



HOUSE OF LORDS

Fixed-term Parliaments

Written Evidence

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Canada's Strange Experience with Fixed Date Elections

In Superman's Bizarro World everything is backwards. "Up is down, down is up. He says "Hello" when he leaves, "Good bye" when he arrives."⁵⁹ Canada has had a Bizarro Parliament for the last few years, in large part due to the 2007 law fixing the election date.

In the 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, in his sole discretion, has the option of seeking dissolution and asking the people for a new mandate.⁶⁰ 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. however, the lack of agreement about what is a confidence vote and the ability of the government to postpone confidence votes has added to the bizarre nature of our Parliament.)

Following adoption of the Canadian fixed election date legislation it became clear that the election call was now solely in the hands of the opposition and the government dared them to do it. With an eye on the polls, the Official Opposition declined. Instead they abstained from voting on legislation and gave reasons why there should not be an election. Unable to get a dissolution in this way the government simply ignored the law, called an election anyway and defended itself in the court of public opinion and in Federal Court.

In a word, Canada's fixed election date legislation has created far more serious problems than it has solved.

Background

The principal impetus for the legislation was the action of Liberal Prime Minister Jean Chrétien in 1997 and 2000 when he sought dissolution after only three years in office and at a moment when the main Opposition party was in disarray. The result both times was a majority for the Liberals and a promise by the Conservatives that they would make it impossible for future Prime Ministers to act in such an arbitrary way by introducing fixed dates for future federal elections. There were also other factors at play.

Three provincial legislatures, British Columbia, Ontario and Newfoundland had already held elections under their respective fixed date legislation. However each of them has a single chamber and all had majority governments. The situation in Ottawa with four parties, a minority parliament and a bicameral chamber has proven much more complicated.

Many Canadian electors are very familiar with American election practices. They wonder why Canadian elections cannot be held regularly as they are in the US or, for that matter, in all Canadian municipalities.

⁵⁹ Seinfeld episode 137, originally broadcast on NBC, October 3, 1996.

⁶⁰ For an article on how recent governments have played fast and loose with the confidence convention see Gary Levy, *The Confidence Game*, *InRoads*, No. 25, Summer/Fall 2009, pp. 48-59

Another argument, rarely articulated except by retired MPs, is simply the desire to remove some unpredictability in public life. It is hard enough on individuals and their families to make the decision to enter politics. When they do not even know the date of the election it becomes even harder to convince busy professional people to take the plunge.

More cynical explanations will have to wait the judgement of history. But it is possible that the fixed election law is part of a very carefully thought out plan to re-engineer the Canadian parliamentary system away from its Westminster roots where the emphasis is on unwritten conventions, self discipline in the pursuit of power and a role for Crown discretion in upholding essential fairness, toward a more American understanding of governance where the people are sovereign, government is an evil that has to be constantly checked and the end always justify the means.⁶¹

Bill C- 16 and its Consequences

Bill C-16 was a very short and simple amendment to the **Canada Elections Act**. It added these key provisions:

56.1 (1) Nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion.

(2) Subject to subsection (1), each general election must be held on the third Monday of October in the fourth calendar year following polling day for the last general election, with the first general election after this section comes into force being held on Monday, October 19, 2009.⁶²

The Bill did not attempt to change the constitutional provision establishing the maximum length of Parliament at five years. Nor did it contemplate the very real possibility that the minority government of Stephen Harper would not last the full 45 months until the scheduled election since the average duration of previous minority governments was about twenty months.

Nevertheless the decision to fix election dates was welcomed enthusiastically by those who believe the Canadian Prime Minister has too much power and that parliamentary democracy is well served by checking this power.⁶³ During testimony to the House Committee most experts felt the Bill did not really change the status quo⁶⁴ although some of them noted how rare it was for a government to propose an institutional reform that does not seem to benefit itself in one way or another.

⁶¹ For an argument that Mr. Harper is deliberately trying to undermine parliamentary institutions see Jennifer Smith, "Parliamentary Democracy versus Faux Populist Democracy" in Peter Russell and Lorne Sossin, *Parliamentary Democracy in Crisis*, University of Toronto Press, Toronto, 2009.

⁶² See Edward McWhinney, "Fixed Election Dates and the Governor General's Power to Grant Dissolution," *Canadian Parliamentary Review*, vol. 31, no. 1, spring 2008

⁶³ See for example, Peter Russell, *Two Cheers for Minority Government*, Emond Montgomery Publications Limited, Toronto, 2008, pp. 134-142

⁶⁴ Canada, House of Commons, Standing Committee on Procedure and Organization, October 5, 2007. Testimony of Henri Milner, Andrew Heard and Louis Massicotte Canada, Senate, Standing Committee on Legal and Constitutional Affairs, February 14, 2007

Adopted on a voice vote by the House the Bill faced an uncertain future in the Senate where the Liberals held a large majority and seemed prepared to delay indefinitely. They heard from witnesses who were much more critical of the Bill such as David Smith who argued that fixed election dates fit neither the theory or practice of parliamentary government. "Fixed election dates do not give the public greater voice in politics. In fact, the partisan motivation and potential for engineering defeats within the House shifts the focus of attention even more than at present from constituents to the party leaders in the House."⁶⁵

The prospects for the bill changed dramatically in the Spring of 2007 when polls were published showing the Conservatives within grasp of a majority. With rumours rampant about a snap election, the Liberal Senators did an about face and returned the Bill to the House in the hope it might forestall an election that could have been disastrous for the Liberals.

The Conservatives did not call an election although on at least two other occasions urgent calls went out to party workers to nominate candidates and get the machinery ready as an election was rumoured to be imminent. For a reform that was supposed to end such speculation the federal law has had virtually no impact.

Nor did the legislation create an equal playing field between government and opposition. Instead it transferred responsibility from the Prime Minister to the Leader of the Opposition for setting the election date. The Official Opposition, led first by Stephane Dion and later by Michael Ignatieff, repeatedly spoke against government bills and then abstained from voting to avoid an election. In early 2008 Prime Minister Harper announced that virtually every vote on government business was going to be a matter of confidence. The result was more abstentions which are the antithesis of what a parliamentary system is supposed to achieve by fixing responsibility in very clear and obvious ways.

In such an atmosphere it is hardly surprising that parliament became more and more dysfunctional. A former Chief of Staff to Prime Minister Mulroney was one of the first to suggest publicly that it was a mistake for the government to feel restrained by its own fixed election date legislation⁶⁶

The Prime Minister came to this view in August 2008 when he met with his caucus to consider the upcoming fall session. He decided to ignore his own legislation. To do this he claimed that Parliament had become unworkable. He met separately and briefly with the leaders of the other three parties and asked them for assurances they would cooperate in making Parliament work. When he failed to receive such assurances, he declared unilaterally that Parliament had lost confidence in his government and asked the governor general to dissolve Parliament and set the election date for October 14, 2008, one year earlier than required under his own fixed-election statute. No vote of confidence took place in the House.

⁶⁵ Canada, Senate, Standing Committee on Legal and Constitutional Affairs, February 14, 2007

⁶⁶ See Norman Spector's column in *Globe and Mail* January 4, 2008.

Mr. Harper could not point to any specific incident other than the general chaotic atmosphere in committees. In calling an election without having been defeated he acted notwithstanding a statute of Canada setting the next federal election for October 2009. Although this was clearly a violation of the spirit of the fixed election date legislation the governor general acceded to the Prime Minister's request to dissolve the House. The other parties theoretically could have proposed an alternative government to run the country until the date set out in the legislation but they did not. The election result was inconclusive as Mr. Harper returned with another minority although with slightly more seats. No one has suggested that the governor general erred in giving Mr. Harper his dissolution but some wondered what is the purpose of a law that can be so easily ignored?

Apologists for the early election likened it to a dentist appointment. If the patient cannot attend he or she simply cancels and makes a new one. This "dental school of governance" did not sit well with many Canadians and the Federal Court was asked to rule on the government's action. The applicants were Democracy Watch, a public advocacy group, and its founder and coordinator Duff Conacher. The named respondents included the Prime Minister, the Governor General and the Governor in Council.

The application sought a declaration that the calling of the election in October 2008 was contrary to the new section 56.1 of the Canada Elections Act, which ostensibly provides for a regime of regular fixed-date elections. The grounds of the application involved the interpretation of the statutory language, but also led the court to a consideration of the nature of the royal prerogative and constitutional conventions. It became necessary for the Court to consider at some length its jurisdiction to hear and determine the issues raised. In particular, it addressed an argument that the Governor General's decision was ultimately political in nature and that judicial scrutiny of such actions would upset the "separation of powers" between the executive and judicial branches of government. The Court accepted this argument, among others, and denied the application.⁶⁷

The Court also reflected upon another practical difficulty. Suppose a loss of confidence in the House of Commons were indeed a necessary condition for the calling of an early election. The courts would then be in the invidious position of determining when a loss of confidence occurs. There is no commonly agreed-upon definition of "non-confidence"⁶⁸ against which a court could make an objective determination. In the words of the Court, "A government losing the confidence of the House of Commons is an event that does not have a strict definition and often requires the judgment of the Prime Minister."⁶⁹

At the outset of the 2008 election campaign the opposition parties roundly criticized Mr. Harper for ignoring his own legislation but with the world heading into the most serious economic downturn since the 1930s, this issue quickly disappeared. During the campaign

⁶⁷ For more information on the case see Doug Stolz, Fixed Date Elections, Parliamentary Dissolutions and the Court, *Canadian Parliamentary Review*, vol 13, no. 1, 2010. See also Guy Tremblay, 'The 2008 Election and the Law on Fixed Election Dates,' *Canadian Parliamentary Review*, 31, no. 4 (2008-9), pp. 24-25

⁶⁸ See Eugene Forsey, "The Problem of 'Minority' Government in Canada" in Forsey, *Freedom and Order*, Carleton Library, 1974.

⁶⁹ Stolz, *op. cit.*

no opposition party promised to repeal the act. After the election dust had settled one independent Senator, Lowell Murray brought in a bill that would repeal the law. In the debate on second reading he said "The bill that we passed into law is a facade. It is misleading; I would almost say it was intended to mislead. In any case, it is of no force or effect."⁷⁰ A few Liberal Senators agreed but repeal died on the Order Paper. Thus the fixed date election law remains on the books although no one expects the next election to be held in October 2012.

The United Kingdom Fixed Election Date Proposal

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 bias 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 on September 13 and will be considered by a Committee of the Whole House.

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, if a motion of no confidence is passed and a new government cannot be formed within fourteen 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 second way an early election can occur is by a vote of at least two-thirds of the House of Commons.

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

⁷⁰ Canada, Senate, *Debates*, January 29, 2009.

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.

Observations and Analysis

While comparisons are tempting there are many nuances between the Canadian and British parliamentary systems. Therefore the following observations will be mainly limited to asking if the proposed UK Bill had been in force in Canada would we have avoided two of the more unfortunate parliamentary episodes in our recent history – first a Prime Minister defying his own fixed date legislation by calling an election without having been defeated in the House and then, a few months later, avoiding certain defeat by proroguing Parliament when faced with a no confidence motion and attacking the legitimacy of the coalition formed to replace the government.

In my view the UK legislation would have prevented both. The requirement for a two thirds majority would have prevented Mr. 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 UK 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.

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. It is hard to believe the governor general would have granted prorogation if she had something like the proposed UK law in place at the time.

One issue that seems to be left hanging in the UK 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 in three years and the damage to the Canadian parliamentary system has been considerable.⁷¹

⁷¹ See Gary Levy, *A Crisis Not Made In a Day*, in Peter Russell and Lorne Sosssein, *Parliamentary Democracy in Crisis*, University of Toronto Press, Toronto, 2009.

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.

A Thought on the Frequency of Elections

It appears that the UK Bill, unlike the Canadian one, will in fact, decrease the number of elections even in situations when no party has a majority.

Polls consistently show that the population at large seems to abhor elections. They would probably be happy with an election every seven, let alone five years. The British proposal seems much more able to deliver fewer elections. Canada has had three elections (2004, 2006, 2008) in six years with the prospect of another one in 2010 or early 2011.

Anyone familiar with American politics will know the difficulty of making coherent policy in a two year election cycle which is basically a permanent election campaign. We simply will not keep pace with China and other developing countries where elections, to say the least, do not consume the time, energy, money and political capital of the western style elections that we hold so dear.

Final Comment

Despite the problems Canada has had with its fixed date election law this is not necessarily an argument against such laws. The UK proposal appears to have drawn the proper lessons from the Canadian experience. Its provisions would, in most cases, prevent a Prime Minister from abusing the power to dissolve the House by requiring him to have some support from other parties. It also provides an orderly way to move from a successful no confidence motion to either an election or a new government without an election and without dragging the Crown into a political controversy. If enacted it could provide a beacon to help the Canadian Parliament emerge from its present conundrum.

24 September 2010

Memorandum by Professor Errol Patrick Mendes, Faculty of Law, University of Ottawa (FTP 24)

The history of fixed elections or fixed Parliaments laws has not been a very successful one at the federal level in Canada although the provincial versions have yet to be fully tested where they are to be implemented by minority governments. Nine of the provinces and territories have fixed elections laws on the books starting with British Columbia in 2001. The sad history of the federal legislation started with the enactment in November 2006 when Parliament enacted Bill C-16, *An Act to Amend the Canada Elections Act*.⁷² The legislation, which was a key part of the election platform of the Conservative Party that brought them to power, established October 19, 2009 as the first date of a federal election that would bring to an end the first four year fixed Parliamentary periods. As one of the constitutional experts most critical of the Prime Minister for breaking his own cherished election platforms, I penned the following article in one of Canada's leading newspapers, *The Ottawa Citizen*.⁷³

It now seems almost certain that Stephen Harper will visit the governor general just after Labour Day to seek an early election. This is despite the fixed election date of October 2009

⁷² Bill C-16, *An Act to amend the Canada Elections Act*, S.C. 2007, c. 10, now codified at *Canada Elections Act*, S.C. 2000, c. 9, s. 56.1.

⁷³ *The Ottawa Citizen*, April 28, 2008 also located at the following url:
<http://www.canada.com/ottawacitizen/news/opinion/story.html?id=d24396f8-fb42-4856-a01e-03eb128d1dcf>