Can a Change of Government occur without a General Election?

Présentation devant la Troisième Conférence “Droit et Parlement”, 2009
Toronto, le 12 novembre 2009

Louis Massicotte
Professeur
Département de science politique
Université Laval
Louis.massicotte@pol.ulaval.ca

Titulaire de la Chaire de recherche sur
La démocratie et les institutions parlementaires

My presentation is an output of the parliamentary crisis Canadians were embroiled in eleven months ago. Like many people who had spent years exploring the basics as well as the details of how parliamentary government operates, I was asked by the media to explain the rules of the game. I concurred with the mainstream among constitutional experts. The scenario whereby the Harper government, upon being defeated in Parliament, would request dissolution, be possibly refused dissolution before the previous election was so close, and would make way for an alternative government, in this case a coalition of all other parties, was perfectly constitutional and was supported by solid precedents.

This scenario did not materialize because the proposed coalition soon foundered under the weight of its own mistakes. From one of Jack Layton’s assistants inadvertently inviting a Conservative MP to be privy to the deliberations of the NDP caucus, to “wise men” being appointed without having been told, and quickly denying they supported the coalition, to a strange ceremony where the Bloc Quebecois was put on the same footing as the other parties despite the fact that not a single cabinet minister was to be appointed from their ranks, signs of ineptitude abounded.
The climax was reached with a bungled address to the Nation from the prospective Prime Minister that will likely go down in history as the first political suicide to be broadcast live on TV, nationwide. No Governor General would have risked her political capital on such a fragile undertaking. All the coalition led to was the withdrawal of provocative policies and a complete change in the government’s approach to the economic crisis. This is far from nothing and was probably closer to what the public really wanted.

Does it follow, however, that the Crisis has established beyond any doubt that no change of government can ever occur within the life of a Parliament without an election being held? This was the contention of the Prime Minister. It was contradicted by most experts in the country. In this presentation, I will try to explain why I think the minority among experts who supported Stephen Harper were wrong.

First, it should be obvious to anyone with knowledge of constitutional history that in countries with a British parliamentary system, coalitions, while being a less frequent scenario, are a perfectly constitutional way of running the country. They can be found in almost every jurisdiction. We had one in Canada during and after World War One. Ontario, Manitoba, Saskatchewan, British Columbia, even Quebec under Mercier, were at times run by coalitions. Incidentally, such coalitions were far more durable on average than minority governments.

Canada owes its very existence as a federation to the Macdonald-Cartier-Brown coalition formed in 1864. Britain was governed by coalitions during both world wars and the depression. Australia has been ruled by a coalition of Liberals and National (Country) parties whenever Labor did not have a majority of its own. New Zealand has been governed by coalitions without interruption since 1996. And I am not talking about other countries with parliamentary government, where coalitions are the normal way of doing things.
Second, precedents abound for changes of government occurring during a parliamentary term without a new election being held. I found six cases in Australia, two in New Zealand before MMP was introduced, four in Canadian provinces. Britain had one in 1924, and many others before. A few of these changes occurred because the defeated Prime Minister requested dissolution but the Crown refused. In most instances, the defeated government did not ask for a new election because one had been held barely a few weeks or months ago. What was unprecedented in the Crisis of last year was the Prime Minister’s insistence that should he be defeated barely seven weeks following a general election, he was nevertheless entitled to another election.

The view that a Prime Minister is entitled to dissolution in any circumstance is rooted in the misconception that the Prime Minister is “kind of” elected by the people, and that his removal by Parliament therefore amounts to an usurpation unless it is later confirmed by the electorate. This is pretty clear from the writings of law professor Henri Brun and his followers, who were the staunchest defenders of the government’s point of view.

Brun’s views, first expressed in a textbook first published in 1972, has led him to venture some ideas that have little to do with the way parliamentary government actually works.

From his contention that the Prime Minister is elected by the people, Brun came to the logical conclusion that whenever a Prime Minister dies, resigns or is thrown out of office during the life of a Parliament, his successor is obliged to go to the polls immediately, come what may. This is a glaring mistake. Actually, only Newfoundland, a few years ago, ever adopted a statute to that effect. I examined Prime Ministerial successions in Old Commonwealth jurisdictions from 1945 to 1996. A few prime ministers appointed in these conditions went immediately to the electorate, because they thought this was the right time, or because the term of the legislature was almost exhausted anyway, but most simply waited for better times, which in many cases meant many years. Indeed, the so-called requirement that Brun expounded so confidently in 1972 has been breached so many times thereafter, not least in Quebec, that he had to backtrack in subsequent editions of his textbook.
There is no empirical support, either in the law of the constitution or in electoral statutes, for the idea that a general election amounts to the election of a Prime Minister. Party leaders are returned by a constituency, not by the Canadian electorate as a whole. Some among their supporters may switch sides after being elected, as one did in 2006. Electoral studies often find that party leaders are less popular than their own party, and even less popular than their chief opponent. Almost always, the party’s majority in the legislature does not reflect a majority of the electorate. Indeed, more disturbingly, it at times does not even reflect a plurality of the electorate, because the opposition party got more votes than the government party. In such instances, the fallacy of the doctrine that the Prime Minister is anointed by the people becomes obvious.

Claims that the Prime Minister have been somehow “chosen by the people” should be taken with the same amount of salt as claims that Popes have been selected by God, or that Presidents of the United States are the leaders of the Free World (I would have liked to vote for Mr. Obama, but I do not remember having had that opportunity). These are grandiose claims that some people (starting with those to whom they apply) may believe in deeply. They may impress others who have little time to think seriously about it. They have much to fear from careful scrutiny by scholars. We are certainly closer to reality by saying that under parliamentary government, Prime Ministers derive their authority from the continued support of their own party and of the legislature, which is itself an imperfect approximation of the people’s will.

Another fallacy that was propagated last year and before is that in a minority Parliament, power must go *automatically* to the party that has the highest number of seats. This, I suspect, is inspired by a belief that the rule that applies in constituency, First-past-the-Post, also applies to the formation of the government. This is not true. When it comes to forming a government, a mere plurality is not enough. A majority, more than half, is needed. If we have none, the prospects of the leading party will depend entirely on the attitude of the other parties. They may support the strongest party, especially if the latter
is very close to a majority. It is also perfectly legitimate for them to gang up against what they perceive as a major threat to what they stand for.

Again, there are many examples to support my contention. Mackenzie King emerged from the 1925 election with only 101 seats against Meighen’s 117. Both were short of a majority. Yet King managed to stay in office by successfully courting the progressives, who kept his weakened government alive for a few months. More recently in Ontario, following the 1985 election, New democratic support went not to Frank Miller’s Tories, who had 52 seats in the legislative assembly, but instead to Peterson’s Liberals, who had only 48.

Precedents to the same effect can be found in other countries with a Westminster parliamentary system. In Britain, the 1923 election returned the Conservatives as the largest party (258), although they no longer had a majority, against 191 Labour and 158 Liberals. When Baldwin was toppled by the House in early 1924, power went (without another election) to Labour under Ramsay MacDonald for about nine months. In Australia, the Watson Labour minority government in 1904 had only 23 supporters in the House of Representatives, against 25 Free Traders and 26 Protectionists: they ranked third in terms of seats, yet they survived for a few months. Deakin’s position as Prime minister in 1906 was even worse: his Protectionist party held only 16 seats, while Labour had 26 and Reid’s self-described “anti-socialists” numbered 27. Yet he went on until 1908, when power passed into the hands of Fisher’s Labour, still the second party in the House, without an election being held. In later coalition governments under Bruce, Lyons, Menzies, Gorton, McMahon and most recently Howard (1998-2001), the Liberals had at times a smaller number of seats than Labour, but the Country party supported them in each case. Political reality and affinities, rather than blind compliance with the plurality rule, dictated the outcome.

Concluding, Eugene Forsey is no longer with us, but his words are, and to me they still ring true. Quote “If a minority government is defeated on a motion of want of confidence very early in the first session of a new Parliament, and there is a reasonable possibility
that a government of another party can be formed and get the support of the House of Commons, then the Governor General could refuse the request for a fresh election”. No one needs to be a staunch monarchist to agree with this (I certainly am not!).

Last year, the second condition identified by Forsey was soon discovered to be missing. The coalition was bedeviled from the start by ambiguities and ineptitude. The insistence by its supporters that the session should not be prorogued betrayed, I suspect, their awareness of how fragile the coalition really was, politically speaking. This however, does not mean that the rules of parliamentary government have been rewritten to the liking of some lawyers or political scientists whose writings, under closer scrutiny, happen to describe not the way the parliamentary system works, but the way it *should* work in their view. This is a trap that professors do best avoiding. They should leave this to politicians.