

**Implementing electoral reform: Specific issues with regard to forming and maintaining a responsible and legitimate government in our parliamentary democracy**

Brief submitted to the

**House of Commons Special Committee on Electoral Reform**

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This special committee is mandated to study electoral reforms in order to replace the current first-past-the-post system with another that would

increase public confidence among Canadians that their democratic will, as expressed by their votes, will be fairly translated and that the proposed measure reduces distortion and strengthens the link between voter intention and the election of representatives.<sup>1</sup>

The new electoral system that will emerge from this reform process could result in more frequent minority or even coalition governments. A number of individuals have expressed the concern that this could encourage more frequent general elections and lead to political instability.

However, recent events in Scotland and Wales show that it is possible to modernize and streamline our parliamentary system while maintaining its intrinsic traditions and political stability. The parliaments of Scotland and Wales both elect members through a form of mixed-member proportional representation (known as the additional member system). While they have had minority and coalition governments, these two parliaments have not had to hold elections more often than every four or five years.<sup>2</sup>

The parliamentary system possesses a number of simple and proven legal measures to stabilize minority and coalition governments. Drawing from measures implemented by the United Kingdom (and several other jurisdictions), I would like to suggest some minor modifications that could be made to our procedures to ensure the stability and political legitimacy of the governments formed following the anticipated electoral reforms.

## **A. Changes to the rules for forming and maintaining a government, and dissolving and proroguing Parliament:**

1. Amend the *Standing Orders of the House of Commons* to provide for the nomination of the prime minister by a vote in the House of Commons, to be held between the election of the Speaker of the House and the Speech from the Throne (the appointment of the prime minister remains the prerogative of the Crown):

*See appendix for examples of legislative and constitutional provisions in Scotland, Wales, Germany and Spain.*

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<sup>1</sup> House of Commons, 42nd Parliament, 1st Session, *Journals*, No. 67 (June 7, 2016).

<sup>2</sup> Scottish and Welsh elections were held in 1999, 2003, 2007, 2011 and 2016.

Advantages:

- clearly identifies who has the confidence of the House and can therefore form a government;
- brings greater transparency to the process of forming the government and builds public confidence in our institutions. When more than one party claims that it can legitimately form a government — for example, when the outgoing government has won fewer seats than another party but, in the absence of a majority winner, wants to retain power — the vote on the nomination motion would lead to a public debate on the issue. Third parties would have an opportunity to explain why they support a specific candidate;
- demonstrates that the government derives its legitimacy from the confidence of the House of Commons. Clarifies for the public that it is the members of the legislature who are elected, not the executive. The nomination motion therefore plays a significant educational role.

For further details on how governments are formed federally, provincially and elsewhere in the Commonwealth, please see H. Cyr, "De la formation du gouvernement," *Revue générale de droit*, Vol. 43, 2013, 381–443.

2. Establish the requirements for voting on non-confidence motions through legislation or amendments to the *Standing Orders of the House of Commons* and restrict these motions to what are known as "constructive" non-confidence motions or, at a minimum, explicitly provide for the possibility of a successor government following a non-confidence vote.

- a. Requirement for a constructive non-confidence motion

*See appendix for examples of constitutional provisions in Belgium, Spain and Germany.*

Advantages:

- limits the use of non-confidence motions since they do not necessarily result in a general election, which the opposition would hope to capitalize on, but rather in the requirement to form a new government that has the confidence of the House;
- prevents repeated elections;
- holds the proponents of a non-confidence motion to

account;

- clarifies expectations concerning the governor general and whether or not he should dissolve Parliament and call a new election, or ask another person to try to form a government.

b. Possibility of a successor government should the House of Commons pass a motion of non-confidence

*See appendix for the legislation in effect in the United Kingdom.*

Advantages:

- clarifies expectations concerning the governor general and whether or not he should dissolve Parliament and call a new election, or ask another person to try to form a government.

For more information on confidence and the parliamentary system, please see H. Cyr, "Du vote de non-confiance," in P. Taillon, E. Brouillet and A. Binette, eds., *Un regard québécois sur le droit constitutionnel. Mélanges en l'honneur d'Henri Brun et Guy Tremblay* (Montréal: Éditions Yvon Blais, 2016).

3. Amend s. 56.1 of the *Canada Elections Act*, S.C. 2000, c. 9, to allow for the early dissolution of Parliament with the approval of two thirds of the members of the House of Commons

*See appendix for the legislation in effect in the United Kingdom.*

Advantages:

- in the event of a majority or coalition government, enables the prime minister to ask the governor general to call an early election with the support of a significant number of members;
- in the event of a minority government, enables the opposition to trigger an early election if it has the support of a significant number of members;
- in a system where only constructive non-confidence motions are allowed, enables an impasse to be overcome if there is no successor government and the current government clearly does not have the support of a significant majority of members.

4. Amend the *Standing Orders of the House of Commons* so that asking for Parliament to be prorogued (or dissolved) without first obtaining the approval of the House of Commons automatically results in a loss of confidence in the prime minister.

Since it is the House of Commons that places its confidence in the prime minister, the House can decide on the terms for granting confidence. In other words, the prime minister would enjoy the confidence of the House from the time of the nomination vote confirming him until he receives a vote of non-confidence or he asks the governor general to dissolve Parliament before the date stipulated in s. 56.1(2) of the *Canada Elections Act*, S.C. 2000, c. 9, without first obtaining the approval of the House of Commons.

Advantages:

- prevents a minority government from circumventing parliamentary control over its actions for long periods of time;
- ensures greater autonomy for the elected House with regard to the government, which derives its legitimacy from the confidence of the House;
- clarifies the issue of whether the prime minister can request prorogation while a non-confidence motion is pending;
- makes it possible to prevent political crises like the one that took place in 2008 during prorogation.

## **B. Implement an objective and impartial Cabinet manual that sets out the rules**

Following the example of the United Kingdom<sup>3</sup> and New Zealand,<sup>4</sup> we need a Cabinet manual that sets out, in an impartial and objective manner, the constitutional rules, conventions and practices for forming and dissolving a government, and the activities of the government and the public service when Parliament is dissolved. We must capitalize on a review of the electoral system to clarify the role of elected members in forming and maintaining a responsible government in our parliamentary system. Canadians are confused about the rules for forming a government — according to one study, more than half of Canadians think they vote

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<sup>3</sup> United Kingdom, Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and Rules on The Operation of Government*, 1<sup>st</sup> ed., 2011, available online at [www.gov.uk/government/publications/cabinet-manual](http://www.gov.uk/government/publications/cabinet-manual).

<sup>4</sup> New Zealand, Cabinet Office, *Cabinet Manual, 2008*, available online at [cabinetmanual.cabinetoffice.govt.nz](http://cabinetmanual.cabinetoffice.govt.nz).

directly for a prime minister! We must not add to this confusion by introducing a new electoral system without including an appropriate public education component.

In Britain, preparation of *The Cabinet Manuel*, which was a cooperative effort, and subsequent outreach activities with the media and the public greatly helped citizens better understand how the parliamentary system works. Thanks to this initiative, the negotiations among parties that followed the 2010 election, which did not result in a majority government, were not seen as a constitutional crisis. Everyone understood that it was constitutionally legitimate for the parties to try to reach an agreement on forming a government that could obtain the confidence of Parliament. This understanding led to a stable coalition government that lasted close to five years.

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# APPENDIX

## 1. Forming a government by nomination vote

### ***Scotland Act 1998, c. 46 (UK)***

#### **46 Choice of the First Minister.**

(1) If one of the following events occurs, the Parliament shall within the period allowed nominate one of its members for appointment as First Minister.

(2) The events are—

(a) the holding of a poll at a general election,

(b) the First Minister tendering his resignation to Her Majesty,

(c) the office of First Minister becoming vacant (otherwise than in consequence of his so tendering his resignation),

(d) the First Minister ceasing to be a member of the Parliament otherwise than by virtue of a dissolution.

(3) The period allowed is the period of 28 days which begins with the day on which the event in question occurs; but—

(a) if another of those events occurs within the period allowed, that period shall be extended (subject to paragraph (b)) so that it ends with the period of 28 days beginning with the day on which that other event occurred, and

(b) the period shall end if the Parliament passes a resolution under section 3(1)(a) or when Her Majesty appoints a person as First Minister.

(4) The Presiding Officer shall recommend to Her Majesty the appointment of any member of the Parliament who is nominated by the Parliament under this section.

## ***Government of Wales Act 2006, c. 32 (UK)***

### **47 Choice of First Minister**

(1) If one of the following events occurs, the Assembly must, before the end of the relevant period, nominate an Assembly member for appointment as First Minister.

(2) The events are—

(a) the holding of a poll at a general election,

(b) the Assembly resolving that the Welsh Ministers no longer enjoy the confidence of the Assembly,

(c) the First Minister tendering resignation to Her Majesty,

(d) the First Minister dying or becoming permanently unable to act and to tender resignation, and

(e) the First Minister ceasing to be an Assembly member otherwise than by reason of a dissolution.

(3) The relevant period is the period of 28 days beginning with the day on which the event occurs; but—

(a) if another of those events occurs within that period, the relevant period is (subject to paragraph (b)) extended to end with the period of 28 days beginning with the day on which that other event occurs, and

(b) the relevant period ends if the Assembly passes a resolution under section 5(2)(a) or when Her Majesty appoints a person as the First Minister.

(4) The Presiding Officer must recommend to Her Majesty the appointment of the person nominated by the Assembly under subsection (1).

## ***Basic Law for the Federal Republic of Germany***

### **Article 63 [Election of the Federal Chancellor]**

(1) The Federal Chancellor shall be elected by the Bundestag without debate on the proposal of the Federal President.

**(2)** The person who receives the votes of a majority of the Members of the Bundestag shall be elected. The person elected shall be appointed by the Federal President.

**(3)** If the person proposed by the Federal President is not elected, the Bundestag may elect a Federal Chancellor within fourteen days after the ballot by the votes of more than one half of its Members.

**(4)** If no Federal Chancellor is elected within this period, a new election shall take place without delay, in which the person who receives the largest number of votes shall be elected. If the person elected receives the votes of a majority of the Members of the Bundestag, the Federal President must appoint him within seven days after the election. If the person elected does not receive such a majority, then within seven days the Federal President shall either appoint him or dissolve the Bundestag.

## ***Spanish Constitution***

### **Section 99**

1. After each renewal of the Congress and in the other cases provided for under the Constitution, the King shall, after consultation with the representatives appointed by the political groups with parliamentary representation, and through the Speaker of the Congress, nominate a candidate for the Presidency of the Government.

2. The candidate nominated in accordance with the provisions of the foregoing subsection shall submit to the Congress the political programme of the Government he or she intends to form and shall seek the confidence of the House.

3. If the Congress, by vote of the overall majority of its members, grants to said candidate its confidence, the King shall appoint him or her President. If overall majority is not obtained, the same proposal shall be submitted for a fresh vote forty-eight hours after the previous vote, and confidence shall be deemed to have been secured if granted by single majority.

4. If, after this vote, confidence for the investiture has not been obtained, successive proposals shall be voted upon in the manner provided for in the foregoing paragraphs.

5. If within two months of the first vote for investiture no candidate has obtained the confidence of the Congress, the King shall dissolve both

Houses and call for new elections, with the countersignature of the Speaker of the Congress.

## **2. A constructive non-confidence motion and alternative successor government:**

### **– Requirement for a constructive non-confidence motion**

#### ***Belgian Constitution***

##### **Article 96**

The King appoints and dismisses his ministers.

The Federal Government offers its resignation to the King if the House of Representatives, by an absolute majority of its members, adopts a motion of no-confidence proposing a successor to the prime minister for appointment by the King or proposes a successor to the prime minister for appointment by the King within three days of the rejection of a motion of confidence. The King appoints the proposed successor as prime minister, who takes office when the new Federal Government is sworn in.

#### ***Spanish Constitution***

##### **Section 113**

1. The Congress may require political responsibility from the Government by adopting a motion of censure by overall majority of its Members.
2. The motion of censure must be proposed by at least one tenth of the Members of Congress and shall include a candidate for the office of the Presidency of the Government.
3. The motion of censure may not be voted until five days after it has been submitted. During the first two days of this period, alternative motions may be submitted.
4. If the motion of censure is not adopted by the Congress, its signatories may not submit another during the same period of sessions.

## **Section 114**

1. If the Congress withholds its confidence from the Government, the latter shall submit its resignation to the King, whereafter the President of the Government shall be nominated in accordance with the provisions of section 99.
2. If the Congress adopts a motion of censure, the Government shall submit its resignation to the King, and the candidate proposed in the motion of censure shall be deemed to have the confidence of the House for the purposes provided in section 99. The King shall appoint him or her President of the Government.

## **Section 115**

1. The President of the Government, after deliberation by the Council of Ministers, and under his or her sole responsibility, may propose the dissolution of the Congress, the Senate or the Cortes Generales, which shall be proclaimed by the King. The decree of dissolution shall set a date for the elections.
2. The proposal for dissolution may not be submitted while a motion of censure is pending.
3. There shall be no further dissolution until a year has elapsed since the previous one, except as provided for in section 99, subsection 5.

## ***Basic Law for the Federal Republic of Germany***

### **Article 67 [Vote of no confidence]**

- (1) The Bundestag may express its lack of confidence in the Federal Chancellor only by electing a successor by the vote of a majority of its Members and requesting the Federal President to dismiss the Federal Chancellor. The Federal President must comply with the request and appoint the person elected.
- (2) Forty-eight hours shall elapse between the motion and the election.

### **Article 68 [Vote of confidence]**

- (1) If a motion of the Federal Chancellor for a vote of confidence is not supported by the majority of the Members of the Bundestag, the Federal President, upon the proposal of the Federal Chancellor, may dissolve the Bundestag within twenty-one days. The right of dissolution shall lapse as

soon as the Bundestag elects another Federal Chancellor by the vote of a majority of its Members.

(2) Forty-eight hours shall elapse between the motion and the vote.

## **– Possibility of a successor government should the House of Commons pass a non-confidence motion (UK)**

### ***Fixed-term Parliaments Act 2011, c. 14***

#### **S. 2 [Early parliamentary general elections]**

(3) An early parliamentary general election is also to take place if—

(a) the House of Commons passes a motion in the form set out in subsection (4), and

(b) the period of 14 days after the day on which that motion is passed ends without the House passing a motion in the form set out in subsection (5).

(4) The form of motion for the purposes of subsection (3)(a) is—

“That this House has no confidence in Her Majesty’s Government.”

(5) The form of motion for the purposes of subsection (3)(b) is—

“That this House has confidence in Her Majesty’s Government.”

## **3. Dissolution of Parliament with the support of two thirds of the House of Commons**

### ***Fixed-term Parliaments Act 2011, c. 14 (United Kingdom)***

#### **S. 2 [Early parliamentary general elections]**

(1) An early parliamentary general election is to take place if—

(a) the House of Commons passes a motion in the form set out in subsection (2), and

(b) if the motion is passed on a division, the number of members who vote in favour of the motion is a number equal to or greater

than two thirds of the number of seats in the House (including vacant seats).

(2) The form of motion for the purposes of subsection (1)(a) is—

“That there shall be an early parliamentary general election.”