The 2008 Election and the Law on Fixed Election Dates

by Guy Tremblay

In 2007 Parliament adopted legislation establishing a fixed date for elections every four years. The date established in the law for the next election was October 19, 2009. In September 2008 the Prime Minister asked the Governor General to dissolve Parliament for an election to be held on October 14, 2008. Some have argued that such a request was improper and even illegal. This article looks at the legal issues surrounding the fixed election date legislation.

The opposition parties in the House of Commons were quick to point out that, by calling the election for October 14, 2008, Prime Minister Harper circumvented if not violated the bill he enacted to establish fixed election dates.[1] The central provision of this bill adds the following to the *Canada Elections Act*:

> 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.
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> (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.

In my opinion, both extreme interpretations of this provision must be ruled out from the outset.

The first interpretation to rule out is that the new act is intended merely to reduce the maximum length of a Parliament from five years to four and that it does not change anything else. Since subsection 56.1 (1) preserves the Governor General's power to dissolve Parliament, it would therefore leave intact the Prime Minister's power to make a recommendation to the Governor General in this regard. This interpretation is not valid as it would make subsection (2) meaningless by requiring the first general election under the new system to be held on Monday, October 19, 2009.

Equally disputable is the opposite interpretation, whereby the Governor General's discretion serves solely to comply with the procedure for amending the Constitution,[2] thereby leaving intact just one power that the Governor General can exercise of her own initiative. Under this interpretation, the act would preclude any potential recommendation for dissolution by the Prime Minister. This interpretation of the act cannot be upheld because it would adversely affect the essence of the Canadian parliamentary system and the democratic principle upon which the Constitution is based. Unlike the presidential system in the United States, the government and Parliament have the power of life and death over each other in Canada.[3] To offset a potential vote of non-confidence in the Commons, the government and the Prime Minister must retain the right to request the dissolution of Parliament.

The federal provision regarding fixed election dates allows the Prime Minister to call elections after a non-confidence vote in the Commons. But it does not spell this out and allows room for other possibilities. In the case of a majority government, the provision in question does indeed deprive the Prime Minister of the power to choose the timing of an election call based purely on opportunism. But is that also true for a minority government? In that case, do the opposition parties in the House alone have the power to decide whether or not an anticipated election will be held by refusing to bring down the government when the circumstances are not to their liking or by bringing it down when they are? The idea that a minority government should have flexibility comparable to that of the opposition parties is certainly defensible. At the end of the summer of 2008, while the House of

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Commons was adjourned, Prime Minister Harper met the leaders of the three opposition parties and then called a general election on the pretext that they no longer had confidence in his government. The Prime Minister did not in my opinion violate subsection 56.1 of the *Canada Elections Act* in so doing, even if he was motivated by electoral or partisan considerations.

Absence of Judicial Sanction

The legality of the election call for October 14, 2008, is nevertheless debatable and has in fact been challenged in Federal Court by the group Democracy Watch. Even if the act has been violated, various legal principles will lead the courts to refuse to sanction the illegality.

First of all, the exercise of the Governor General's powers is governed by constitutional conventions and not by strict legal principles. This includes the power to dissolve Parliament, which is specifically maintained in subsection 56.1 (1) of the *Canada Elections Act*. In this case, the most relevant constitutional convention is that the Governor General only dissolves Parliament at the Prime Minister's request. Since the opinions expressed by the Supreme Court in 1981 and 1982 with regard to the repatriation of the Constitution, it has been clear that the courts may rule on whether or not a constitutional convention exists, but may not sanction such a convention.[4] Insofar as the resolution of the dispute depends on the constitutional convention upheld by subsection 56.1 of the *Canada Elections Act*, a court of justice may not make binding conclusions.

Regardless of constitutional conventions, the courts are likely to find that the issue here is purely political and that it is not justiciable. When the Auditor General of Canada did not gain the access to documents to which she was legally entitled, the Supreme Court ruled that her sole recourse was to complain to the House of Commons.[5] The Court noted that this was essentially a dispute between the legislative and executive branches and pointed out that the government's refusal to provide the requested information could have an impact of the public's opinion of the government's performance. Similar considerations apply to the argument that Prime Minister Harper acted illegally by calling the election: he acted in response to a dispute between Parliament and the government, calling upon the electorate to settle it. A court of justice could also find that the Governor General is a more appropriate authority to uphold the law in this case. In any event, the alleged illegality can be sanctioned in the political arena alone.

Finally, the principles of necessity, rule of law and *de facto* authority also preclude judicial sanction of this alleged illegality. The principles in question prevailed in Manitoba, for instance, to ensure that laws that were unconstitutional (because they were unilingual) still had effect when time was allowed to re-enact them in both languages.[6] In the present case, a court of justice cannot "cancel" the election on October 14, 2008, several months after it was held or demand that the illegally dissolved House of Commons be reconstituted. The need to preserve the democratic system and the rule of law means that the validity of the general election of October 14, 2008 and of subsequent actions by public authorities must be recognized.

I firmly believe that the new provision of the *Canada Elections Act* regarding fixed elections dates does not prevent a minority government from asking the Governor General to dissolve Parliament because the government must have flexibility comparable to that of the opposition parties in the House in this regard. Prime Minister Harper's decision and the way he proceeded certainly constitute a precedent that could influence the interpretation not only of the federal act but also of all existing provincial acts that preserve the lieutenant governor's power to dissolve the legislature.[7] The fact remains that, regardless of interpretation, the fixed election dates act cannot be sanctioned by the courts after the fact, after it has been violated. However, a court of justice could issue a statement regarding its scope. A government could even, through a reference, call upon the Court of Appeal or the Supreme Court to rule on the interpretation of this act.

Notes

1. *An Act to Amend the Canada Elections Act*, S.C. 2007, c. 10.
2. Pursuant to paragraph 41a) of the *Constitution Act, 1982*, both houses of Parliament and the legislatures of the ten provinces must be in agreement in order to change the "office" of the Governor General, which includes her power to dissolve Parliament: *Attorney General of Ontario v. OPSEU*, [1987] 2 S.C.R. 2, p. 46-47.
3. Regarding the means of constraint by Parliament and the government in the Canadian parliamentary system, see Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 5th Edition, Cowansville, Éditions Yvon Blais, 2008, p. 607-611.
4. *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753; Re: *opposition to a resolution to amend the Constitution*, [1982] 2 S.C.R. 793.
5. *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49.
6. *Re: Manitoba Language Rights*, [1985] 1 S.C.R. 721.
7. Fixed election dates every four years have been set in British Columbia, Newfoundland and Labrador, Ontario, Prince Edward Island, New Brunswick, Saskatchewan and Manitoba.