1982* and with it, the *Canadian Charter of Rights and Freedoms*.[1] As the Supreme Court of Canada has explained: "When the Charter was introduced, Canada went....from a system of Parliamentary supremacy to constitutional supremacy....Simply put, each Canadian was given individual rights and freedoms which no government or legislature could take away."[2] Over the last three decades, the *Charter* and its entrenched list of rights and freedoms has come to dominate Canadian constitutional politics, scholarship, and law. Debate continues in academic circles,[3] among political parties,[4] and occasionally in judicial decisions themselves[5]

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

2 *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 131.

3 See Peter Hogg et. al., "Charter Dialogue Revisited – or 'Much Ado About Metaphors'" (2007) 45 Osgoode Hall L.J. 1, and the collection of articles that follows.

about the democratic nature (or anti-democratic tendencies) of judicially-enforced constitutional rights and freedoms. Without question, the adoption of entrenched constitutional rights has moved Canada closer in constitutional culture to that of the United States of America and further from the United Kingdom and its venerable traditions of parliamentary government. In Canadian debates about abortion, same-sex marriage, prostitution laws, assisted suicide, religious freedoms, political speech, minority linguistic rights, and a host of other contentious social/political/legal matters, the ***Charter*** and its discourse of rights and freedoms looms large.

Canada's "rights revolution"[6] has invariably changed the way constitutional law is studied and taught. Not all have welcomed the change,[7] but none would dispute the ***Charter's*** impact on the constitutional law classrooms of Canadian law schools.[8] Before 1982, Canadian

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4 See Rainer Knopff and Andrew Banfield, "'It's the Charter Stupid': The Charter and the Courts in Federal Partisan Politics," in Joseph Magnet and Bernard Adell, eds, ***The Canadian Charter of Rights and Freedoms at Twenty Five Years*** (Toronto: LexisNexis Butterworths: 2009).

5 See Newfoundland (Treasury Board) *v*. N.A.P.E., [2004] 3 S.C.R. 381; ***Vriend***, supra note 2.

6 Michael Ignatieff, ***The Rights Revolution*** (Toronto: Anansi, 2000); ***Dominique*** Clément, ***Canada's Rights Revolution: Social Movements and Social Change, 1937-82*** (Vancouver: UBC Press, 2008)

7 See Roderick A. Macdonald, "Post-Charter Legal Education: Does Anyone Teach Law Anymore?" ***Policy Options*** (February 2007) 75

8 R.C.B. Risk has suggested that a Canadian constitutional scholar from the 1960s transported to the present would feel a little like Dorothy from the ***Wizard of Oz***. See R.C.B. Risk, "On the Road to Oz: Common Law Scholarship about Federalism after World War II" in R.C.B. Risk, ***A History of Canadian Legal Thought: Collected Essays***, ed. by G. Blaine Baker & Jim Phillips (Toronto: The Osgoode Society for Canadian Legal History, 2006) 404 at

constitutional law classes focused on issues related to British and Canadian constitutional history, parliamentary supremacy, the nature of executive power, and federalism, specifically, the constitutional division of powers between the federal and provincial governments. Today, Canadian constitutional law texts and classes alike emphasize the individual rights provisions of the constitution. My students sometimes pester me at the beginning of the constitutional course I teach at the University of Alberta, Faculty of Law, "When do we get to the ***Charter***?" For many, Canadian constitutional law and the ***Charter*** have become one and the same. And yet, a series of political and constitutional events in Canada during the past two years have reminded Canadians that our constitutional law is about a great deal more than the ***Charter***. Indeed, Canadians have recently discovered that much of their democratic government, including the critical relationship between Parliament and Executive, rests on the foundations of unwritten constitutional traditions and conventions usually overlooked and taken for granted.

Before December 2008, few Canadians had heard of the parliamentary practice known as prorogation. To prorogue Parliament is to suspend or adjourn it for a period of not more than twelve months.[9] Prorogation should not be confused with dissolution, which requires the election of a new Parliament; a prorogation simply involves a break between sessions of Parliament. The power to prorogue Parliament rests solely with the Governor General – the Queen's representative, a power she exercises on the advice of the prime minister. In December 2008 and

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425-427.

9 Section 5 of the ***Charter***, ***supra*** note 2 stipulates that Parliament must sit at least once every twelve months.

again in December 2009, Prime Minister Stephen Harper requested that the Governor General, Michaëlle Jean, prorogue Parliament. Both instances were highly controversial and attracted a tremendous amount of attention, and a good deal of criticism among academics, the media, and citizens generally. The prorogation crisis highlighted crucial features of Canadian constitutional law often poorly understood by politicians and the public. Was the Governor General always bound to follow the prime minister's advice? If not, when and in what circumstances could she refuse to follow his requests? If she did refuse the prime minister's advice, what legal and political consequences would follow? Disagreement and uncertainty surrounding these important questions, has required Canadians to re-examine and interpret their constitutional traditions and conventions in light of the ideals of modern democratic governance and constitutional supremacy. In the process, the constitutional relationship between Parliament and Executive has returned to prominence.

Canada's Constitutional Background

Canadian constitutional law began in a series of relationships between French and British newcomers and Aboriginal Peoples between the 16th and 19th centuries. In the second half of the 18th century, Britain gained control of its North American territories from the French, just as it lost several of its colonies to the Americans. By the 1860s, politicians in the remaining colonies of British North America began to explore the possibility of a federal union for a host of political, military, and economic reasons. The result was the ***British North America Act*** of 1867 (still in force today as the ***Constitution Act, 1867***).[10] The Constitution's opening preamble

declared that Canada would have a Constitution "similar in Principle to that of the United Kingdom," despite the fact that the United Kingdom had no written constitutional document. Nonetheless, the framers of the Canadian Constitution maintained that in its spirit, as well as in its adoption of a Westminster parliamentary system, Canada had followed the historic constitutional traditions of Great Britain. In the words of one of Canada's earliest constitutional scholars, A.H.F. Lefroy, the Canadian constitution "adhered as closely as possible to the British system in preference to that of the United States."[11] With its House of Commons and Senate (standing in for the House of Lords), and traditions of responsible government in which Executive power is held formally by the Crown, but in reality by the prime minister and cabinet, Canada's Parliament mirrored that of Great Britain.

Because the constitutional framers agreed that Canada would follow British constitutional practice, much of the actual political machinery of parliamentary government was left unstated. Politicians, lawyers, and citizens alike simply assumed that British constitutional conventions – the unwritten rules of parliamentary government – would fill in the gaps in Canada's constitutional text and guide the workings of Canadian democracy.[12] As the Supreme Court of Canada explained: "Although these underlying principles are not explicitly made part of the Constitution by any written provision … it would be impossible to

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10 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C 1985, App. II, No. 5 [*Constitution Act, 1867*].

11 A.H.F. Lefroy, *The Law of Legislative Power in Canada* (Toronto: Toronto Law Book and Publishing Company, 1897-8) at lx.

12 See Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991).

conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood."[13] Among the most important of the unwritten principles is the notion of responsible government. Although formally executive power vests with the Queen and her representative, the Governor General, by unwritten convention, they must act on the advice of a prime minister and cabinet possessing the confidence of the House of Commons. If a majority of MPs vote non-confidence in the government, the Governor General must dissolve the Parliament and hold an election, or must seek a new prime minister among the existing MPs who could govern with the confidence of the House of Commons. In effect, it is the unwritten principle of responsible government that acts as a check against a Government's abuse of executive or legislative power, and in so doing, anchors Canadian constitutional practice to the ideals of modern democracy.

On the whole, Canada has been very well served by the combination of written rules and unwritten conventions that define our constitutional law. Despite the political pressures associated with governing a geographically large, heterogeneous, multicultural, multilinguistic, and multinational state, Canada has an enviable record as a stable constitutional democracy. Yet, by their very nature, constitutional conventions possess the seeds of controversy. As unwritten and flexible rules that evolve over time, constitutional conventions can, at certain moments, be subject to intense disagreement as to their scope, content, and applicability.[14] The recent prorogation crisis is, at its heart, a disagreement about a series of unwritten constitutional rules; a

13 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 51.

disagreement exacerbated, in turn, by a series of related shifts in Canadian political culture.

Canada's Changing Politics

One of the most significant developments in Canadian politics in the last two decades is the formation and electoral success of the Quebec separatist political party, the Bloc Québécois (BQ). As the home of a majority population of French-speaking peoples, the province of Quebec has always maintained and demanded a distinct place within the Canadian federation. In the early 1990s, a group of disaffected politicians from Quebec founded the BQ to represent Quebec's sovereignty interests in federal politics, but the political antecedents of the Bloc extend back considerably further. Over the last forty years, the explicitly separatist Parti Québécois (PQ) has enjoyed significant popular support at the provincial level, forming the government of Quebec on three separate occasions.[15] During two of their mandates, the PQ held provincial referenda – in 1980 and 1995 – asking Quebec residents whether the province of Quebec should become sovereign and separate from the rest of Canada. In the 1995 referendum, 49% of Quebecers voted in favour of the proposition that Quebec "should become sovereign after having made

14 A famous example occurred when the provinces and federal government disagreed over the conventions governing the amendment of the Constitution itself: see ***Re: Resolution to amend the Constitution***, [1981] 1 S.C.R. 753.

15 See Graham Fraser, ***René Levesque and the Parti Québécois in Power***, 2nd ed. (Montreal & Kingston: McGill-Queen's University Press, 2001).

a formal offer to Canada for a new economic and political partnership."[16] Current support for separation within Quebec is not quite that high, but regardless, the PQ and BQ continue to dominate Quebec politics.[17]

The presence and electoral success of the BQ means that it has become very difficult for other political parties to win a majority government in federal elections, i.e. a Parliament in which a single political party secures the majority of the House of Commons' 308 seats. In the 1990s and early 2000s, Jean Chrétien and the Liberal Party won three straight majority governments, but largely because of a momentary split between Canada's conservative political parties.[18] It is no coincidence that Canadian federal elections have produced only minority governments since Canada's conservative parties merged in 2003.[19] In a minority government, the winning political party wins the plurality, but not majority, of seats in the House of Commons. While political parties would obviously prefer to win a majority government and the control of the House of Commons that follows, Peter Russell argues that parliamentary democracy may be better served by minority governments which, by their nature, diffuse power and "restore vitality

16 See generally, David Schneiderman, ed., ***The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession*** (Toronto: James Lorimer, 1990).

17 Currently, the Bloc hold 48 of Quebec's 75 seats in the House of Commons. Most political observers expect the Bloc to increase its seat totals in the next federal election.

18 In the late 1980s, the Reform Party of Canada split from the Progressive Conservative Party; the parties later reunited as the Conservative Party in 2003.

19 See generally Peter H. Russell, ***Two Cheers for Minority Government: The Evolution of Canadian Parliamentary Democracy*** (Toronto: Emond Montgomery, 2008).

to Parliament."[20] Whatever their attributes and detriments, minority governments are part of the new political reality in Canada. And, given that minority parliaments (or, to adopt the British terminology, hung parliaments) currently exist in almost all of the major Westminster parliamentary systems – Canada, the United Kingdom, Australia, India, and New Zealand – there may be broader political and cultural forces fracturing political support among traditional brokerage political parties, and supporting the prevalence of minority government.[21] Certainly, Canada's regional tensions – exacerbated since the rise of the BQ – appear to be writing themselves ever deeper into Canada's electoral politics: the Conservatives win the majority of seats in Western Canada, the Liberals do well in urban Ontario, larger cities, and Atlantic Canada, and the BQ take most of the seats in Quebec. Current polls indicate that in the next federal election either the Conservatives or Liberals will win another minority government with the BQ increasing its dominance in Quebec.

The succession of minority governments over the last six years has invariably changed a number of dynamics in Canadian politics. With majority governments, the ruling political party enjoys *de facto* control of the House of Commons and, by extension, the political agenda. Not so in minority governments. There remains the perpetual threat that the opposition parties – the Liberals, New Democratic Party, and BQ – which combined have more Members of Parliament (MPs) than the governing Conservatives, will defeat government legislation or, more drastically,

20 *Ibid.* at 129.

21 An investigation of such forces lies beyond the scope of this paper, but certainly the rise of interest-group politics and new media are contributing to the erosion of power among traditionally successful political parties.

pass a vote non-confidence and force an election. The heightened political stakes and general instability of minority governments have led to a more divisive political culture. Borrowing from political tactics of Conservatives in Australia and Republicans in the United States, Canada's Conservative Party has set a highly aggressive tone in dealing with their political opponents.[22] Under near constant threat of an election – historically, minority governments in Canada tend to survive an average of eighteen months – Canada's political parties appear locked in a near perpetual political campaign typified by negative attacks of their political adversaries. Despite the fact that minority governments require compromise and conciliation to function effectively, Canada's Parliament has become characterized instead by mutual distrust, animosity, and partisan attack. Many argue that minority governments have rendered the Canadian Parliament essentially dysfunctional.

Minority governments and the divisive nature of Canadian politics have important ramifications for Canadian constitutional law. Because of the more unstable nature of minority governments, political parties have more frequently turned to parliamentary tactics to gain political advantage over their opponents. The result has been increasing numbers of political disputes involving parliamentary procedures, parliamentary committees, votes of confidence, and proroguing and dissolving Parliament. In a recent skirmish, a number of opposition MPs brought forward a motion seeking to find the governing Conservatives in contempt of Parliament for their refusal to produce documents relating

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22 See generally Tom Flanagan, ***Harper's Team: Behind the Scenes in the Conservative Rise to Power*** (Montreal & Kingston: McGill-Queen's University Press, 2007).

to the detention of Afghan prisoners during the Canadian military operations in Afghanistan. The Speaker of the House of Commons – the MP elected by fellow parliamentarians to preside over the House of Commons and enforce its parliamentary procedures – ruled that the unwritten constitutional rules of parliamentary democracy included "the fundamental right of the House of Commons to hold the Government to account for its actions."[23] The Speaker gave the Government and opposition parties fourteen days to fashion a solution, and hinted that a finding of contempt of Parliament against the Government was possible if they did not.[24] Although a compromise was reached in this instance, the episode is emblematic of the deep conflicts that Canada's political parties have begun to transfer to the workings of Parliament itself.

A good deal of such parliamentary conflicts concern the contentious constitutional relationship between the Executive and Parliament, a relationship defined only in a loose manner by Canada's Constitution. According to the ***Constitution Act, 1867***, "The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen."[25] The Constitution implicitly recognizes that the Queen's executive functions will be carried out by her representative, namely the Governor General.[26] In Canada, by constitutional convention, the Queen appoints the Governor General on

23 Speaker of the House of Commons, Ruling on the Questions of Privilege Raised on March 18, 2010, (27 April 2010).

24 Steven Chase, "Parliament Has the Power" ***The Globe and Mail*** (28 April 2010) A1.

25 ***Constitution Act, 1867***, s. 9, supra note 10.

26 See generally Edward McWhinney, ***The Governor General and the Prime Ministers: The Making and Unmaking of Governments*** (Vancouver: Ronsdale Press, 2005).

advice from the prime minister. Most Governor Generals serve five year terms. Canada's recent Governor Generals have been ex-politicians, or prominent figures from the arts or academia. Canada's current Governor General, David Johnston, replaced Michaëlle Jean in October 2010. In practice, the Governor General's powers are extremely limited and largely ceremonial. Constitutional conventions – many of which have been in place for more than a century – dictate that the actual reins of executive power lie with the prime minister and cabinet. But what role is retained for the Governor General in exercising the prerogative powers of the Crown? Is the exercise of such powers by an unelected and unaccountable appointed official consistent with the ideals of democracy? The prorogation crisis in December 2008 brought these issues to the fore.

Prorogation

The power to prorogue Parliament – to terminate a session of Parliament, but without calling an election – is not mentioned in Canada's Constitution. Prorogation was common parliamentary practice at the time of Confederation and would have been understood by Canada's constitutional framers to be among the unwritten prerogative powers retained by the Crown. The Crown prerogative is, in the words of A.V. Dicey, "the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown."[27] In Canada, the Crown's

27 Quoted with approval in ***Black v. Canada (Prime Minister)*** [2001] O.J. No. 1853 (C.A.).

prerogative powers have been greatly reduced by statute so that many of these powers are now possessed by Parliament, or the prime minister and cabinet. In Canada, prorogation has not been regulated by statute, but instead by constitutional convention. The Governor General acting on behalf of the Queen retains the exclusive power to prorogue Parliament, but only on the advice of a prime minister operating with the confidence of the House of Commons. The effect of prorogation is that all legislative matters currently pending in Parliament die. When Parliament returns, a new session begins with a Speech from the Throne outlining the government's new legislative priorities. Prorogation was a common technique of adjourning Parliament for holiday periods or during the summer, but recently, Parliament has adopted a sitting schedule with a number of pre-determined breaks. As a result, prorogation has been used much less frequently in the past decades. In the normal course, a prime minister seeks to prorogue Parliament when a government's legislative agenda has been completed and a short parliamentary break is required to craft a new set of legislative objectives for the next parliamentary session. For over one hundred years, prorogation occurred in Canada without controversy.[28] Two years ago, most Canadians – indeed most lawyers – would not have been able to tell you what prorogation meant.

Prorogation's constitutional obscurity changed in December 2008. Prime Minister Harper and the Conservative Party returned to power with a second minority government in the October 2008 federal election.

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28 Other than in 2008 and 2009, prorogation last attracted political controversy in 1873, when Canada's first Prime Minister, Sir John A. Macdonald, prorogued Parliament in the midst of a political financing scandal. See Donald Creighton, ***John A. Macdonald: The Old Chieftain*** (Toronto: University of Toronto Press, 1955) at 166.

Shortly after Parliament returned, and in response to a number of the government's announced economic policies, the opposition parties began to explore the idea of forming a coalition government to replace the Conservatives. In early December, the Liberals and NDP with the support of the BQ announced that they would, at the earliest opportunity, vote non-confidence in the Conservative government, and would seek from the Governor General permission to form an alternative government with Liberal leader Stéphane Dion serving as prime minister. Since an election had just been held and new Parliament elected, the opposition parties argued that, following a vote of non-confidence, the Governor General had the authority to appoint a new prime minister rather than dissolving the Parliament and forcing another election. Seeking to avoid the impending vote of non-confidence, Prime Minister Harper requested that the Governor General prorogue Parliament.[29] Simultaneously, the Conservative Party unleashed an aggressive attack on the legitimacy of the coalition, stressing that it would contain "separatists and socialists," and would be led by Dion, a politician who had just led the Liberals to arguably their worst electoral performances since Confederation. The Conservative message was blunt. "We will use all legal means to resist this undemocratic seizure of power," the Prime Minister claimed, "such an illegitimate government would be a catastrophe, for our democracy, our unity and our economy."[30]

On the snowy morning of 4 December 2008, Canadian citizens watched with tense anticipation as the Prime Minister visited the

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29 See generally Peter H. Russell, & Lorne Sossin, eds., ***Parliamentary Democracy in Crisis*** (Toronto: University of Toronto Press, 2009).

30 Michael Valpy, "The 'Crisis': A Narrative" ***ibid.*** at 13.

Governor General to request prorogation of Parliament. Some had speculated that the Governor General might refuse the Prime Minister's request.[31] The Conservatives let it be known that any refusal would be interpreted by the Government as an inappropriate, perhaps even illegitimate, interference with democracy. The stakes were high and the atmosphere politically charged. After a two hour meeting, the Prime Minister emerged from the Governor General's residence and announced that she had agreed to prorogue Parliament. Politics aside, the prorogation raises interesting constitutional questions that have been widely debated among Canadian constitutional scholars since. Did the Governor General have the constitutional authority to refuse the Prime Minister's request, and, if she did, should she have refused to follow his advice and instead called upon the nascent coalition to form Government? Does a coalition government need to run explicitly on that premise, or can such coalitions form after an election has been held? Does or should Parliament have a say in when the Prime Minister can request prorogation? All of these questions involved notions of democracy, parliamentary government, the role of the Governor General, and, perhaps above all, the role of unwritten constitutional rules.

Canadian academics are divided on these questions. In my view, the Governor General undoubtedly possesses the constitutional authority – in the form of a reserve prerogative power of the Crown – to refuse the requests of a Prime Minister no longer in possession of the

31 The only roughly similar situation in Canadian history occurred in 1926 when Lord Byng refused Prime Minister King's request to dissolve Parliament. Scholars still debate today whether he was right to do so. See Eugene A. Forsey, ***The Royal Power of Dissolution of Parliament in the British Commonwealth*** (Toronto: Oxford University Press, 1968).

confidence of the House of Commons.[32] The matter becomes more difficult when the Prime Minister is *about* to lose the confidence of the House of Commons, as in the December 2008 example. In this scenario, I think that the Governor General must judiciously consider all of the surrounding circumstances in exercising her discretionary reserve powers. In other words, the Governor General has a choice to make. She must make that choice in the best interests of the Canadian Constitution mindful, of course, of the legal, political, and cultural context in which that Constitution necessarily operates. While being careful not to be swayed by the partisan attacks on either side of the political divide, she must nonetheless gauge the viability and sincerity of any potential Government-in-waiting, just as she must also examine the purpose and length of the proposed prorogation of Parliament. Such a balancing demands that the Governor General avoid intervening in delicate matters of partisan politics, but so too must she retain the discretion to protect the Constitution from a prime minister contemptuous of Parliament's fundamental rights.

By all accounts, this delicate balance is precisely what the Governor General did in granting the Prime Minister's request to prorogue Parliament in December 2008. In my opinion, she granted the request because, in the moment it was made, the Prime Minister had not yet lost the confidence of the House of Commons and had, in fact, won an explicit vote of confidence just days before the putative coalition formed. Perhaps more importantly, the Prime Minister agreed to return to face an immediate vote of confidence when Parliament resumed in the

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32 See Eric Adams, "The Constitutionality of Prorogation" (2009) 18 Constitutional Forum constitutionnel 17.

relatively short time span of six weeks. The Governor General might well have refused his request, had these conditions not been placed upon his prorogation. I think it is also significant that, despite the fact she ultimately granted his request, the Governor General took nearly two hours to make her decision. In interviews after she left office, the Governor General candidly admitted that she believed she had a discretionary decision to make. In speaking to the length of her meeting with the Prime Minister, the Governor General explained: "You have to think about it. You have to ask questions. The idea wasn't to create artificial suspense. The idea was to send a message – and for people to understand that this warranted reflection."[33] What message did she send? I believe that in carefully and deliberately weighing her options, Jean, reaffirmed the power of the Governor General to protect the Constitution and Parliament from an Executive which breaches the unwritten, but crucial, rules of Canadian constitutional law.

The question of the Governor General's constitutional power arose again in December 2009 when, for the second time in a year, Prime Minister Harper requested the prorogation of Parliament. In this case, it appeared clear, although never admitted, that the Prime Minister wanted to terminate the activities of a parliamentary committee demanding documents related to the Canadian military mission in Afghanistan. Public reaction against this second prorogation was even more severe than a year earlier. Within a few weeks, over two hundred thousand people had joined a facebook group, "Canadians Against Proroguing Parliament." In addition, an open letter signed by some two hundred

33 Alexander Panetta, "Michaëlle Jean had hidden message in prorogation crisis" *The Globe and Mail* (29 September 2010).

academics in law, political science, philosophy, and history accused the Prime Minister of "making cavalier use of the discretionary powers entrusted to him in our Parliamentary system, [and] undermining our system of democratic government."[34] The academics reminded the Prime Minister that "[o]ur parliamentary and constitutional institutions are grounded not just in explicit rules but also in the spirit of those rules." For these critics, the Prime Minister's repeated requests to prorogue Parliament risked creating new constitutional rules which weakened parliamentary institutions at the expense of an increase in executive power. The Conservatives have largely dismissed such criticisms as overblown. While others have begun to worry that all hope is lost for Canada's parliamentary institutions and the sense of fairness that is required by all political parties to make Parliament work. By way of conclusion, let me explain why I think that the prorogation controversies have been good for Canadian constitutional democracy.

Conclusions

The controversies surrounding prorogation in the last two years have exposed how little most Canadians know about their parliamentary system of government. Canada's proximity to, and close cultural and economic relationship with, the United States often blurs the important differences between the presidential and parliamentary systems of government. As Peter Russell puts it, "We don't elect a government; we elect a representative assembly."[35] For too long, many Canadians have

34 http://www.noprorogation-nonprorogation.ca/

simply assumed that our prime minister is the equivalent of the American president. And, to a certain extent, Canadian prime ministers have themselves fostered this analogy by concentrating power in the executive branch of government, and governing, especially during majority governments, as unchallengeable during their term in office. But the rise of minority governments in Canadian political culture has required a shift in thinking. Canadians are learning that Parliament matters.

So too are federal politicians. Parliamentary committees – under the control of the opposition parties during minority governments – are increasingly seeking to hold the Government to account, as the controversy over the release of Afghan detainee documents illustrates. A current controversy over whether the Government can forbid civil servants from giving testimony at committee hearings is ongoing. There are, as well, currently a number of initiatives seeking to make Parliament function better – including revising the rules governing Question Period, the daily questioning of the Government in the House of Commons. Finally, the House of Commons' Standing Committee on House Procedures and Affairs is investigating various proposals to require Parliament's consent before the prime minister requests a prorogation of Parliament. In all cases, Parliament seeks to reaffirm its crucial role as a check on executive power. Arguably most important of all of these developments has been the reaction and engagement of Canadian citizens in the constitutional dimensions of parliamentary affairs. In my view, Canadians have the capacity to strengthen the constitutional conventions that underlie Canada's constitutional arrangements by

35 *Two Cheers for Minority Government*, *supra* note 14 at 1.

exacting a political cost on political parties – whether in Government or Opposition – that abuse Parliament. While many commentators worry about the state of Canadian constitutional government, I believe Canada has entered an important moment of informal constitution-building that is reenergizing Parliament and its constitutional functions. After several decades of power drifting in increasing concentrations in the executive branch, in particular, the office of the prime minister, a rebalancing of the relationship between Parliament and Executive will ultimately be good for Canadian constitutional law.

All of which suggests that there is infinitely more to Canadian constitutional law – in both its attributes and its challenges – than is contained within the ***Canadian Charter of Rights and Freedoms***. And if Canada is going to continue to develop its parliamentary constitutional traditions it must be increasingly prepared to look beyond the constitutional rights culture of the United States for guidance. It may well be that in resolving many of our constitutional controversies valuable lessons exist not only in Canada's own constitutional history, but across the Commonwealth, and among other parliamentary systems of government, including Japan. There is, as ever, much to learn from each other.