

# *New Brunswick's 'Hung Legislature' of 2018: Completing the Trilogy of Legislative Oddities*

During the past 30 years, New Brunswick's Assembly has witnessed a trio of legislative oddities. First, in 1987, one party won every seat in the Assembly, meaning there was no opposition presence among MLAs. Second, in 1994, changing standings among caucuses in the Assembly created a situation where two opposition parties had an equal number of seats and vied to be recognized as the Official opposition. Third, and most recently, a general election resulted in New Brunswick's first minority parliament since 1920. The incumbent government attempted to demonstrate it retained the confidence of the Assembly despite losing its majority, but was defeated when the House met to consider the Address in Reply to the Speech from the Throne. After briefly summarizing the first two oddities, the authors deal substantively with the third and explain how the precarity of a minority parliament and policy differences among the four parties in the Assembly could mean the electorate will return to the polls well in advance of the province's next fixed election date.

**Stewart Hyson and Don Desserud**

**N**ew Brunswick's general election, held September 24, 2018, produced an inconclusive result. The incumbent Liberal party won 21 of the 49 seats and captured 38 per cent of the popular vote. The Progressive Conservative (PC) party won 22 seats yet received 32 per cent of the popular vote. The remaining six seats were evenly split between the Green Party and the People's Alliance. For only the second time in its history – the first occurring almost a century ago – New Brunswick would have a minority government. This is a remarkable situation; but perhaps even more interesting is that this result constitutes the third and latest legislative oddity the province has experienced within the past 30 or so years.

Until now, New Brunswick has almost always been governed by a party with a majority in the Assembly.<sup>1</sup> Only the Liberals or the PCs have ever formed the government in New Brunswick, and except for 1991 when the upstart Confederation of Regions Party (CoR) won eight seats, only these two parties have ever formed the Official Opposition. In 1987, the Liberals won every seat in the legislative assembly. That was the first oddity. By 1994, with the PCs and CoR tied with six seats each in opposition, the Speaker had to rule as to which party was to form the Official Opposition. That was the second oddity. Now we have a third oddity: a minority government. With only the most tenuous hold on power, this minority government took control after orchestrating a defeat of the Address in Reply to the Speech from the Throne.

The first two oddities were examined in previous articles that appeared in this periodical and will be briefly recalled below in later discussion. The most recent oddity, however, poses an interesting dilemma: how will New Brunswick's elected parties navigate this precarious legislature?

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### **Oddity One: A One-Party Legislature**

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In 1987, the Liberals under the leadership of Frank McKenna won all 58 of the Assembly's seats with approximately 60 per cent of the popular vote. This situation created interesting logistic problems within the Assembly. What would Question Period look like with no opposition parties? Who would sit on the "opposition" benches? What, if any, role would the parties without seats play in the functioning of the Assembly?

McKenna's solution to the seating arrangement was to divide his cabinet into two groups: one group sat to the right of the Speaker, and the other on the left. The Premier took a seat on the left. Question Period consisted of Liberal backbenchers lobbing rather soft questions at cabinet ministers. The Legislative Library's research staff and services were expanded, in part to allow senior but non-elected PC and NDP officials to better prepare their party positions on policy issues, and both parties were offered free office space. As well, these parties were permitted one non-voting member on the Legislative Administration Committee. When the house was in session, opposition party leaders were invited to sit on the benches normally reserved for the media. Finally, the day after major announcements was set aside as a "media day," where the opposition parties could present their respective opposing positions to the gathered press corps.<sup>2</sup>

### **Oddity Two: Tied opposition parties**

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Some of the 1987 changes worked; others did not. So, the results of the 1991 election, which brought eight members of the CoR Party into the House together with three PCs and one NDP MLA came as a relief to some. At least now there was an Official Opposition. But the inexperienced CoR members were not able to maintain a united front, and two CoR MLAs eventually chose to sit as Independents. In addition, by the fall of 1994 the PCs had won three by-elections and were now tied with CoR in the House. The standings were: Lib 43, CoR 6, PC 6, Ind 2 and NDP 1.

Recognition as the Official Opposition brings a party status, privileges and financing. The PCs immediately claimed that their historical position in New Brunswick politics meant that their party was far more suited to form the Official Opposition than the disintegrating CoR Party. However, CoR disagreed, arguing that as the existing Official Opposition, it

should retain its status. In the end, Speaker Shirley Dysart decided in favour of the CoR Party. In her ruling on December 16, 1994, she explained that given the two parties were tied, incumbency and convenience (as the next election was likely just over a year away) were enough to conclude the CoR party should remain as the Official Opposition.<sup>3</sup>

Both these two controversies proved to be short-lived. This is where we see one of the more appealing attributes of the Westminster model: it is remarkably adaptable to new situations. As C. E. S. Franks observed, "[there] is room within the Westminster model of [parliamentary] government for many different configurations of power."<sup>4</sup> While the defining constitutional features of the Westminster model are essential, New Brunswick's one-party legislature and Dysart's ruling reveal just how flexible the model can be. The same notion of adaptability is also valid when we consider the current oddity posed by the hung legislature and minority government.

### **Oddity Three: New Brunswick's Hung Legislature and Minority Government:**

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#### *Constitutional Perspective*

The unusual results of 2018 left many New Brunswickers puzzled on election night as to which party had "won" the election. The constitutionally-correct answer was both simple and unsatisfying: until the House met and dealt with the Address in Reply to the Speech from the Throne, determining the victors of the election was not possible.<sup>5</sup>

Lessons acquired from Eugene Forsey's account<sup>6</sup> of the federal "King-Byng" affair of 1925-26 and other similar experiences are worth recalling. Constitutionally, the first minister (prime minister or premier) is not directly elected by the electorate but is appointed by the Queen's representative. When one party wins a majority, this appointment is a foregone conclusion. But if no party has a majority, the premier or prime minister will be the person who can command the support of most of the elected members. In pure constitutional terms, the incumbent government always has the right to meet the house to see whether it can demonstrate majority support, regardless of the election outcome. But, when majority support is unlikely, the normal practice is for the premier or prime minister to "read the writing on the wall" and resign before the house meets. Peter Hogg has wondered whether this is now a "constitutional convention."<sup>7</sup>

Sometimes, as in the case of British Columbia's general election of May 2017, it is not obvious which party will be able to gain support from MLAs who are Independent or members of smaller party caucuses. In such a situation, the constitutional right of the incumbent government to meet the House kicks in. Then it becomes a question of determining whether the elected members will support the government. The first chance for the Assembly to make its support known comes with the Speech from the Throne. After the election of the Speaker, followed by a Throne Speech and the presentation of the *pro forma* bill, a debate ensues, and the House is asked to vote on what is known as the "Address in Reply to the Speech from the Throne." This is basically the legislative assembly's response to the executive's presented agenda.

There are other means by which governments can be defeated and lose the confidence of the House.<sup>8</sup> But the vote on the Address is the first and the most conclusive. If the government loses this vote, then the first minister is constitutionally required to resign or ask for a dissolution. The latter is unlikely to be granted when the new legislature is meeting just after a general election. Therefore, normally the government would resign, and the Queen's representative would ask the leader of the party best able to find majority support in the House to be the new premier or prime minister.

This is what happened in New Brunswick. Premier Brian Gallant insisted on his right to meet the legislature and have the Lieutenant-Governor deliver a speech from the throne. Before the Throne Speech can be delivered, the House had to choose a speaker. The MLAs of the other three parties (PC, Green, and PA) publicly announced that they would not allow their names to stand for election as Speaker. Meanwhile, Liberal MLAs also declared their unwillingness to serve as speaker for fear of further weakening their numbers. Finally, Liberal MLA Daniel Guitard did agree to allow his name to go forward, and he was duly declared Speaker.

Speakers only vote in the case of a tie, and do so respecting the conventions of the casting vote. New Brunswick has seen such a situation before: in 2004, when the government and opposition had the same number of members on the floor, Speaker Bev Harrison was called upon to break ties continually. However, the situation facing Gallant was more dire. His total votes on the floor now numbered just 20. Even with the Green Party's three votes, Gallant's government

could only muster 23 votes. The combined strength of the PCs and the People's Alliance MLAs totaled 25 votes. After an attempt to amend the Throne Speech by the Liberals, the combined PC and People's Alliance MLAs were able to defeat the Gallant Liberal government. They proposed an amendment to the government motion to accept the Throne Speech that declared their lack of confidence in the Gallant government. That amendment was passed, and the amended motion, to not accept the Throne Speech, was also passed.

Following his government's defeat on November 2, 2018, Premier Gallant reportedly walked to the Lieutenant-Governor's residence and submitted his resignation.<sup>9</sup> Fortunately, Lieutenant-Governor Jocelyne Roy-Vienneau had hosted a vice-regal conference in the summer of 2018 that had focused on minority governments and parliamentary rules and procedure. She was thus familiar with the constitutional situation before her and how to deal with it. She had the recent BC example to guide her as well.<sup>10</sup>

The Lieutenant-Governor accepted Gallant's resignation and called upon Higgs to form a new government. Guitard decided to remain as Speaker (likely to the relief of Higgs), and so the PC government was not weakened by having to find one of their own to take the chair. With the support of the People's Alliance, Higgs was able to win the legislature's support on November 30, 2018 by a similar margin of 25 to 23 for his PC government's Throne Speech.<sup>11</sup>

#### *Party Politics Perspective*

The constitutional question centred on the pivotal role played by the lieutenant-governor, the convoluted election of the Speaker, and the attempt by the Liberal government to find cross-party support for its continued existence. The Westminster system proved resilient: a new government was chosen with a minimum of disruption. However, there is also a more "practical" dimension in play in New Brunswick, one which involves party politics and leadership and above all, compatibility. It is the lack of the latter that may eventually trip up the Higgs government.

Although very rare in New Brunswick, minority governments are not so rare in Canada. As a result, we have a significant body of literature that has addressed the difficulties and challenges such governments face.<sup>12</sup> Furthermore, many minority governments

manage to function quite well, further evidence the adaptability of the Westminster model. But how have successful minority governments managed to survive? Interestingly, formal arrangements, such as coalitions or attempts at formalizing a “pact,” whereby a smaller party agrees to support a minority government for a specific period, have been quite rare in Canada.<sup>13</sup> Apparently, the strong adversarial orientation found in Canada, including New Brunswick, undermines formal cooperative efforts.

Instead of these more formal mechanisms, minority government has usually worked through more incremental modes based on informal understandings. The governing party, for instance, knows that it can usually count on a smaller party’s support when introducing bills in line with the latter’s policy priorities or by avoiding more divisive policies. Another effective tactic is for the governing party to seek policy accommodation on individual issues with different opposition parties. Occasionally, the governing party may entice one or more opposition MLAs to break with their party and vote with the government on a specific bill, or to leave their party to join the governing party.

Kris Austin, leader of the People’s Alliance, was quick off the mark with his announcement on September 28, 2018 that his party would support a PC government for 18 months. However, he also reserved the right to withdraw his party’s support on a bill-by-bill basis, if his members believed a bill’s content was contrary to the PA’s key policy priorities.<sup>14</sup> This was not a formal pact, one mutually negotiated and agreed to by the PC and PA parties; rather, it was an “explanatory statement” by Austin of the PA’s position.

The PA’s relative success in this election may have convinced it that it can only do better if an early election is called. On the other hand, according to statements by the leaders of the other parties in the legislature, the PC party is the only one that would ever agree to work with the PA to pass legislation. A new election may result in a scenario where the PA does not hold the balance of power, even if it increases its seat total. In terms of a legislative program, both the PCs and the PA favour tax cuts, have pledged to reduce government expenditures, and want to see deficit and debt reduction. The two parties should not have difficulty more or less seeing eye-to-eye on these types of issues. The PA’s stance on official bilingualism in the province, however, appears to be out of line with the PC’s policy.

Although the PCs have historically recognized the importance and value of official bilingualism in the province – this was especially the case during the premiership of Richard Hatfield (1970-87), and again under the leadership of Bernard Lord (1997-2006), official bilingualism is not high on the agenda of the current PC party.<sup>15</sup> However, the People’s Alliance has been the most vocal party in its criticism of how bilingualism has been implemented in the province. In addition, the PA only contested 30 predominantly anglophone constituencies in 2018; it avoided 19 northern, francophone constituencies. The Liberal and Green parties are strong advocates of official bilingualism and have MLAs from both linguistic communities in their caucuses.

As leader of the Green Party, David Coon comes from the province’s environmental movement. He won his seat initially in the 2014 election and again in 2018. Coon could arguably be described as a fiscal conservative; he may find agreement with the Higgs government on certain economic policies. However, the Greens staunchly oppose one of Higgs’ most important policy platforms: the resumption of hydraulic fracturing to drill for natural gas (commonly known as “fracking”).

Finally, shortly after his minority government’s defeat, Gallant announced his intention to resign as Liberal leader. The Liberals will be led by an interim leader until a leadership convention is held in mid-June 2019. Until a new leader is chosen and firmly in place, the Liberals will probably have little desire to defeat the PC government and have a general election.

## **Conclusion**

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The 2018 general election had an inconclusive result, but the adaptability of the Westminster model allowed for the emergence of a minority government. This is understandable whether we take a constitutional or party politics perspective. But how long will the Higgs minority government endure, and will it govern effectively as it navigates a minority parliament? We cannot comment with any certainty on these questions because much depends on the compatibility of the parties in the legislature.

New Brunswick’s next general election is scheduled for September 26, 2022 under the provincial fixed election statute. However, this stipulation may not be met because of the precarious nature of minority governments. Whether the PC government tires of courting support from the other parties or the latter

tire of tidbit concessions from the PC government, a general election could be called at an earlier date. Fluctuations in public opinion polls will also affect the motivation levels of party leaders as to how hawkish they are to engage in a new election campaign. Specific policy disputes will arise unexpectedly that may lead to the government's defeat and a journey to the polls.

When the dust settles on this era in New Brunswick politics, it will be interesting to evaluate how well the province's political traditions and institutions have weathered this third legislative oddity, and whether minority parliaments where there is a precarious balance of power are no longer as exceptionally rare as they have been.

### Notes

- 1 Don Desserud and Stewart Hyson, "Bringing New Brunswick's Legislative Assembly into the 21<sup>st</sup> Century," Study of Provincial and Territorial Legislatures Series (Ottawa: Canadian Study of Parliament Group, 2011).
- 2 Stewart Hyson, "Where's 'Her Majesty's Loyal Opposition' in the Loyalist Province?" *Canadian Parliamentary Review* 11, 2 (Summer 1988), pp. 22-25.
- 3 "Speaker's Ruling: Tie or Equal Number of Members in Two Opposition Parties," *Journals of the Legislative Assembly of New Brunswick*, Third Session of the Fifty-second Legislative Assembly, Dec. 16, 1994, pp. 330-335. Also see Stewart Hyson, 'Determining the Official Opposition in New Brunswick and the House of Commons,' *Canadian Parliamentary Review* 19, 3 (Autumn 1996), pp. 2-6.
- 4 C. E. S. Franks, *The Parliament of Canada* (Toronto: University of Toronto Press, 1987), p. 10.
- 5 Andrew Heard, "Constitutional Conventions and Parliament," *Canadian Parliamentary Review* 28, 2 (Summer 2005), p. 21.
- 6 Eugene Forsey, "The Problem of 'Minority' Government in Canada," *The Canadian Journal of Economics and Political Science* 30, 1 (February 1964), pp. 1-11.
- 7 Peter Hogg, *Constitutional Law of Canada: 2018 Student Edition*, Toronto: Carswell, 2018 (9.7b).
- 8 See, for example, Don Desserud, "The Confidence Convention under the Canadian Parliamentary System," *Parliamentary Perspectives No. 7* (Ottawa: Canadian Study of Parliament Group, October 2006).
- 9 *Telegraph-Journal*, Saint John, N. B., Nov. 3, 2018, p. A1.
- 10 Harry Forestell, *CBC News for New Brunswick*, (Fredericton, N. B., Jan. 2, 2019).
- 11 *Telegraph-Journal*, Saint John, N. B., Dec. 1, 2018, p. A3
- 12 See, for example, Forsey 1964, pp. 1-11; Linda Geller-Schwartz, "Minority Government Reconsidered," *Journal of Canadian Studies* 14, 2 (Summer 1979), pp. 67-79; and Peter H. Russell, *Two Cheers for Minority Government: The Evolution of Canadian Parliamentary Democracy* (Toronto: Emond Montgomery Publications Limited, 2008).
- 13 On what seems to be a particular "Canadian" distaste for coalition governments, see Ian Stewart, "Of Customs and Coalitions: The Formation of Canadian Federal Parliamentary Alliances," *Canadian Journal of Political Science* 13, 3 (September 1980), pp. 451-79.
- 14 *Telegraph-Journal*, Saint John, N. B., Sept. 29, 2018, p. A1.
- 15 Official bilingualism received little substantive coverage in the Higgs government Speech from the Throne. *Telegraph-Journal*, Saint John, N. B., Nov. 21, 2018, p. A3.