

# **Reining in the Crown's Authority Over Dissolution**

## **The *Fixed-Term Parliaments Act* of the United Kingdom versus Fixed-Date Election Laws in Canada**

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Defence of Thesis

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# The Debate Over Fixed-Date Election Laws in Canada Has Been Flawed

- \* The terms of debate in Canada have overlooked fundamental questions
- \* Executive authority and the Crown of Canada;
- \* The constitutional entrenchment of the same;
- \* What Responsible Government means and how it works;
  - \* A) How dissolution works in practice
  - \* B) How the Crown's authority over dissolution could in fact be altered or restricted
  - \* C) Established constitutional roles of the Governor and First Minister

# Sources of Authority for the Crown of the U.K. vs The Crown of Canada

The British Crown derives its authority from three sources:

1. Prerogative (*prae + rego*)
2. Crown as a legal person (Ram Doctrine)
3. Statute

The Crown of Canada derives its authority from *four* sources:

1. General constitutionally entrenched executive authority
2. Specific constitutionally entrenched provisions
3. Crown as a legal person (Ram Doctrine)
4. Statute

# Dissolution: Constitutionally Entrenched Executive Authority

- \* Constitutional entrenchment of the Crown's authority over dissolution
  - \* Constitutional amendment under s. 41(a) of the *Constitution Act, 1982* equivalent of the *Fixed-Term Parliaments Act, 2011*.
- \* Non-derogation clauses in Canadian fixed-date election laws.
  - \* Extra-constitutional or non-constitutional reform
  - \* Fear of “opening the constitution”

# Responsible Government

- \* Constitutional entrenchment of Crown of Canada's authority over dissolution:
  - \* Section 9 of the *Constitution Act, 1867*
  - \* Section 50 of the *Constitution Act, 1867*
  - \* Section 41(a) of the *Constitution Act, 1982*
- \* Established constitutional positions of the Crown and First Minister of the Crown are also part of the Constitution of Canada.
- \* Fixed-date election laws therefore must contain the non-derogation clause

# Responsible Government

- \* But couldn't a law limit the Prime Minister's or Premier's capacity to advise the Governor General or Lieutenant Governor to dissolve the assembly without derogating from the Crown's authority over dissolution?
- \* No.
- \* Responsible Government means that a statute law cannot drive a wedge between the Crown and First Minister of the Crown, since the former acts on the latter's advice.

# How Dissolution and Elections Work

- \* Three-step process in Canada, issued as three proclamations
- \* All are carried out on ministerial advice
- 1. Dissolving the existing parliament (PM)
- 2. Issuing writs of election (Cabinet)
- 3. Summoning the next parliament *pro forma* (PM)



# Snap Elections

- \* “a Prime Minister’s power to request a dissolution of Parliament and the timing of an election does not invariably confer an electoral advantage on the governing party.”
- \* Todd identified four justifications for early dissolution:
  1. After the Crown dismisses one ministry for another
  2. Breaking deadlock between the two houses
  3. When the government and the Commons are at odds
  4. When the Commons and the people are at odds.
- \* Early dissolution is not a cancer on the body politic. It can be beneficial.

# Snap Elections

<u>Snap Elections</u>	<u>How They Affected the Incumbent</u>
1874	Win: The Liberals expanded their parliamentary majority
1911	Loss: Laurier ended 15 years of Liberal government
1958	Win: Conservatives went from plurality to majority
1965	Draw: Liberals went from plurality to plurality
1968	Win: Liberals went from plurality to majority
1997	Win: Liberals went from majority to majority
2000	Win: Liberals went from majority to majority
2004	Loss: Liberals went from majority to plurality
2008	Draw: Conservatives went from plurality to plurality

# History & Intent of the Canadian Fixed-Date Election Laws

- \* They all started as reactions against specific Prime Ministers
- \* 1972-1974: First fixed-date election bills introduced by New Democratic MPs
  - \* Prevent Trudeau I from dissolving minority parliament early
- \* 1988-2007: the Reform Party, Canadian Alliance, and Conservative Party championed fixed-date election bills.
  - \* The Reform Party also supported constructive non-confidence.
  - \* Reaction against Campbell's late dissolution of 1993 and Chretien's early dissolutions in 1997 and 2000.
- \* In the provinces, governments of all parties introduced fixed-date election bills.

<u>Jurisdiction</u>	<u>Year of Enactment (and Amendment)</u>	<u>Party in Government</u>
British Columbia	2001 (2017)	BC Liberals (New Democrats)
Newfoundland & Labrador	2004 (2015)	Conservatives (Conservatives)
Ontario	2005 (2016)	Liberals (Liberals)
Northwest Territories	2006	Not applicable
New Brunswick	2007	Conservatives
Canada	2007	Conservatives
Manitoba	2008 (2012)	New Democrats (New Democrats)
Saskatchewan	2008 (2012)	Saskatchewan Party (Saskatchewan Party)
Prince Edward Island	2008 (2013)	Liberals (Liberals)
Alberta	2011	Conservatives
Quebec	2012	Pequistes
Nunavut	2014	Not applicable

# Variations in the Canadian Laws I

- \* All fixed-date election laws, federal and provincial, preserve the Governors' authority over dissolution
  - \* Different wording, same outcome
- \* Contained in either *Elections Act*, *Constitution Act*, or *Legislative Assembly Act* (or equivalent thereof)
- \* They all originally scheduled elections in x month every 4 years.
  - \* Legislatures can therefore live for more than 4 years
  - \* Manitoba, Saskatchewan, and Prince Edward Island changed schedules in 2012 and 2013 to avoid conflict with federal schedule
  - \* Currently, Newfoundland & Labrador's scheduled election for 2019 overlaps with federal election.

# Variations in the Canadian Laws II

Non-Derogation Clause	Affirmation Clause
Canada	British Columbia
Alberta	Quebec
Saskatchewan	
Manitoba	
Ontario	
New Brunswick	
Prince Edward Island	
Newfoundland and Labrador	

“Nothing in this section affects the powers of the Lieutenant Governor, including the power to dissolve the Legislative Assembly, by proclamation in Her Majesty’s name, when the Lieutenant Governor sees fit.” (PEI’s *Elections Act*)

“The Lieutenant Governor may, by proclamation in Her Majesty's name, prorogue or dissolve the Legislative Assembly when the Lieutenant Governor sees fit.” (BC’s *Constitution Act*)

# Variations in the Canadian Laws III

Elections Act	Legislative Assembly Act	Constitution Act
Canada	Saskatchewan	British Columbia
Alberta	Quebec	
Manitoba	New Brunswick	
Ontario	Newfoundland & Labrador	
Quebec		
Prince Edward Island		

Newfoundland & Labrador:  
Alberta:

“election on change of premier”  
scheduled range from 1 March to 31 May

# The Trouble with Timing: Being Early

- \* First ministers can advise governors to dissolve legislatures early.
- \* Early dissolutions with fixed-date election laws have happened five times:

<u>First Ministers Who Elected to Go Early</u>	<u>Result for the Incumbent Government</u>
Harper (Canada), 2008 (Minority Parliament)	Draw: (Conservatives expanded their plurality but failed to secure a majority)
Marois (Quebec), 2014 (Minority Parliament)	Loss: (The incumbent PQ lost and the rival Liberals won a majority)
Wynne (Ontario), 2014 (Minority Parliament)	Win: (The incumbent Liberals went from a plurality to a majority)
Prentice (Alberta), 2015 (Majority Parliament)	Loss: (The rival New Democrats won a majority)
MacLauchlan (PEI), 2015 (Majority Parliament)	Win (The Liberals expanded their majority)



# The Trouble with Timing: Being Late

- \* Late elections: legislatures extend their own lives through statutory amendments
  1. Newfoundland and Labrador: 2015
  2. Manitoba: 2016
  3. Saskatchewan: 2016
- \* Prince Edward Island might do the same for 2019-2020.

# The Trouble with Timing: Next Scheduled Elections

Jurisdiction	Month and Year
Canada	October 2019
British Columbia	October 2021 (formerly May 2021)
Alberta	March 1 - May 31 2019
Saskatchewan	November 2020 (April 2021?)
Manitoba	October 2020
Ontario	June 2018 (formerly October 2018)
Quebec	October 2018
New Brunswick	September 2018
Prince Edward Island	October 2019 or April 2020
Newfoundland & Labrador	October 2019

# Effects of Canadian Laws

- \* They have not imposed a *minimum* lifespan of four years.
- \* But they have, in effect, reduced the *maximum* lifespan from 5 years to something between 4 and 5 years.
  - \* Dissolution by efflux of time
- \* Only a constitutional amendment could eliminate the involvement of First Ministers and Governors in dissolution

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## **When the Bell Tolls for Parliament: Dissolution by Efflux of Time**

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### **INTRODUCTION: THREE MEANS OF DISSOLVING PARLIAMENT**

In his classic treatise *Commentaries on The Laws of England* of 1753, William Blackstone described dissolution as “the civil death of a parliament” and explained that it can occur in one of three ways:

1. By the king’s will [...];
2. By a demise of the crown [...];
3. By length of time.<sup>1</sup>

First, dissolution “by the king’s will” remains the primary method of dissolving parliament in Canada and remained so in the United Kingdom until the general election of 2015. Responsible Government, in which “Ministers of the Crown take responsibility for all acts of the Crown,”<sup>2</sup> has preserved dissolution by the Crown’s will because the Queen or Governor, as the case may be, acts on and in accordance with ministerial advice, save for exceptional circumstances.<sup>3</sup> Responsible Government thereby reconciles the medieval principle of Royal Infallibility with liberal democracy and self-government: the Queen can still do no wrong because it is the ministry which takes responsibility for all acts of the Crown. Second, dissolution “by a demise of the Crown” no longer exists in either British or Canadian law; this extinct method stems from the nature of the medieval English State, but it had become increasingly impractical in the Modern Era, particularly after the Glorious Revolution, and legislatures across the British Empire abolished it. Third, dissolution “by length of time”, also known as “efflux of time,” means that

<sup>1</sup> Sir William Blackstone, *Commentaries on the Laws of England in Four Books. Notes selected from the editions of Archibald, Christian, Coleridge, Chitty, Stewart, Kerr, and others, Barron Field’s Analysis, and Additional Notes, and a Life of the Author by George Sharswood. In Two Volumes, Volume 1, Books I & II, edited by George Sharswood* (Philadelphia: J.B. Lippincott Co., 1893) at 187.

<sup>2</sup> Sir John George Bourinot, *Parliamentary Procedure and Practice*, 4th ed. (Montreal: Dawson Brothers Publishing, 1916) at 102.

<sup>3</sup> R. Macgregor Dawson, *The Government of Canada*, 5th ed. (1970), revised by Norman Ward (Toronto: University of Toronto Press, 1947) at 175.

# There And Back Again: A Tale of Dissolution in England & the UK, 1641-2011

Source of the authority for dissolution has oscillated throughout English and British history

1. The first *Triennial Act, 1640* (Statute for 1<sup>st</sup> 50 Days; Crown thereafter)
2. The *Act Against Dissolving the Long Parliament Without Its Own Consent, 1641* (Statute)
3. The second *Triennial Act, 1664* (Crown)
4. The third *Triennial Act, 1694* (Crown)
5. The *Septennial Act, 1715* (Crown)
6. The *Parliament Act, 1911* (Crown)
7. The *Fixed-Term Parliaments Act, 2011* (Statute)

# *The Fixed-Term Parliaments Act, 2011*

- \* Like the Canadian laws, it was also passed for political reasons: keeping the Cameron-Clegg coalition intact for the full 5 years
- \* The Prime Minister and Queen no longer play any role at all in dissolving Parliament.
- \* Parliament now dissolves by efflux of time pursuant to the statute itself every 5 years, apart from two exceptions:
  - \* A) If two-thirds of MPs support a motion that there be an early general election
  - \* B) If after losing a motion of confidence (with a simple majority), the House fails to support a new ministry on a confirmation vote in 14 days, the Parliament dissolves automatically to break the deadlock.
  - \* The latter is similar to constructive non-confidence

# How Dissolution Worked and Works in the United Kingdom

## Pre-Fixed Term Parliaments Act

- \* Three executive actions in one proclamation issued by the Queen on ministerial advice:
  1. Dissolution of Parliament on 12 April 2010;
  2. Lord Chancellor issues writs of election
  3. Lord Chancellor summons the next parliament for 18 May 2010.

## Fixed-Term Parliaments Act

These three steps now flow from the statute, no longer from the Crown's authority.

1. Parliament dissolves by efflux of time (or under exceptional procedures)
2. Lord Chancellor issues writs of election pursuant to statute
3. Parliament is summoned according to statute.

# Two Elections Under *The Fixed-Term Parliaments Act, 2011*

## General Election of 2015

- \* Dissolution by efflux of time, i.e., automatically, according to the statute itself.
- \* “Parliament has been prorogued and will automatically dissolve on 30 March under the *Fixed-term Parliaments Act*.”

## General Election of 2017

- \* parliament may be dissolved early if two-thirds of MPs pass a motion “That there shall be an early parliamentary general election.”
- \* Prime Minister May herself introduced this motion in April 2017.
- \* Labour passed it.
- \* She regretted it!

# Dissolution, Constructive Non-Confidence, & Confirmation Votes

- \* The Government may no longer deem certain bills matters of confidence
- \* Constructive non-confidence and confirmation votes replace the confidence convention.
- \* This law shows how Westminster parliamentarism is an organic system: once one thing is changed (dissolution), various other things need to change, too (confidence convention).
- \* Early election of 2017 showed futility of even the *Fixed-Term Parliaments Act*, with its real restrictions on executive authority.



# Prospects for Reform

- \* Best change for regulation and marginal restrictions on summoning, proroguing, and dissolving parliaments would come in minority parliaments – like 2004 to 2011.
- \* Limit the maximum time between sessions and parliaments
- \* Canada's fixed-date election laws stem from normative (and dubious) assertions that First Ministers have too much power and misinterpretations of what Responsible Government means.
- \* Snap elections aren't always bad, and they don't always guarantee victory for the incumbent government.
  - \* This week, two journalists encouraged Trudeau to go for a snap election!

# Conclusions

- \* “a Prime Minister’s power to request a dissolution of Parliament and the timing of an election does not invariably confer an electoral advantage on the governing party.”
- \* Todd identified four justifications for early dissolution:
  1. After the Crown dismisses one ministry for another
  2. Breaking deadlock between the two houses
  3. When the government and the Commons are at odds
  4. When the Commons and the people are at odds.
- \* Early dissolution is not a cancer on the body politic. It can be beneficial.

# Conclusion

- \* General problem of how the courts will adjudicate separation of powers and entrenchment of the Crown's executive authorities in particular
- \* Canada is now far more institutionally conservative (or inert) than the United Kingdom
- \* Canada will never adopt a *Fixed-Term Parliaments Act* because we fear “opening the constitution.”
- \* Now that Harper's no longer PM, no one cares any longer anyway – except obsessive eccentrics like me.