

Prorogation:
The Government's Constitutional and Legal Powers

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Introduction: Foundations and Assumptions

The heart of Canadian democracy is Parliament. When it is working well, so is Canadian democracy; when it pauses, so too does democratic vigilance. Although it has been the fashion in recent academic and popular publications to diminish the importance of Parliament in our system of government, Parliament has stood the test of time in ensuring transparency of government actions, the accountability of the government to the people and acting as a voice for Canadians as the founders envisioned. While Prorogation often is derided as a political tool, closer examination situates it as an important aspect of the relationship between the executive and legislative branches of government.

As the Supreme Court of Canada reminded us in 2018,¹ the executive branch (including the elected and administrative components) is subject to the legislative branch:

Parliamentary sovereignty therefore means that the legislative branch of government has supremacy over the executive and the judiciary: both must act in accordance with statutory enactments, and neither can usurp or interfere with the legislature's law-making function (para 55).²

Although parliamentary supremacy is subject to the limits imposed by the constitution, it is a fundamental principle that the legislative branch is supreme over the executive as well as judicial branches. The corollary of this principle is, thus, that the "executive cannot fetter the legislature's law-making power" (para 59).

A core strength of the Canadian political system is that the executive, embodied in the Prime Minister and Cabinet, is empowered to act decisively and efficiently on behalf of Canadians. In both majority and minority government situations, the first duty of Parliament is to support the executive by passing its legislative agenda. While this support is normally provided by the government members in the House of Commons, it will be supplemented by the opposition parties where there is agreement on policies and by necessity if the government does not hold a majority of seats in the House. These clear roles for a strong executive and a supporting legislature ensure order and uninterrupted governance even during emergencies – key promises of the Canadian political system.

¹ *Reference re pan-Canadian securities regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189.

² Just as the 2011 Court delivered a message to the Harper government with its comments on Statistics Canada and data collection, one wonders if the 2018 Court is delivering a message to the Trudeau government's directions to Ministers that they are accountable to the PM and Parliament by noting that the executive is responsible and subordinate to Parliament.

To ensure that the Prime Minister and Cabinet do not become too powerful, however, Parliament has a second important duty – one that is often undervalued. Parliament must hold the government to account for its decisions and actions. Opposition parties normally perform this function by asking the government tough questions in the House of Commons during question period, debating the Throne Speech, scrutinizing the budget and fiscal updates, or calling government witnesses to appear before House committees.

By confronting the government directly in the House of Commons, opposition parties shine a light on instances of questionable or poor judgment, and offer alternative views or scenarios, so that citizens can decide to keep or fire the government in the next election. By performing this duty, the opposition helps ensure that governance is not only uninterrupted but also that it is transparent, good governance during both normal times and crises – although often at the cost of appearing negative or confrontational.

Prorogation: Definition, Functions and Source

Prorogation embodies these fundamental aspects of the relationship between the executive and Parliament. It is a more refined tool than the blunter one of dissolution which dissolves Parliament and instigates an election. Prorogation pauses rather than halts the work of Parliament, and thus keeps government working. It enables the executive reassess and reset its priorities and to present them to parliament (support function). When Parliament resumes, it will debate, assess and vote upon the new agenda as expressed in the Speech from the Throne and subsequently through other instruments including the Budget (surveillance and confidence functions).

Prorogation has two components: it suspends the work of Parliament by ending its current session; and it resets the parliamentary agenda with the start of a new session and Speech from the Throne (Heard 2014). Proposed legislation dies, with the exception of Private Members bills, but may be resumed by all party agreement at the same stage in the new session.³ Parliament may be prorogued for hours or up to the constitutional limit of one year but normally does not exceed 40 days, unless a further extension is requested by the Prime Minister and granted by the Governor General (Heard 2014, 2011).

Derived from the common law prerogative powers of the Crown under the Westminster model of parliamentary government, prorogation and dissolution of the House of Commons have taken on a uniquely Canadian character through evolution and codification. Section 38 of the *Constitution Act, 1867* states that “The Governor General shall from Time to Time, in the Queen’s name, by Instrument under the Great Seal of Canada, summon and call together the House of Commons.” This includes prorogation and dissolution (Hawkins 2011; Tremblay 2010).

³ *House of Commons Procedure and Practice*, Third edition, 2017.

By virtue of the *Letters Patent 1947*,⁴ the Governor General is authorized and empowered to exercise the powers of the Crown with respect to “summoning, proroguing or dissolving the Parliament of Canada” (Hawkins 2011; Desserud 2009). By convention, the power to advise dissolution and prorogation lie with the Prime Minister.

Power of Prorogation and its Exercise: Complexity and Controversy

The power of prorogation has become more complex and controversial in its exercise owing to the ambiguities around its accepted usage. The power is governed more by convention than by codified rules out of necessity to maintain flexibility in addressing future circumstances. It is important to understand some basic practices in its use as well as the points of controversy.

Under the conventions of responsible government, the Governor General acts under the direction and advice of ministers who are members of Parliament and collectively hold the confidence of the House (Hogg 1992). This ensures that the executive is beholden to the legislature. If the advice tendered by Cabinet is lawful and constitutional, then the Governor General is obligated to accept and follow it. This ensures that the head of state is ultimately accountable to the citizens through the government and Parliament. The Prime Minister as the head of government is responsible for the decisions of the Governor General. The opposition parties may and should hold the government to account for the advice and decision but not the Governor General and do not advise the Governor General although the power is evolving for the opposition to inform the Governor General (Desserud 2009; Hawkins 2013; Brodie 2018). While the parties may debate the actions or the decisions, the Governor General remains above the fray. This convention maintains the impartiality of the office of the Governor General.

Things become trickier if the advice is unconstitutional or unlawful or if the government does not hold the confidence of the House. The first responsibility of the Governor General is to advise and warn the Prime Minister of this possibility. The first remedy resides with the Prime Minister and government. However, matters become murkier if the government presses forward. If the first remedy is unavailable and the advice contravenes the constitution or legislation then the Governor General can refuse the advice or defer action (Hawkins 2013; Bowden and MacDonald 2013).

In the second case whereupon the government is unable to proceed with its agenda and Parliament is deadlocked, then again the first and preferable remedy is for the government to accept the responsibility and advise the Governor General on the best way out of the deadlock. In this case, prorogation is a less drastic decision and course forward than dissolution and an election. A pause in the work of the House may be a means of allowing passions in Parliament to subside and a more reasoned debate to occur when the House reconvenes. Given that the Throne Speech and confidence vote commence the new session, the legislature can then express its displeasure and force an election if the impasse has not been resolved.

⁴ *Letters Patent Constituting the Office of the Governor General of Canada* (1 October 1947).

However, in practice, complexities arise. While advice that contravenes legislation may be more easily discerned, advice that is unconstitutional and in defiance of conventions is often more subject to disagreement. While the first remedy would be to assign primacy to the government position and to hold it accountable in the House, circumstances may arise when this is unacceptable. For example, if a Prime Minister refused to leave office and to reconvene Parliament after an election that gave the majority of seats to the opposition, then the Governor General would be justified in refusing the advice and in acting to force Parliament to reconvene. However, circumstances may be less clear than this example suggests.

Another matter to consider with prorogation is the question of confidence. If a government has lost a vote of confidence, then the Governor General would be correct in rejecting the advice of a Prime Minister to prorogue Parliament rather than to dissolve it or call upon another party to form government (Russell and Sossin, 2009). However, the experience of the Pearson government in the 1960s has loosened the rules around confidence votes making the application of this rule murkier. The evolution of the British House with respect to confidence votes, also sets a model for more flexibility on confidence, although a similar practice has not been adopted here and the circumstances are quite different. Similarly, Heard notes that if there had been a vote of confidence in the House for an alternative government, then the Governor General would be justified in refusing the advice of the Cabinet that no longer held the confidence of the House (Heard 2014). However, if a government has received a vote of confidence just prior to a request for prorogation, then the prospects of facing a vote of confidence that it may lose is not likely sufficient grounds for the Governor General to refuse prorogation as the example of December 2008 would indicate.

In sum, the Governor General is obligated to accept the advice of the duly elected government of the day that enjoys the confidence of the House unless that advice is unconstitutional or unlawful or until the government no longer holds the confidence of the House. However, a brief comparison of the prorogation controversies of 2008 and 2020 illustrate the complexities of these matters.

The Nature of the Controversy around Prorogation and its “Legitimate” Use

While the details of controversial examples of prorogation are too extensive to be reported here, some areas of controversy may be pointed out.

First, 2008 raised three important matters that provoked a storm of controversy.

1. When is confidence lost for a government? The government had received a vote of confidence one week prior to the request for prorogation. However, it faced another one in the next opposition day that it seemed likely to lose. When prorogation appears to be a means of avoiding a vote of confidence then its legitimacy is open to question.
2. Is a multiparty agreement to form a coalition government valid grounds to assume that a government lacks the support of the House? In 2008 the agreement was “shaky”

with the leader of the official opposition likely to be replaced by a leader who had signalled his reluctance to accept the agreement. This raises questions about multiparty agreements, and although primacy must be given to actual confidence votes also raises issues of legitimacy and public trust.

3. The duration of the prorogation is important. Adjourning from December to the end of January seemed a long time to evade a confidence vote. However, in terms of House days missed, the delay was significantly reduced and the Prime Minister indicated that an extension would not be requested or advised (Rasmussen). Similarly, in the case of 2020, prorogation coincided with a break in House sittings and would reconvene on the same day as it was previously scheduled to do so.

Both 2008 and 2020 share a striking similarity. Both governments were facing economic crises. Both governments used the prorogation to develop new plans that they could present to the House. Both governments received the confidence of the House following the prorogation. This fit with the basic parliamentary principle of stable, continued governance in times of crises.

The experiences of 2009 and 2020 raise another important question.⁵ In 2009, the Harper government was facing difficult questions raised by the opposition parties over the transfer of prisoners to Afghan authorities and the question of torture (Walters 2011). The inquiries of the House Committee were shut down by prorogation. Similarly in 2020, the Trudeau government was facing difficult questions from the opposition regarding the WE Charity Foundation and spending to deal with COVID-19. Prorogation shut down the activities of those committees. This raises questions about the underlying motivations of government in the use of prorogation.⁶ When prorogation is seen by the public as motivated by political avoidance of difficult circumstances, it becomes more controversial and perhaps delegitimized as a necessary and important tool of a democratic government. It is seen as means of government punishing an uncooperative House rather than as a legitimate way to reset the government agenda (Smith, 1995).

Remedies?

The prerogative power of prorogation is a necessary and important tool for governments to use in a parliamentary system. It allows government to refresh, reset and renew the government agenda and to correct its course if it has veered off or if it faces changed circumstances. Parliament cannot likely control its usage or existence given that it is based in constitutional authority. However, parliament could consider three actions that would be in keeping with its responsibilities to support the government and to hold the government to account:

⁵ This issue was also raised in the prorogation of the Ontario legislature by the McGuinty government in 2012.

⁶ Compare Malloy (2020) to Bowden (2020), and Hughes (2019).

1. Ensure a robust debate and examination of the Report of the government on prorogation. Was its usage justified? This debate will enhance the role of Parliament and its legitimacy as a defender of democracy in the public mind.
2. Examine the usage of multiparty agreements and their effects on the ability of the House to hold the government to account. I have argued for this review elsewhere.
3. Consider whether the work of committees should cease during prorogation or whether a mechanism should be devised to allow for certain committees to continue their work during prorogation.

A parliamentary democracy promises stable government with a strong executive that is subject to the scrutiny of the legislature. This opportunity to scrutinize the government decision to prorogue provides parliament with an opportunity to fulfill its role as the heart of democracy in Canada.

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