No Discretion: On Prorogation and the Governor General

Nicholas A. MacDonald and James W.J. Bowden

This paper examines the often-ignored prorogation of 1873, the evolution of the governor general's reserve power over time, and the fundamental differences between dissolution and prorogation. It concludes that the Macdonald-Dufferin prorogation of 1873 serves as the relevant case for the Harper-Jean prorogation of 2008, rather than the oft-cited King-Byng Affair of 1926, and that the governor general's reserve power does not apply to prorogation.

The prorogation of parliament in 2008 left Canadians – politicians, academics, and the electorate alike – scrambling to figure out the constitutional role of the governor general. Across the country many questions were posed, but they were answered without a thorough historical examination of the practice of prorogation or an analysis of the development of responsible government in the Westminster system. The answers tended to analyze the quality of the prime minister's advice – an issue entirely separate from the constitutional role of the governor general in Canada.

Of the scholarship on the Harper-Jean prorogation of 2008, Andrew Heard occupies one extreme in his support for the use of the reserve power in matters of prorogation and the argument that Governor General Michaëlle Jean should have rejected Prime Minister Stephen Harper's advice to prorogue in 2008.[1] In the middle, C.E.S. Franks also acknowledges the applicability of the reserve power to prorogation but reluctantly concludes that "the governor general made the right decision."[2] Peter Hogg, Adam Dodek and Barbara Messamore accept that the reserve power still applies to prorogation but believe that the governor general wisely accepted the prime minister's advice for various reasons more emphatic than those of Professor Franks.[3] Professor Hogg, for instance, believes that an imminent vote of confidence suffices to activate the reserve power that allows a governor general to reject a prime minister's advice.[4] At the other extreme, Henri Brun argues that the governor general possessed no personal discretion because the reserve power does not apply to prorogation; he supports a more narrow interpretation of the power and would sanction it only in the gravest emergency.[5] Guy Tremblay agrees with Professor Brun and believes that "the governor general must accede to a request of prorogation or dissolution."[6] Finally, based on the writings of the late Professor Robert MacGregor Dawson, the Harper-Jean prorogation of 2008 did not meet the constitutional test on the acceptable use of the reserve power.[7] Of these scholars, only Professor Messamore devoted serious attention to the little-known Macdonald-Dufferin prorogation of 1873 and applied its lessons to the Harper-Jean prorogation of 2008; in contrast, Professors Franks and Russell invoked the King-Byng Affair of 1926, which involved dissolution and not prorogation, and therefore provides a bad example with respect to the Harper-Jean prorogation.

Scholars who support a broader interpretation of the governor general's powers have overlooked two crucial points. First, that prorogation differs significantly from dissolution both in its historical origins and procedural consequences and is therefore not comparable to dissolution in relation to the ability of the governor general to refuse a prime minister's advice. Second, that the constitutional conventions that govern our Westminster system of responsible government have, via the United Kingdom, developed over the course of nearly 800 years by wresting power *from* the monarch and vesting it in cabinet and parliament.

Nicholas A. MacDonald and James W.J. Bowden are students in the Department of Political Science at Carleton University. *This is an edited version of a paper presented to the Carleton Graduate Student Conference in Canadian Politics, entitled "Canadian Democracy at a Crossroads?", held on February 10-11, 2011.*

Prorogation vs. Dissolution

Originally developed during the Tudor period as an economical alternative to dissolution, various monarchs and prime ministers have used prorogation as a political tactic.[8] Today, prorogation is a tool that the prime minister may employ in order to call a new session of Parliament. Normally, a prime minister requests a prorogation after achieving all of the legislative goals set out in the Speech from the Throne. The prorogation of a parliamentary session effectively clears the Order Paper of parliamentary business: all government legislation and most proceedings cease.[9] It "resets" most aspects of parliament, whereas a dissolution ends the parliament altogether. Prorogation denotes a suspension of parliamentary procedures for a determined period of time by convention: the prime minister and governor general agree upon the duration of the intersession, which usually lasts no more than ten weeks. Following the intersession, the parliament reconvenes for a new session, which the government opens with a Speech from the Throne; this outlines the government's legislative priorities, and the subsequent debate on it constitutes the first vote of confidence of the new parliamentary session. No general election occurs, and the composition of the House of Commons and the government remain intact. Most importantly, the proclamation of prorogation denotes when parliament will resume.

> ***Canadian prime ministers have, on average, requested prorogation every twelve to twenty-four months since 1867, and no governor general has ever rejected a prime minister's advice to prorogue.***

In contrast, dissolution formally ends not only a parliamentary session but the parliament itself and precipitates a general election. A dissolution of parliament normally occurs in one of three ways: (a) the prime minister asks the governor general to dissolve parliament because his or her five-year constitutional term in office has expired;[10] (b) the prime minister feels that the government has completed the mandate on which it was elected (typically after about four years); or (c) the prime minister informs the governor general that he or she has lost the confidence of the House of Commons. Members of Parliament cease to hold office; however, ministers and the Speaker of the House of Commons continue to hold office until they are replaced following the election. The prime minister cannot request prorogation after losing the formal confidence of the House of Commons; at that point, he could only resign or request dissolution.

Any analysis of the prorogation of parliament of December 4, 2008 must differentiate between the *formal* loss of confidence and an *imminent* loss of confidence. A formal loss of confidence occurs when a majority of the Members of Parliament of the House of Commons vote against the government's Speech from the Throne, budget, estimates, or other piece of key legislation that the government considers a matter of confidence, or when they carry a motion of non-confidence. Public statements or written declarations signed outside the House of Commons would constitute an imminent or perceived loss of confidence in the government. The principle of parliamentary sovereignty means that only the will of the House as an *institution* prevails. This does not include the opinions of a group of Members of Parliament speaking outside of the House of Commons. Confidence can only be withdrawn on a formal vote, not in an extra-parliamentary fashion or forum. An imminent or perceived loss of confidence differs substantively from a formal loss of confidence; therefore, the idea that the governor general should ever treat an imminent loss of confidence as a formal loss must be rejected. Finally, an imminent loss of confidence does not free the monarch or his or her representative from the principle that he or she must regard the government's advice as binding.

The Macdonald-Dufferin Prorogation of 1873

Prime Minister Sir John A. Macdonald requested that Governor General Lord Dufferin prorogue parliament on August 13, 1873. He did so in order to prevent a committee examining allegations of conflict of interest and corruption in relation to the proposed Pacific Railway from tabling its report, because it would have implicated him in wrongdoing.[11] Despite public outcry, questions on the role of the governor general, and a signed letter of protest from dozens of Members of Parliament, the governor general granted the prime minister's request and issued the proclamation of prorogation.[12] The prorogation of August 13, 1873 brings up the same basic question as that of December 4, 2008: does an imminent or anticipated loss of confidence undermine the constitutionality of a prime minister's advice to prorogue and thus allow the governor general to invoke the Crown's reserve power?

According to Edward Blake, a prominent Liberal Member of Parliament and former Liberal leader, ninety-three Members of Parliament – mostly Liberals, but even some Conservative backbenchers – signed a formal letter of protest and presented it to His Excellency the Governor General. After Lord Dufferin formally issued the proclamation of prorogation, they held an "Indignation Meeting" to express their disapproval and

protest the constitutionality of his decision. In a manner again so reminiscent of the Harper-Jean prorogation of 2008, the Liberals condemned Lord Dufferin's decision for having allowed the government to evade the will of parliament, even though after the intersession, the same parliament applied pressure to Macdonald and forced both his resignation and that of his government. In a lengthy and detailed letter to the Colonial Secretary, dated August 15, 1873, Lord Dufferin elaborated on his interpretation of the role of the governor general within the framework of responsible government. He considered himself obliged to follow all of the advice that his ministers tendered to him while they still held the formal confidence of the House of Commons. Lord Dufferin also argued that "the suggestion that my refusal to take their advice on prorogation would not have been tantamount to a dismissal of them, is too untenable to need refutation."[13] In other words, Dufferin believed that his refusal to follow his ministers' advice when they had not lost the formal confidence of the House would have breached the principles of responsible government.

Perhaps because the world today seems so far removed from the centuries of bitter and bloody struggles that Canada's British ancestors endured under the despotic Crown of absolute monarchs like Henry VIII and Charles I, modern political scientists and constitutional lawyers do not take seriously the implications of the Crown's interference on democratic government. Instead, today's observers have the luxury of benefitting from their legacy. The trajectory of the Westminster system since at least the English Civil War has tended toward taking away power from the monarch and vesting it in cabinet and parliament. Most historians and their political contemporaries of the nineteenth century clearly understood and supported this principle and respected it more so than some contemporary scholars.

For instance, Lord Dufferin's biographer, Canadian historian William Leggo, introduced his account of Lord Dufferin's tenure in Canada with a brief history of responsible government, "which has since the reign of George III been slowly evolving itself in Great Britain." He concluded in 1878 that "these opinions [against Dufferin's decision] are utterly subversive of Constitutional Government, and if acted upon would degrade the rule of a country to a 'personal' one, and render the Executive … independent of his Ministry, and therefore of the people." Lord Dufferin concluded his letter to the Colonial Secretary with a passage that suggests that he saw himself as the liberal-Whiggish successor of Lords Durham and Elgin and that he could not morally justify the interference of the Crown and of his personal views in a colonial matter:

> Trained in the liberal school of politics under the auspices of a great champion of Parliamentary rights, my political instincts would revolt against any undue exercise of the Crown's prerogative. I trust that the people of Canada will ultimately feel that it is for their permanent interest and a Governor General should unflinchingly maintain the principle of Ministerial responsibility, and that it is better he should be too tardy in relinquishing this palladium of colonial liberty, than too rash in resorting to acts of personal interference."[14]

Clearly Lord Dufferin considered the rejection of his ministers' advice a breach of responsible government and an unjust personal interference. Furthermore, the British Government approved of his decision to grant prorogation, declaring that "Her Majesty's Government fully approve your having acted in these matters in accordance with constitutional usage."

After the controversial Macdonald-Dufferin prorogation of 1873 and five years of strained relations between Prime Minister Alexander Mackenzie's Liberal government and Lord Dufferin, Edward Blake called for the establishment of permanent letters patent in order to codify certain constitutional conventions relating to the governor general's reserve power. According to Professor Messamore, the *Letters Patent and Instructions of 1878* "represent an often-overlooked milestone in Canadian constitutional development" and another instance of transferring the Crown's powers from the monarch to the political executive. Canada's first five governors general never challenged their roles as ceremonial figureheads; not until 1926 when Lord Byng refused Prime Minister Mackenzie King's request for dissolution did the monarch's representative challenge the constitutional convention that the governor general accept the prime minister's advice while his government still held the formal confidence of the House of Commons.

Lessons from the King-Byng Affair of 1926

According to David E. Smith, the King-Byng Affair "has only peripheral relevance" with respect to the Harper-Jean prorogation of 2008, and Professor Messamore argues that it "was not really analogous."[15] Professor Hogg believes that "it is not a close analogy to the Harper-Jean prorogation of 2008," but in the same article he devoted significant attention to the King-Byng Affair and mentioned the Macdonald-Dufferin prorogation of 1873 only in a footnote as if it had no bearing on the Harper-Jean prorogation of 2008.

Peter Russell argues that: "it is well established that the governor general should not allow a prime minister to use dissolution of a Parliament to escape facing a vote of confidence in the House, so why should the request to prorogue be any different?"[16]

He erroneously treats one case as a "well-established" precedent, when in fact constitutional scholars have debated the legitimacy of Lord Byng's refusal to grant Prime Minister Mackenzie King dissolution for over eighty years. Never since 1926 has a Canadian governor general refused a request for dissolution, and no British monarch has refused a request for dissolution since the second Great Reform Bill of 1867. Thus, if anything, this "well-established" principle opposes Professor Russell's own argument and suggests the opposite: that the governor general ought to accept the prime minister's advice when his or her government still commands the formal confidence of the majority of the House of Commons.[17]

Prior to the Harper-Jean prorogation, Professor Russell maintained that a governor general might retain the discretion to reject the advice of the prime minister to dissolve parliament.[18] He justified this argument on the basis of section 50 of the *Constitution Act, 1867,* which vests the power to dissolve parliament in the governor general. Central to Professor Russell's argument that the ability of the governor general to exercise discretion on this matter exists is the written constitution's clear delineation of the governor general's authority to dissolve parliament. However, since the written constitution never mentions prorogation, he cannot logically apply this argument on dissolution to prorogation. Thus Professor Russell's apparent transposition of the two terms – which does not address the significant differences between prorogation and dissolution that have been enumerated – is clearly flawed and must be rejected.

Professor Franks also argues that the governor general retains the discretionary power in weighing a prime minister's request for prorogation because of his interpretation of the King-Byng Affair. Though Professor Franks accepts and concludes that the governor general exercised her discretionary powers wisely and correctly in 2008, he presumes that the governor general ought to exercise these reserve powers based on a non-logical syllogism: "what applies to a prime minister's request for dissolution of a Parliament so that a general election can be held should apply to a request for prorogation" because, Professor Franks continues, "the dissolution precedent dictates that the governor general should reject a prime minister's advice to prorogue a session when a viable alternative government exists."[19] He offered no evidence why a debatable precedent relating to dissolution should automatically apply to a request for prorogation, or why the governor general ought to treat requests for dissolution and prorogation identically. Therefore, Professor Franks' assertion must be unequivocally rejected – one cannot simply transplant the use of a supposed "principle" of dissolution to an instance of prorogation.

The Harper-Jean Prorogation of 2008

On October 14, 2008, Canadians elected their 40th Parliament. The results of the election confirmed what many had predicted: a second, though strengthened, Conservative minority government with the Liberals as the Official Opposition (though weaker than in the 39th Parliament) and relatively little change in the seat distribution of the Bloc Québécois and New Democratic Party (NDP). It seemed that incumbent Prime Minister Stephen Harper sought to make parliament work, stating that "this is a time for us all to put aside political differences and partisan considerations and to work cooperatively for the benefit of Canada." Upon parliament's return on November 18, 2008, most Members of Parliament were optimistic that they could make the 40th Parliament productive. The Speech from the Throne that opened the first session on November 19, 2008 indicated that the government would work to better the economy for the benefit of all Canadians.

The storm began with the Minister of Finance's Economic Statement on November 27. Conventionally an opportunity for the Minister of Finance to announce minor changes to the budget, this statement announced significant policy positions on how the government intended to approach a looming economic crisis. Most contentious perhaps was the government's position not to provide economic stimulus and the forecast of a slight surplus for the coming fiscal year, which most economists strongly rebuked and which put the government starkly at odds with the opposition parties' desired approach to the anticipated recession. But the opposition parties were further disgruntled with other elements in the provocative statement largely irrelevant to the economy. For example, the government planned to eliminate the public subsidy of $1.95 per vote to the political parties (more important to the opposition parties than to the Conservatives), to downgrade pay equity in the public service, and to suspend the right of public servants to strike until 2011. As a supply day in the House of Commons (an opportunity for the opposition to air its grievances to the government), Monday, December 1 presented the opposition parties with an opportunity to withdraw their confidence in the government over the economic update. Liberal leader Stéphane Dion, New Democratic leader Jack Layton, and Bloc Québécois leader Gilles Duceppe jointly announced two agreements by which the Liberals and the NDP would form a coalition government until June 30, 2011, to which the Bloc Québécois guaranteed its

support on matters of confidence until the end of June 2010. Stéphane Dion would have remained as leader of the Liberal Party and become prime minister until the Liberals chose their new leader the following year.

On December 1, 2008, Liberal leader Stéphane Dion proclaimed:

> I have respectfully recommended to Her Excellency that she should, at her first opportunity, exercise her constitutional authority and invite the leader of the Official Opposition to form a new government with the support of the two other opposition parties.[20]

These presumptuous remarks overlooked that the governor general only receives and acts upon advice from either the cabinet as a whole or the prime minister individually.[21] Under no circumstances can the governor general treat statements from the opposition as binding or constitutionally legitimate advice.[22] In 2004 as Leader of the Opposition, Stephen Harper made the same presumptuous mistake, though couched in more ambiguous language, when he, Jack Layton, and Gilles Duceppe sent a joint letter to Governor General Adrienne Clarkson that asked her to "consider all her options." The letter also declared that "we respectfully point out that the opposition parties, who together constitute a majority in the House, have been in close consultation." In 1873, after sending a formal letter of protest to Governor General Lord Dufferin, the Liberals held an "Indignation Meeting", which resolved "that the prorogation of Parliament without giving the House of Commons the opportunity of prosecuting the enquiry it had already taken was a gross violation of the privileges and independence of Parliament, and of the rights of the people."[23] The cases from 1873, 2004, and 2008 all serve to demonstrate the constitutional irrelevancy of advice given to the governor general by any party other than the cabinet or the prime minister.

In response to these developments, the government pushed the opposition day forward to December 8, 2008. The Conservatives reacted swiftly and attempted to dismiss the proposed coalition government by denouncing it as unconstitutional. On December 4, 2008, after the first session of the 40th Parliament had been seated for only thirteen days, and facing an imminent vote of confidence in the House of Commons, Prime Minister Harper sought an audience with Governor General Michaëlle Jean at Rideau Hall and asked that parliament be prorogued until January 26, 2009. After some deliberation, the governor general consented.

Responsible Government and the Reserve Power

Prior to Confederation in 1867 and even before the Canadian colonies received responsible government in 1848, some public figures refused to acknowledge the role of the governor general as one of true authority. In 1838, Joseph Howe, later a cabinet minister in the Macdonald government, wrote that "[the governor] may flutter and struggle in the net … but he must at last resign himself to his fate: and like a snared bird be content with the narrow limits assigned to him by his keepers."[24] This quotation beautifully illustrates the historical parliamentary interpretation, well-recognized throughout the nineteenth century, that while the governor general might possess authority in principle and under the law, he or she does not, and cannot, normally act outside the advice of the political executive in practice.

> ***Professor Dawson asserts that the governor general has never been free to follow his own judgment because prior to the*** *Statute of Westminster*, ***he had always been torn between the advice of the prime minister and the interests of the British government.***

In Canada, the entrenchment of responsible government in 1848 transferred the bulk of the Crown's powers from the governor to the political executive, which now exercises them in the name of the Crown. Responsible government means that when the political executive commands the formal confidence of the House of Commons, the monarch or his or her representative is bound by constitutional convention to follow and carry out the advice of the prime minister or cabinet in all matters. P.J. Boyce defines the Crown's reserve powers as those exercised without ministerial advice in circumstances requiring personal discretion. However, he argues that they still apply in only four situations: the appointment and dismissal of a prime minister and cabinet, requests for dissolution, and "enforcement of an election," a variant of appointment and dismissal. The governor general may only invoke his reserve power when the executive's advice or actions undermine "the very foundations of the political system." Prorogation does not figure into Professor Boyce's formula.

Her Majesty Queen Elizabeth II has revealed her own interpretation of her constitutional role and the extent of the Crown's reserve powers in the United Kingdom. Her private secretary, Sir William Heseltine, published in July 1986 the three principles that govern the relationship between the monarch and her prime minister.

> 1. The Queen enjoyed the right, and indeed the duty, to express her opinion on government policy to the Prime Minister,
>
> 2. The Queen had to act on the advice of her ministers, and
>
> 3. Communications between the Queen and the Prime Minister were confidential.[25]

The modern British view leaves little room for the monarch's discretionary use of the reserve power. Admittedly, the deference with which British politicians treat the Queen contrasts with some of the audacious requests made by the prime ministers to the governors general, but that audacity speaks more to the character of the prime ministers than to that of the governors general. The governor general should only invoke the reserve power in order to safeguard parliamentary democracy from collapse, not to punish an audacious prime minister. Professor Smith believes that "the problem with the reserve power today is not so much how to check the Crown's use of it as how to prevent the prime minister from abusing it."[26] The electorate, not the governor general, should judge a prime minister's audacity at the ballot box. Professor Dawson put this most eloquently:

> The advice given may be bad; it may be shortsighted; it may be foolish; it may even be dangerous – these considerations may induce the governor to remonstrate with his ministers and try to win them over to his point of view; but if they persist, his only course of action is to shrug his shoulders and acquiesce. The decision is not his, but that of his government, and eventually the people and their representatives will deal with those who have proffered the advice.[27]

Most scholars generally agree that under the "most exceptional circumstances", the governor general may reject the prime minister's advice. But scholars part ways on the definition and interpretation of these "most exceptional circumstances". Professor Hogg, for instance, believes that an imminent vote of confidence empowers the governor general to exercise discretion and reject the prime minister's advice. Professor Franks thinks that the governor general should reject the advice of the prime minister if a viable alternative to the present government exists. However, with respect to these "most exceptional circumstances," Professor Dawson identified two highly restrictive conditions that must be present in order for the governor general to override the prime minister's advice. The interpretation of the "most exceptional circumstances" should require the most restrictive of definitions given the 800-year development of Westminster parliamentarism that has transferred power from the monarch to cabinet and parliament "[...], and ultimately gave rise to full-fledged responsible government in the mid-nineteenth century."

Professor Dawson's conditions recognize that the reserve powers of the governor general should be interpreted as narrowly as possible. He indicates clearly that there must be no doubt of the wisdom of the governor general's decision to deny a prime minister's advice; indeed, "the governor general must be so sure of the inherent righteousness of his intervention and his popular vindication that he is willing to stake both his reputation and his office upon its general acceptance."[28]

The first necessary condition would be present if:

> "the operation of the usual constitutional procedures (as directed by cabinet) in the matter in question must be such that it would not simply involve some moderate delay or temporary inconvenience – it would have to perpetuate for some time a state of affairs which is plainly intolerable and a violation of the spirit and intent of the constitution."[29]

The second criteria that Professor Dawson sets is that: "there should also be no reasonable doubt whatever of the essential wisdom and justice of the governor's intervention." According to this, "if any such doubt is present, it constitutes prima facie evidence that the governor general should hold his hand."

Accordingly, "the most exceptional circumstances" are limited to two necessary conditions that might justify a governor general's refusal of the prime minister's advice: the advice offered by the prime minister must be an intolerable violation of the spirit and intent of the constitution over an extended period of time, and there can be absolutely no doubt as to the righteousness and constitutionality of the governor general's decision. The Harper-Jean prorogation of 2008 met neither of these conditions. The intersession of the prorogation lasted a total of six weeks and overlapped with the standard Christmas adjournment and therefore did not "perpetuate a state of affairs intolerable to the constitution." Rather, it is more akin to the "moderate delay or temporary inconvenience" that Professor Dawson specifically notes as insufficient to activate the governor general's discretionary power and reject the prime minister's advice. As to the second condition, the influx of literature asking "if the governor general made the right decision" clearly indicates that there *was* and still is doubt on the "inherent righteousness" of the decision. Thus, based on Professor Dawson's criteria, it simply cannot be argued that the governor general should, or could, have rejected the prime minister's advice in 2008.

Professor Dawson's conditions limit and constrain the reserve power and the capacity of the governor

general to reject the prime minister's advice. But he also tempers the former argument that "any assertion of the reserve power will be very extraordinary indeed." This strengthens the need for the retention of this prerogative because "it is an emergency device invoked to re-establish genuine democratic control at a time when the normal constitutional procedures have faltered and are in danger of being improperly and unscrupulously employed." Professor Dodek agrees that the governor general ought to act as "the safety valve" and "constitutional fire extinguisher," which implies a role limited to constitutional emergencies. Professors Brun and Tremblay also believe in minimal vice-regal intervention in a doctrine very similar to that of Professor Dawson: "'His or her intervention could not go beyond that which is necessary in order to allow for the proper functioning of the institutions from which the decision flows.'"[30] Professor Brun further contends that the governor general can only reject the advice of his or her prime minister if the latter's party suffered a clear defeat and no longer held the confidence of the new parliament, yet refused to resign, or clearly lost an election and refused to resign; therefore, in his estimation, prorogation does not fall under the Crown's reserve power. He also argues that the timing of Prime Minister Harper's advice to prorogue, when an election had occurred only a few weeks before, in no way contributed to the governor general's personal discretion. Professor Russell has argued in the past that "in this democratic age, the head of state or her representative should reject a prime minister's advice only when doing so is necessary to protect parliamentary democracy."

The use of the reserve power can exact a severe political and constitutional toll and significantly weaken both the offices of the prime minister and governor general, and the governor general and prime minister personally, and thus tarnish the dignity of the entire political system. Whatever their interpretation of the propriety of and lessons drawn from the King-Byng Affair of 1926, most Canadian scholars agree that it diminished the reputation of the Office of the Governor General for a time.

Jean Leclair and Jean-Francois Gaudreult-Desbien put forward the argument that perhaps, as a check on the powers of the prime minister, the governor general should be given even more discretion in matters of prerogative.[31] These proposals, however, contradict the very notion of reserve powers, which as Professor Dawson notes, by nature, can never become broader or be extended: "Prerogative powers … can shrink but clearly cannot be enlarged; for if a new executive power rests on valid precedent, it is no extension but merely revival, and if it is given new lease of life by act of Parliament it becomes a statutory power and not prerogative."[32] Awarding more discretion to the governor general would also repudiate the general trajectory of 800 years of Westminster history that have wrested power from the monarch. The *Bill of Rights* of 1689 that resulted from the Glorious Revolution declared "that the pretended power of suspending power of laws, by regal authority, without the consent of parliament, is illegal and that the pretended power of dispensing with laws, or the execution of laws, by regal authority, … is illegal."[33] These principles apply not only to the United Kingdom but to Canada as well. The Federal Court of Canada has noted that:

> The *Magna Carta (1215)*, the *Bill of Rights (1689*), and the *Act of Settlement (1701)* were arguably the first steps to curtail the absolute powers of the Crown and establish the concept of parliamentary sovereignty. They began a process of restricting the prerogatives of the Crown that continues to the present day.[34]

Professor Dawson has further noted that, "succeeding centuries have seen the reserve powers reduced and limited by various contractual agreements (such as the *Magna Carta*), by statutes (such as the *Bill of Rights*), and by simple disuse." The latter point that the reserve power can become more limited due to simple disuse applies not only to unwritten constitutional conventions, but even to the written constitution. For instance, even though the *Constitution Act, 1867* still formally includes the federal government's powers of reservation and disallowance, exercised by the political executive in the name of the Crown, they have become inoperable and have been considered dissolute for decades.[35]

English constitutionalist William Bagehot argued in 1867 that the monarch's reserve power to refuse royal assent no longer existed because no monarch had invoked it since 1707, which demonstrates that components of the reserve powers can become inoperable after about 150 years and that, in general, the Crown's authority becomes more narrow and limited in scope as it is entrenched in the political executive.[36] Professor Boyce also contends that the scope of the reserve power has become more limited and narrow over time, especially since the entrenchment of responsible government. Edward McWhinney agrees that the Crown's reserve power has diminished over time and points out that no monarch in the United Kingdom has refused even a request for dissolution since the second Great Reform Bill of 1867. He also suggests that by 2008, prorogation may no longer have legitimately fallen under the governor general's reserve power.

House of Commons Audrey O'Brien and Deputy Clerk Marc Bosc state that a governor general's refusal of a prime minister's advice to prorogue would be tantamount to the dismissal of the government – which contradicts the principle of responsible government.[37] In 1968, the Privy Council Office produced the *Manual of Official Government Procedure of the Government of Canada*, geared toward cabinet ministers and senior public servants as a comprehensive, authoritative reference on the workings of government. It definitively states that "the Governor General does not retain any discretion in the matter of summoning or proroguing Parliament, but acts directly on the advice of the Prime Minister."[38] No governor of the former Crown colonies from 1848 to Confederation and no Canadian governor general since 1867 has ever rejected a prime minster's advice to prorogue; if the Crown's reserve power ever applied to prorogation, more than 160 years of its non-use during responsible government have rendered it inoperable.[39] For all these reasons, the monarch or his or her representative ought to be obliged to grant a prime minister's request for prorogation if he retains the formal confidence of the House of Commons.

When the prime minister no longer commands the formal confidence of the House of Commons, the governor general can invoke the reserve power on any advice that the prime minister gives. Building on that principle, Professor Hogg contends that an *imminent* loss of confidence also frees the governor general from the obligation of carrying out the prime minister's advice and invokes her reserve powers because otherwise, "a Prime Minister could always avoid (or at least postpone) a pending vote of no-confidence simply by advising the prorogation (or dissolution) of the pesky Parliament." However, a basic overview of parliamentary procedure invalidates Professor Hogg's assertion and demonstrates that a government in fact cannot indefinitely avoid or postpone a vote of non-confidence via prorogation, because it necessarily results in a new session of parliament, which in turn necessitates a new Speech from the Throne.

The Address in Reply of the Speech from the Throne marks the first vote of confidence of any session, and parliament must debate this before conducting other business. The opposition can vote against this and thus defeat the government. The government can therefore only invoke prorogation *once* before the House of Commons could withdraw its confidence. In addition, the *Constitution Act, 1982* requires that parliament meet at least once annually. Parliament must convene in order, at the very least, to pass supply in the form of the budget and estimates; the bills associated with supply constitute votes of confidence on which the government cannot evade parliament's will. Professor Hogg did acknowledge, however, that the opposition still had the opportunity to cast a vote of non-confidence in the government upon the start of the second session of the 40th Parliament. For these reasons, no prime minister could use prorogation as a tool to evade parliament's will indefinitely, as some scholars have argued and used to support the claim that Governor General Michaëlle Jean should therefore have refused Prime Minister Stephen Harper's request for prorogation.

Conclusion

Unwritten convention, precedent, and history form the foundation upon which British parliamentarism and common law rest and from which they derive their authority and legitimacy. This principle of the importance of history and convention means that we must apply historical precedents and the existing body of knowledge to contemporary situations. By definition, Lord Dufferin set a precedent by granting the controversial prorogation of 1873, since none of his predecessors had done so under similar circumstances. While this case may not establish a *binding* precedent, Lord Dufferin's decision and his justifications should certainly have entered into calculus of the political actors in 2008 because of the numerous similarities between the two cases. Contrary to much of the present scholarship, since the King-Byng Affair involved dissolution, the principles and precedents drawn from it cannot properly be applied to prorogation because of the significant differences between prorogation and dissolution. Based on the work of Professors Dawson and Brun, the King-Byng Affair supports, if anything, the *limitation* of the Crown's reserve powers, and constituted an inappropriate intervention on the part of Lord Byng.

Taking into account the centuries of history that underpin the Westminster system of government and therefore also the Parliament of Canada, the Supreme Court of Canada has recognized that:

> The evolution of our democratic tradition can be traced back to *Magna Carta* (1215) and before, through the long struggle for Parliamentary supremacy which culminated in the English *Bill of Rights* of 1689, the emergence of representative institutions in the colonial era, and the development of responsible government in the 19th century.[40]

These events have served to vest power in Parliament and transfer royal prerogative from the monarch to cabinet. Any efforts to empower the Crown's representative would thus repudiate that important and binding history and threaten the principles of responsible government. The perplexing tendency

among some constitutional scholars in applying a case relating to dissolution to prorogation overlooks the fundamental differences between the two parliamentary devices. For instance, both Professor Peter Hogg, one of the foremost experts on the Canadian constitution, and Professor Franks have invoked the King-Byng Affair of 1926 as a point of reference for their views on the Harper-Jean prorogation of 2008, when in reality, if anything, the point of reference must surely be the Macdonald-Dufferin prorogation of 1873. Professor Franks suggested in an interview with the *Globe and Mail* on December 3, 2008 that Governor General Michaëlle Jean should have accepted Prime Minister Stephen Harper's advice to prorogue only on the condition that the government's power to appoint officeholders be suspended, as it is during an election, because an "unprecedented use of prorogation could validly be met with an unprecedented use of the reserve power."[41] Contrary to Professor Franks' assertion, the Macdonald-Dufferin prorogation bears a striking resemblance to the "unprecedented" Harper-Jean prorogation of 2008: they both saw a prime minister trying to escape controversy, a letter addressed to the governor general and signed by a significant number of Members of Parliament withdrawing their confidence informally in the government, and a prime minister asking the governor general for a prorogation of parliament in order to avoid an imminent vote of non-confidence.

This paper does not intend to ignore or gloss over the way that the prorogations of 1873 and 2008 unfolded in reality; clearly the majority of the political actors – certainly Lord Dufferin and Michaëlle Jean themselves – believed that the Office of the Governor General possessed the reserve power to accept or reject the prime minister's request. But based on the available evidence, we can only conclude that the governor general's reserve power *ought* not to apply to prorogation.

Some may argue that this paper has engaged in a pedantic debate over semantics; however, the debate is fundamental to the practice of parliamentary democracy in Canada. Prorogation and dissolution are not functionally, or even historically, comparable, as demonstrated by their different effects on the composition of the House and their respective uses in 1873 and 1926. Prorogation differs sufficiently from dissolution in that "the most exceptional circumstances" on which a governor general may reject the prime minister's advice should never apply to it. The historical erosion of the Crown's reserve power and the transfer of those prerogatives to the executive within the framework of responsible government limit the Crown's prerogative to reject a prime minister's advice to the most exceptional circumstances in order to protect parliamentary democracy from imminent collapse. The prorogation of 2008 certainly did not merit the governor general's intervention to reject the prime minister's advice. Furthermore, it is absolutely vital that the powers of the governor general not be confused with the quality of advice offered to the office by the prime minister. Finally, it would seem highly irresponsible for Canadians to return to a state of heightened monarchic discretion and undermine the pillars of our modern democracy and responsible government. For all of these reasons, it is unfathomable that a governor general could ever refuse a prime minister's request for prorogation.

Notes

1. Andrew Heard, "The Governor General's Suspension of Parliament: Duty Done or a Perilous Precedent," in *Parliamentary Democracy in Crisis*, ed. Peter Russell and Lorne Sossin (Toronto: University of Toronto Press, 2009): pp. 47-62.
2. C.E.S. Franks, "To Prorogue or Not to Prorogue" in *Parliamentary Democracy in Crisis*, pp. 33-46.
3. Peter Hogg, "Remarks on the Governor General's Discretionary Powers," Address to the Spring Seminar on the Role of the Governor General of the Canadian Study of Parliament Group, Ottawa, Ontario, (26 March 2010); Adam Dodek, "Fixed Election Dates and the Expansion of the Governor General's Power," Address to the University of Ottawa's Faculty of Common Law's Forum on "Canada's New Governor General: The Challenges Ahead", (Ottawa, Ontario, 28 September 2010); Barbara J. Messamore, "Conventions of the Role of the Governor General: Some Illustrative Historical Episodes," *Journal of Parliamentary and Political Law* (forthcoming 2011)
4. Peter Hogg, "The 2008 Constitutional Crisis: Prorogation and the Power of the Governor General," *National Journal of Constitutional Law* (2009-2010)
5. Henri Brun, "La monarchie réelle est morte depuis longtemps au Canada," *La Presse,* 4 December 2008.
6. Guy Tremblay, "La gouverneure générale doit accéder à une demande de prorogation ou de dissolution," *Le Devoir,* 4 December 2008.
7. R. MacGregor Dawson, *The Government of Canada.* 5th ed. (1970), revised by Norman Ward (Toronto: University of Toronto Press, 1947)
8. Charles B. Davison, "Prorogation: A Powerful Tool Forged by History," *Law Now* 34, no. 2 (November-December 2009): 1-5; Bruce M. Hicks, "British and Canadian Experience with the Royal Prerogative," *Canadian Parliamentary Review* (Summer 2010) pp. 19-20.
9. Although all bills, motions, debates, etc on the order paper are dropped, since 2003, prorogation has had almost no practical effect on Private Members' Business. Orders of the House also survive prorogation. Audrey O'Brien and Marc Bosc, *House*

of Commons Procedure and Practice, 2nd Ed. (Ottawa: House of Commons and Editions Yvon Blais, 2009), pp. 382-384, 479-482.

10. *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s. 50, reprinted in RSC 1985, App. II, No 5.; *Constitution Act, 1982*, s 4(1), behind Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
11. Barbara J. Messamore, "A Matter of Instinct: Lord Dufferin in the Pacific Scandal," in *Canada's Governors General, 1847-1878: Biography and Constitutional Evolution* (Toronto: University of Toronto Press, 2006): 148-177; Joseph Pope. *Correspondence of Sir John Macdonald: Selections from the Correspondence of the Right Honourable Sir John Alexander Macdonald, G.C.B.* (Toronto: Oxford University Press, Canadian Branch, 1921), p.: 219.
12. Messamore 2006,148-177; William Leggo, *The History of the Administration of the Right Honourable Frederick Temple, Earl of Dufferin, K.P., G.C.M.G., K.C.B., F.R.S., Late Governor General of Canada* (Montreal: Lovell Printing and Publishing Company, 1878): 124-182; Hariot Hamilton-Temple-Blackwood, (Marchioness of Dufferin and Ava). *My Canadian Journal, 1872-1878.* (London: John Murray, 1891), p. 104. Her Grace the Lady Dufferin wrote in her journal on Thursday, 14 August 1873 that "The political excitement is fearful, and we hear that the Opposition is going to ask for the Governor-General's recall!! So expect us home in disgrace."
13. Leggo, *p.*169.
14. Leggo, p. 181.
15. David E. Smith, "The Crown and the Constitution: Sustaining Democracy?" Presentation, Conference on the Crown (Ottawa, Ontario, 10 June 2010): 5; Messamore 2011 (forthcoming).
16. Peter Russell and Lorne Sossin, "Introduction," in *Parliamentary Democracy in Crisis*, ed. Peter Russell and Lorne Sossin (Toronto: University of Toronto Press, 2009), pp. xv.
17. Edward McWhinney,"The Constitutional and Political Aspects of the Office of the Governor General," *Canadian Parliamentary Review* (Summer 2009), pp. 7-8.
18. Peter Russell and Lorne Sossin, *op.cit.* pp. 137-151.
19. Franks 2009, p. 33.
20. Michael Valpy, "The 'Crisis': A Narrative," in *Parliamentary Democracy in Crisis*, ed. Peter Russell and Lorne Sossin (Toronto: University of Toronto Press, 2009), p. 12-13.
21. Peter J. Boyce, *The Queen's Other Realms: The Crown and Its Legacy in Australia, Canada, and New Zealand.* (Annandale, NSW: The Federation Press, 2008), p. 58.
22. Donald A. Desserud, "The Governor General, the Prime Minister and the Request to Prorogue," *Canadian Political Science Review* 3, no. 3 (2009), pp.40-54.
23. Leggo 1878, p. 139.
24. Dawson 1947, p. 11
25. Boyce 2008, p. 48.
26. David E. Smith, *The Invisible Crown: The First Principle of Canadian Government* (Toronto: University of Toronto Press, 1995), p. 57.
27. Dawson 1947, p. 161.
28. Dawson 1947, p. 163.
29. *Ibid*
30. Andrew Heard, *Canadian Constitutional Conventions* (Toronto: Oxford University Press, 1991), p 22.
31. Jean Leclair and Jean-Francois Gaudreult-Desbien, "Of Representation, Democracy, and Legal Principles: Thinking about the *Impensé*," in *Parliamentary Democracy in Crisis*, pp. 105-118.
32. Dawson 1947, p. 147.
33. Canada. Royal Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police. *Second Report: Freedom of Information under the Law*, Volume 1 (Ottawa: Her Majesty the Queen in Right of Canada, August 1981), p. 393.
34. *The Matter of Omar Khadr and the Prime Minister et al.*, [2010] FC 715 at para. 59.
35. Canada. Department of Justice, *Disallowance and Reservation of Provincial Legislation*, G. V. La Forest, Reprinted 1965 (Ottawa: Her Majesty the Queen in Right of Canada, 1955), pp. 13-22, among others.
36. William Bagehot, *The English Constitution*. (London: Collins, 1963)
37. O'Brien and Bosc 2009, p. 56.
38. Canada. Privy Council Office, *Manual of Official Procedure of the Government of Canada,* Henry F. Davis and André Millar. (Ottawa, Her Majesty the Queen in Right of Canada, 1968), p. 150.
39. Messamore 2011 (forthcoming), Hogg 2009-2010, 2.
40. *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 63.
41. Michael Valpy, "Going Where No Governor General Has Gone Before," *Globe and Mail,* 3 December 2008.