

# Harper's New Rules Revisited: A Reply to Knopff and Snow

*This article offers a response to arguments put forward by Rainer Knopff and Dave Snow in the Canadian Parliamentary Review about the 2008 prorogation controversy. In "Harper's New Rules' for Government Formation: Fact or Fiction?" (Vol. 36, No. 1), Knopff and Snow dismiss the theory that the Conservative government and its well-known supporters in the punditry believed that changes in partisan control of parliamentary government could only occur following fresh elections, thereby establishing "new rules". Instead, they suggest the arguments of government supporters at the time, most notably those of political scientist Tom Flanagan, fit within the mainstream of Canada's parliamentary tradition and engaged with an "older consensus" articulated by constitutional expert Eugene Forsey in *The Royal Power of Dissolution*. In his response to this piece, the author is critical of Flanagan's engagement with Forsey's book-length argument and suggests Forsey's conditions for dissolving parliament and holding a new election were not met in the face of the proposed coalition government in 2008.*

## David Schneiderman

What constitutional sense can we make of the prorogation controversy of December 2008? Prime Minister Harper claimed that the proposed Liberal-NDP coalition could not take power without a fresh election. Anything short of a vote flouted democratic principles. Conservative talking points alleged this amounted to a 'coup d'état.' Opinion writers Tom Flanagan<sup>1</sup> and Michael Bliss<sup>2</sup> jumped into the fray, Flanagan alleging that the coalition's "apologists didn't pay attention in Political Science 101" and instead promoted a "head-spinning violation of democratic norms."<sup>3</sup> The opposition's conceit, maintained Bliss, was that "they can legally succeed in what millions of Canadians see as the overturning of the outcome of the democratic election, and do it without giving Canadians the ultimate say in the matter."<sup>4</sup> Could not governments change hands without fresh elections? Though coalition governments at the federal level have mostly been the exception,

one would think that this was entirely consistent with Canadian parliamentary traditions.

For this reason, Peter Russell felt the need to restate what he called the "golden rule." First, parliamentary elections "are not like hockey games." Party leaders do not "win the right to govern simply by leading the party that gets the most seats," rather, they have only the privilege of forming a government that has the confidence of a majority of the House of Commons.<sup>5</sup> Second, under parliamentary rules of government, if Harper lost the confidence of the House, the governor general could call on the coalition government, led in the interim by Stéphane Dion, if it had a reasonable prospect of securing majority support. Russell coined the term "Harper's new rules" to describe these new terms of engagement.<sup>6</sup> Aucoin, Jarvis and Turnbull agreed that "changing the government without an election has always been considered a possible outcome following the defeat of a government on a vote of confidence."<sup>7</sup> The deep disagreement over what the constitutional rules entailed during this episode, they argued, lent credence to their view that the absence of clear rules regarding the functioning of important features of parliamentary democracy undermined the operation of responsible government in Canada.

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The problem with the views of the Prime Minister and his supporters, then, was that it seemed deeply at odds with history and tradition.<sup>8</sup> Conservatives, moreover, were uncharacteristically slow to identify how their views fit within that tradition. Five years after the event, Rainer Knopff and Dave Snow attend to this deficiency by claiming that the Prime Minister intended to lay down no new rule that the defeat of a minority government always results in a new election.<sup>9</sup> They respond specifically to Russell and Aucoin, Jarvis and Turnbull's characterization of "Harper's new rules": that parliamentary elections result in the election of the prime minister and that the prime minister cannot be changed without another election.<sup>10</sup> This characterization of Conservative talking points and editorial opinion, Knopff and Snow argue, is a manufactured one.<sup>11</sup> Neither Harper nor his proxies, like Flanagan, promoted an "elections only" view of governmental transition. They made no claim that a change of government necessitates a fresh election in every case, only in *this* case. On most other occasions – what they call "normal" circumstances – no election would be warranted.<sup>12</sup> "Harper's new rules," they conclude, "turn out to be rather mythical."<sup>13</sup>

*"Normally," Flanagan wrote, since "the last election was so recent, a defeated prime minister should not expect a new election, and the opposition should get a chance to govern. But this is not a normal situation."*

Both Russell and Aucoin, Jarvis and Turnbull looked to (former Harper advisor) Tom Flanagan for an explanation of the 'basic tenets of the Conservative's version of the constitution.'<sup>14</sup> Regrettably, Flanagan never laid out an explanation in any comprehensive way. Rather, all that the critics referred to was a short editorial opinion published in the *Globe and Mail* in January 2009, as the crisis was winding down.<sup>15</sup> There, Flanagan maintained that electing the prime minister is one of the "most important decision[s] in modern politics," in which case, "a gross violation of democratic principles would be involved in handing government over to the coalition without getting approval from the voters."<sup>16</sup> Flanagan's editorial opinion looked very

much like an insistence, without qualification, on an election whenever there is a change of government.

### **"A Gross Violation of Democratic Principle"**

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The problem, Knopff and Snow argue, is that the critics ignored a Flanagan editorial opinion published one month earlier<sup>17</sup> which they claim, "thoroughly fits into the older consensus" about when dissolution (though not prorogation) should occur.<sup>18</sup> Flanagan claimed that criteria articulated by the venerable constitutional authority, Eugene Forsey, had been satisfied by the threat of the coalition government, warranting a new election. "Normally," Flanagan wrote, since "the last election was so recent, a defeated prime minister should not expect a new election, and the opposition should get a chance to govern. But this is not a normal situation." Flanagan then cited Forsey's book-length defence of Lord Byng's refusal to grant Prime Minister Mackenzie King parliamentary dissolution in *The Royal Power of Dissolution of Parliament in the British Commonwealth*.<sup>19</sup> Even Forsey admits, observed Flanagan, that if (quoting Forsey) "some great new issue of public policy had arisen, or there had been a major change in the political situation" the Governor General would have been required to accede to King's request. "The emergence of the opposition coalition has satisfied both those conditions for going back to voters," Flanagan concluded. This is because Liberal leader Stéphane Dion "explicitly rejected" the prospect of a coalition with the NDP during the course of the 2008 electoral campaign. Bringing in the Bloc Québécois as a "supporting partner," though not a formal coalition partner, is "an even more radical step," maintained Flanagan. This is why it is "preposterous," he wrote, "to install a Bloc-based coalition in power without giving voters a chance to discuss it."

Knopff and Snow claim that Flanagan's engagement with this "older consensus," articulated by Forsey in *The Royal Power of Dissolution*, situates Flanagan within the mainstream of Canada's parliamentary tradition. That should be sufficient, they maintain, to dispense with claims about "new rules," etc. But, did Flanagan engage with that tradition, in general, and Forsey's text, in particular? Did the circumstances of December 2008 satisfy Forsey's criteria of "a great new issue of public policy" or a "major change in the political situation"? This begs the question: what are the parameters of that "older consensus"?

It is important, before answering this question, to acknowledge that in December 2008, the Prime Minister merely was seeking prorogation of a parliamentary



The prorogation controversy of 2008-2009 prompted many Canadians to become more engaged and knowledgeable about parliamentary procedures. Above: January 23, 2010 Parliament Hill prorogation demonstration.

session and not the dissolution of Parliament. The circumstances therefore concerned a less drastic request and so lessened the stakes considerably. Yet the terrain over which there is disagreement is whether dissolution would be warranted in the case of a change of government – precisely the object of Forsey’s book. From this angle, the stakes remain quite high, hence, the need to get the extant rules right.

### What Are the Parameters of the ‘Older Consensus’?

Forsey’s authoritative tome is an exhaustively researched defence (remarkably, this was Forsey’s doctorate hastily completed while teaching full-time at McGill University<sup>20</sup>) of the Governor General’s refusal to dissolve Parliament in 1926 at the request of a prime minister facing an impending motion of censure.<sup>21</sup> Rather than accede to Mackenzie King’s request for dissolution, Governor General Byng called upon Arthur Meighen, leader of the Conservative opposition, to form the government. That government fell in less than a week.<sup>22</sup>

Resisting the proposition that a prime minister is entitled automatically to dissolution upon demand, Forsey acknowledged that there are circumstances in which dissolution could be granted. No government was entitled to dissolve Parliament unless, among other things, some “great new issue of public policy had arisen” or “there had been a major change in the political situation,”<sup>23</sup> though the precedent on this front was mixed.<sup>24</sup> Forsey tended to treat “some great new issue of public policy” and “major change in the political situation” as interchangeable.<sup>25</sup> Flanagan contended that, by proposing that which Dion explicitly rejected during the September 2008 campaign, namely a coalition government, Dion “wrought a *fundamental change* in the political situation because it involved an entire potential government, not just this or that policy” and so satisfied Forsey’s “conditions” warranting dissolution and a new election.<sup>26</sup>

Let us accept, for the moment, that a “great issue of public policy” or “major change in the political situation” warrants dissolution (as mentioned,

the evidence of established practice is equivocal). Forsey's lawyerly scrutinizing of the record nowhere suggests that coalitions could not legitimately arise after an election or that such a coalition satisfied these conditions. To the contrary, Forsey considers coalition governments, both before and after elections, as a foreseeable response to political exigencies. He expressly contemplates, for instance, coalitions arising in response to repeated dissolutions.<sup>27</sup> More to the point, in his response to A.B. Keith's proposal that dissolution be granted automatically upon the Prime Minister's request,<sup>28</sup> Forsey suggests otherwise. Instead of dissolution, Forsey asks, why should the electorate not "take the consequences [of a prior election] in the form of a coalition or a series of minority Governments?"<sup>29</sup> Coalitions may be short lived, Forsey insists, in which case might "it not be the wish of the House, and also the country, that there should be a new coalition, or a new minority Government with independent support from another party, without a general election?"<sup>30</sup> Note that Forsey envisages "new" coalitions, not only those that are floated during election campaigns. Forsey expressly contemplates a scenario where two parties might join together after an election, in a passage that deserves to be quoted at length.<sup>31</sup>

If two Opposition parties, hitherto at issue on some great question of public policy, drop their opposition to each other and 'fuse', then it certainly seems reasonable for the minority Government to challenge the new, fused party in the country. But if the opposition 'coalition' is merely a temporary arrangement for the purposes of the division lobby; if it expresses no more than purely negative agreement that the existing Government is undesirable; then it may be questioned whether, in all circumstances, it is reasonable that a minority Government should be granted a dissolution.

The Liberals and NDP appeared to have no plans of forming a coalition – indeed, we were reminded that Liberal leader Dion expressly rejected it<sup>32</sup> – until precipitated by the events of November 2008. In the face of a mounting global economic crisis, the government's November 27 financial statement threatened to withdraw per-vote political subsidies for all federal political parties, cap public service wages, temporarily suspend the right to strike, and remove pay equity claims from the Canadian Human Rights Commission jurisdiction.<sup>33</sup> As for the government's fiscal prospects, Minister of Finance Jim Flaherty predicted small budget surpluses in the coming years.<sup>34</sup> This prompted the opposition parties to immediately begin scheming in advance of a looming confidence vote. This resembled the scenario of a temporary coalition rather than one where political parties, formerly in disagreement on

some great issue of public policy, change their views and 'fuse' into a single new party. It is reasonable to question, then, whether a minority government should be granted dissolution and an election held in the circumstances of 2008 according to Forsey's own discussion of the matter.

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Australian precedent in 1909 suggests that even in cases of 'fusion,' it may be reasonable not to accede to a request for dissolution. According to Justice H.E. Evatt, parties in 1909 were divided over "great questions of public policy: immigration and the land tax, and defence."<sup>35</sup> During the election campaign, there was no prospect of any cooperation forthcoming between the two non-Labour opposition parties (the Protectionists and the Free Traders). Negotiations toward a coalition (the so-called "Fusion" government) between opposition parties was made even more difficult because some members of the proposed coalition were of the view that the electorate in 1906 had been led to believe that no coalition was possible.<sup>36</sup> The threatened Labour government described the coalition as a "monstrous combination" that was "hatched in darkness."<sup>37</sup> The Governor General, Lord Dudley, however, refused Prime Minister Fisher's request for dissolution.<sup>38</sup> The governor general, Evatt concludes, "proceeded upon a principle which was not out of accord with what until then had been accepted as Australian practice."<sup>39</sup> A.B. Keith described the exercise of discretion in this case as "unwise" and "contrary to constitutional usage."<sup>40</sup> This was not the case, maintained Evatt, though it "may not have been wisely exercised."

#### **"This Changes Everything"**

Could it be that the role the Bloc Québécois would play in propping up the proposed coalition gave rise to some great new issue of public policy that then warranted an election?<sup>41</sup> Flanagan, in his 2008

editorial, maintained that this was “an even more radical step” than the proposed Liberal-NDP coalition government.<sup>42</sup> This is particularly awkward for Harper and his former adviser Flanagan to have argued. In a co-authored essay from late 1996, they precisely contemplated a formal pact with the Bloc after a federal election, calling for the construction of a new conservative alliance “at least of the two Anglophone sisters [the Progressive Conservative and Reform Parties] and perhaps ultimately including a third sister.”<sup>43</sup> The “third sister” is an allusion to the Bloc Québécois, whose rural supporters they describe as “voters who would not be out of place in Red Deer, except that they speak French rather than English.”<sup>44</sup> We also know that as Conservative opposition leader, Stephen Harper proposed some sort of arrangement with the Bloc and NDP in a September 9, 2004 joint letter to then Governor General Adrienne Clarkson during the life of the minority Liberal government of Paul Martin.<sup>45</sup> The letter described the opposition parties as “together constitut[ing] a majority in the House,” and as “hav[ing] been in close consultation.” The joint letter continues: “We believe that, should a request for dissolution arise this should give you cause, as constitutional practice has determined, to consult the opposition leaders and consider all of your options before exercising your constitutional authority.”<sup>46</sup> Documents proposing a joint speech from the throne even were circulating.<sup>47</sup> It is “without question,” explained then-federal NDP leader Jack Layton, that Harper was prepared to enter, if not a formal coalition, into “some kind of relationship with the Bloc.”<sup>48</sup> So, the Bloc’s support hardly satisfied the “great issue of public policy” or “major change in the political situation” criteria articulated by Forsey.

The second of these two events are acknowledged by Knopff and Snow for the purposes of showing that Harper did not hold to an elections-only view prior to 2008.<sup>49</sup> Whatever Harper’s earlier views, Knopff and Snow fail to acknowledge that the Bloc’s support of the coalition would not have satisfied Forsey’s conditions for dissolution. This, after all, was merely a ‘temporary arrangement,’ expressing ‘no more than purely negative agreement that the existing Government [was] undesirable.’

### “Mythical New Rules”

Indeed, Knopff and Snow decline altogether to take a position on whether Forsey’s conditions were met in 2008.<sup>50</sup> They admit only that the question is “of course, contentious and debatable.”<sup>51</sup> Instead, they argue that, by reason of Flanagan’s engagement with Forsey’s

scouring of the commonwealth record on dissolution, it was not the case that Flanagan (or those in agreement with him) held to an elections-only rule in the case of the defeat of a minority government. “Harper’s new rules,” they claim, “turn out to be mythical” – the critics have set up only “straw men” to knock down.<sup>52</sup> It turns out, in fact, that Flanagan’s engagement with Forsey’s careful account was superficial and muddled. It amounted to a denial of precedent and flew in the face of Forsey’s own words on the subject. If not a “new rule,” it verges on the fanciful.

### Notes

- 1 Tom Flanagan, ‘Only Voters Have the Right to Decide on the Coalition’ *The Globe and Mail* (9 January 2009) A13.
- 2 Michael Bliss, ‘Playing Footsie With the Enemy’ *National Post* (4 December 2008) A23.
- 3 Flanagan, ‘Only Voters Have the Right to Decide on the Coalition.’
- 4 Bliss, ‘Playing Footsie With the Enemy.’
- 5 Peter H. Russell ‘Learning to Live With Minority Parliaments’ in Peter Russell and Lorne Sossin, eds., *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009), pp. 136-49 at 137.
- 6 Russell, *ibid.* at 141.
- 7 Peter Aucoin, Mark D. Jarvis, and Lori Turnbull, *Democratizing the Constitution: Reforming Responsible Government* (Toronto: Emond Montgomery Publications, 2011) at 173.
- 8 Lawrence Leduc, ‘Coalition Government: When it Happens, How it Works’ in Peter Russell and Lorne Sossin, eds., *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009), pp. 123-35.
- 9 Rainer Knopff and Dave Snow, “‘Harper’s New Rules’ for Government Formation: Fact or Fiction?” *Canadian Parliamentary Review* 2013 (Spring): 18-27.
- 10 Russell, p. 141.
- 11 Knopff and Snow, “‘Harper’s New Rules’ for Government Formation,” p. 25.
- 12 Knopff and Snow, “‘Harper’s New Rules’ for Government Formation,” p. 23. In most other circumstances, they write, ‘a governor general’s refusal of early dissolution remains entirely legitimate’ (at p. 23).
- 13 Knopff and Snow, “‘Harper’s New Rules’ for Government Formation,” p. 25.
- 14 Aucoin, Jarvis, and Turnbull, p. 175.
- 15 Tom Flanagan, ‘Only Voters Have the Right to Decide on the Coalition’ *The Globe and Mail* (9 January 2009) A13.
- 16 Flanagan, *ibid.*

- 17 Tom Flanagan, 'This Coalition Changes Everything' *The Globe and Mail* (8 December 2008) A15.
- 18 Knopff and Snow, "'Harper's New Rules" for Government Formation,' p. 19.
- 19 Eugene A. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (Toronto: Oxford University Press, 1943).
- 20 Helen Forsey, *Eugene Forsey: Canada's Maverick Sage* (Toronto: Dundurn, 2012), p. 37.
- 21 Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth*, pp. 132, 145.
- 22 Forsey, *ibid.*, pp. 131-39.
- 23 Forsey, *ibid.*, p. 262.
- 24 Forsey, *ibid.*, pp. 265, 266. Forsey refers to Sir Robert Peel as originating authority for the proposition, later endorsed by Lord John Russell (*ibid.*, pp. 265, 267). Todd affirms that there must be 'an important political question ... at issue.' See Alpheus Todd, *Parliamentary Government in the British Colonies*, 2nd ed. (London: Longman's, Green, and Co., 1894) pp. 773-74. See also Arthur Berriedale Keith, *The King and the Imperial Crown* (London: Longmans, 1936) p. 177 ('an important change of policy').
- 25 Forsey, *ibid.*, p. 265; cf. Eugene A. Forsey, 'Professor Angus on the British Columbia Election: A Comment' *The Canadian Journal of Economics and Political Science* (1953) 19: 226-30, p. 228.
- 26 Flanagan, 'This Coalition Changes Everything.' (emphasis added).
- 27 Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth*, p. 93.
- 28 A.B. Keith, *The Constitution of England from Victoria to George VI, Volume I* (London: Macmillan, 1940), pp. 86-87. 'Normally,' Keith writes 'the electorate should be allowed to decide, for it may be held to take the consequences of returning a dubious verdict in the previous contest.'
- 29 Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth*, p. 111.
- 30 Forsey, *ibid.*, p. 116.
- 31 Forsey, *ibid.*, p. 117.
- 32 Stephen Chase, 'Dion Rules Out Coalition' *The Globe and Mail* (23 September 2008).
- 33 Finance Canada, "Economic and Fiscal Statement" (27 November 2008) online at <http://www.fin.gc.ca/ec2008/speech/speech-eng.html> (accessed 8 August 2012).
- 34 Les Whittington and Bruce Campion-Smith, 'Showdown Looms Over "Mean" Tory Blueprint' *Toronto Star* (28 November 2008).
- 35 Herbert Vere Evatt, *The King and His Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions* (London: Oxford University Press, 1936), c. VI. The episode is discussed in Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth*, pp. 35-37 and in Henry Gyles Turner, *The First Decade of the Australian Commonwealth: A Chronicle of Contemporary Politics, 1901-1910* (Melbourne: Mason, Firth and McCutcheon, 1911) pp. 214-21.
- 36 Evatt, *The King and His Governors*, p. 51.
- 37 Evatt, *ibid.*
- 38 Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth*, p. 37.
- 39 Evatt, *The King and His Governors*, p. 54. Fischer was returned to government in the election one year later (at p. 53).
- 40 Arthur Berriedale Keith, *Responsible Government in the Dominions, Vol. 1* (Oxford: Clarendon Press) p. 165.
- 41 Even Michael Ignatieff, Dion's immediate successor as leader of the Liberal Party, claims that the coalition lacked 'legitimacy and stability' in his post-political reflections in *Fire and Ashes: Success and Failure in Politics* (Toronto: Random House Canada, 2013) at 112.
- 42 Flanagan, 'This Coalition Changes Everything.'
- 43 Stephen Harper and Tom Flanagan, 'Our Benign Dictatorship' *The Next City* (Winter 1996-97) 2(2): 34-39, 54-57 at 54.
- 44 Harper and Flanagan, *ibid.* at 55.
- 45 Lawrence Martin, *Harperland: The Politics of Control* (Toronto: Viking Canada, 2010) at p. 183.
- 46 Brian Topp, *How We Almost Gave the Tories the Boot: The Inside Story behind the Coalition* (Toronto: Lorimer, 2010) at p. 34.
- 47 Joanna Smith, 'Alliance, PCs eyed 2000 deal with us, says Bloc leader' *The Toronto Star* (4 December 2008).
- 48 Martin, *Harperland* at p. 183.
- 49 Knopff and Snow, "'Harper's New Rules" for Government Formation,' p. 24.
- 50 Knopff and Snow, *ibid.*, p. 23.
- 51 Knopff and Snow, *ibid.*
- 52 Knopff and Snow, *ibid.*, p. 25.