

OPINION: FIXED ELECTION LAW

Canada's fixed election date law is a serious problem

The Canadian bill, which is still on the books, is essentially a constitutional crisis in waiting. It ought to be repealed and replaced by a law that makes sense, like the proposed British law.

By GARY LEVY

When I was a young researcher for the McGrath Committee on Reform of the House of Commons the chairman asked me for a paper on certain aspects of British procedure. After reading the literature I sent him a 20-page memorandum and he promptly called me. "So that is how the British do it. Well, we certainly do not want to do it that way!"

Unfortunately this attitude is all too prevalent among Canadians although there seems to be some support for Conservative MP Michael Chong's recent proposal for a British style Question Period. Of course, there are constitutional and cultural differences between Canada and the U.K., but they do have a fair bit of experience when it comes to Parliamentary government and we should not be too quick to dismiss their experience.

A case in point is the recent British proposal for a fixed election date currently undergoing committee hearings in the House of Commons and House of Lords.

The arguments for and against fixed date elections are strikingly similar to the ones in Canada. Those in favour argue the legislation will redress the balance between the Commons and the executive, at present biased in favour of the latter. They also argue that it will bring Westminster into line with the devolved legislatures, with the European Parliament and with many national governments in Europe having fixed date elections without major problems.

Those opposed argue that fixed date elections will lead to much longer election campaigns, will have no effect on the quality of government and will essentially alter the British constitutional system by limiting the royal prerogative to dissolve Parliament on the advice of the Prime Minister. Such legislation also risks having the courts intervene on matters heretofore the sole domain of Parliament.

The Proposal and Reaction

The Fixed-Term Parliaments Bill was introduced on July 22, 2010. It passed second reading by a vote of 311 to 23 and will be considered by a Committee of the Whole House as well as by a House of Lords Committee.

The bill fixes the date of the next general election as May 7, 2015, and provides for five-year fixed terms thereafter although the Prime Minister can alter the date by up to two months. There are two ways in which an election could be triggered before the end of a five-year term.

First, an early election can occur if there is a vote whereby at least two-thirds

of the House of Commons supports an early election.

Second if a motion of no confidence is passed and a new government cannot be formed within 14 days Parliament will be dissolved and a general election will be held. According to the deputy prime minister's statement on July 5, 2010, the definition of no confidence will be put into law and a vote of no confidence will still require only a simple majority of Members of the House.

The bill authorizes the Speaker of the House to issue a certificate declaring that a vote of no confidence in the government has been passed and certifying that a new government cannot be formed. In a brief to the Political and Constitutional Reform Committee the Speaker raised some concerns about this aspect. He said there could be legal challenges over what constitutes a no confidence motion and whether in fact an alternative government could be formed. At the very least, he suggested, the definition of confidence should be part of the Standing Orders rather than put in legislation where it could be interpreted by the courts.

What would have happened in Canada if we had the proposed U.K. bill instead of our own. Would our Prime Minister have been able to defy his own legislation by calling an election without having been defeated in the House? Would he, a few months later, have been able to avoid defeat by proroguing Parliament when faced with a no confidence motion?

In my view, the U.K. legislation would have prevented both. The requirement for a two-thirds majority would have stopped Prime Minister Stephen Harper from seeking the dissolution of Parliament in September 2008. Or if he did the Governor General would surely have told him to go back to the House and bring proof that two-thirds of the members favoured dissolution.

The prorogation matter is a bit more problematic since the U.K. bill specifically says it does not change the Crown's power of prorogation. But if Canada had a law that provided for a 14-day period for forming a new government after a vote of no confidence we would likely have seen a change in government without an election in December 2008.

The opposition coalition was formed in less than 14 days and the government would have been less successful in criticizing its legitimacy if coalitions were specifically anticipated in the fixed date legislation. It is hard to believe the Governor General would have granted prorogation if we had something like the proposed U.K. law in place at the time.

The fact that the leader of the opposition had resigned and that the two-party coalition would be propped up by a third party seeking the breakup of Canada in its present form would still have made many people unhappy. But the alternative government proposed by the Liberal-NDP coalition would, for better or worse, have seen the light of day.

The Canadian bill, which is still on the books, is essentially a constitutional crisis in waiting. The U.K. bill very cleverly removes any possibility of the Crown becoming involved in potential political controversy regarding the timing of elections.

One issue that seems to be left hanging in the U.K. as it is in Canada, is the confidence convention. If we are going to have fixed election laws it is extremely important to be clear on what is the convention and when and how such votes shall be taken.

Indeed the December 2008 prorogation crisis was made possible by the fact that some confidence votes (those on opposition days) can be unilaterally postponed by the government. This has happened twice and the damage to the Canadian Parliamentary system has been considerable.

A good starting point for codifying the confidence convention is the Quebec National Assembly which, ironically does not have fixed date elections. However, in September 2009, Quebec became the only legislature in Canada to set out the elements of confidence in its Standing Orders. The key paragraphs are as follows:

Confidence of the Assembly in the Government

303.1. Confidence of the Assembly in the Government: how raised—The confidence of the Assembly in the Government may be raised only by means of a vote on:

- (1) a want of confidence motion;
- (2) a motion by the Prime Minister, "That this Assembly approve the general policy of the Government";
- (3) a motion by the Minister of Finance, "That this Assembly approve the budgetary policy of the Government";
- (4) a motion for the passage of an appropriation bill introduced pursuant to Standing Order 288; or
- (5) any other motion that the Prime Minister, or his representative, shall have expressly declared a question of confidence in the Government.

304. Want of confidence motions; number—Members sitting in opposition may move seven want of confidence motions during any session; and the said motions shall comprise those they are entitled to

move during the debate on the opening speech of the session and during that on the budget speech.

304.1 Purpose—A want of confidence motion shall state that the assembly withdraws its confidence in the government.

305. Allocation—The president shall allocate such opposition; and in so doing he must have regard to the presence of independent Members.

306. Notice; precedence; how disposed of—Except as otherwise provided, one clear day's notice shall be given of a want of confidence motion, and the debate on such motion shall have precedence.

It must be held within a single sitting day and shall conclude one quarter hour before the assembly is to rise, whereupon the question on the motion shall be put:

Provided that during any period when the assembly may meet during extended hours the debate on a want of confidence motion shall conclude three hours after the time appointed in these Standing Orders for the assembly to meet.

306.1. Amendments—No amendment to a want of confidence motion may be received.

Conclusion:

In a traditional Westminster model, theoretically, the government introduces legislation; Parliament debates and then either passes or defeats it. If rejected the government can and should regroup and move on to other matters.

If the government is stymied to the extent it can no longer govern, the Prime Minister has the option of seeking dissolution and asking the people for a new mandate. He or she can also ask for dissolution when things are going well but may pay a political price at the polls for such overt opportunism. (Dissolution may also occur if the opposition wins a vote of no confidence).

If we want to change this we must find a way to stop a Prime Minister from unilaterally calling an election whenever he or she wants and also specify a way to deal with defeats over no confidence. The British proposal would accomplish both of these objectives. The present Canadian law does not.

In a word, Canada's fixed election date legislation has created far more serious problems than it has solved. It ought to be repealed but if we really want fixed elections let us replace it with something that makes sense like the proposed British law.

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