Electoral Reform, Minority Government, and the Democratic Deficit:

Removing the Virtual Right of First Ministers to Demand Dissolution

by Peter Aucoin and Lori Turnbull

Five of ten provincial governments – New Brunswick, Prince Edward Island, Quebec, Ontario, and British Columbia – are considering changes to the way in which votes cast during provincial elections are translated into seats in their provincial legislatures. Federally, the Law Commission of Canada has recommended specific changes to the electoral system. This article considers one possible consequence of major electoral reform – the more frequent occurrence of minority or coalition government – and suggests a need to rethink certain traditional Canadian conventions of responsible government, namely the virtual right of Canadian prime ministers and premiers to dissolve the legislature and call elections when they see fit, even after their governments have lost the confidence of the legislature. It recommends new protocols to govern the respective powers of first ministers and governors general or lieutenant governors in the operation of responsible government.

The prospect of greater frequency of single-party minority governments (or coalition-party majority governments which are more susceptible to collapse into a single-party minority government than are single-party majority governments) demands a reconsideration of the virtual right of a first minister to call an election when her or his government is defeated on a vote of confidence in the legislature. Under the constitution, a prime minister or premier merely advises the Crown (the Governor General or Lieutenant Governor) to dissolve the House and thereby call an election. No constitutional expert denies that the Crown in Canada possesses a residual power to deny a first minister's request for dissolution. Yet, as the tradition has evolved in Canada, the first minister has assumed a virtual right to dissolution, even when their government is defeated in the legislature on a matter of confidence. There is one major exception to this right, but, even in this circumstance, unfortunately, there is an entirely unsatisfactory degree of uncertainty about what the Crown should do in granting or refusing dissolution.

At a time when most Canadian governments are addressing the so-called "democratic deficit",[1] a deficit that is partly due to a perceived excessive concentration of power in first ministers, the issue of a first minister's prerogative to call an election following a defeat in the legislature has not yet been addressed in the agenda of democratic reform that is now in fashion in several jurisdictions. Indeed, the one remedy to check the perceived excess of power vested in first ministers to call elections,

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namely the proposal to legislate fixed election dates, is amazingly silent on this most critical issue.

In British Columbia, a first jurisdiction to legislate fixed election dates, the statutory provision to accommodate the requirement of responsible government, that is, that an election may be called as a consequence of the defeat of a government in the legislature on a matter of confidence, provides for no protocol on the matter. Nothing is said about the fact that there is an alternative to an election in this circumstance. The alternative, of course, is a new government summoned by the governor and formed from the existing legislature without a new election. In this instance, the first minister of the defeated government will have already submitted her or his resignation to the governor, thus bringing that government to an end, or will do so when a new government is formed.

The Canadian Tradition

In Canada, the responsibilities of a Governor General or Lieutenant Governor (hereafter a governor) are now usually thought of as ceremonial. The principles of representative democracy, to say nothing of precepts of direct democracy, are deemed to have overtaken a governor's discretionary powers in the actual conduct of government. Given this understanding, it is generally assumed that a first minister's request for dissolution should almost always be granted. In fact, there is now considered to be only one situation where it is not certain whether a governor might not, even should not, grant dissolution.

The situation occurs when a government has lost a vote of confidence in the House in the period immediately following an election that it had called. In this instance, it is accepted that the governor should seek to determine whether a new government can be formed by the leader of the Official Opposition without the legislature being dissolved and a new election being held. Unfortunately, how long this "period immediately following an election" needs to be before the right of a first minister to dissolution is restored has never been definitely established.

Canada's foremost authority on the subject, the late Senator Eugene Forsey, defended the right and power of a governor to refuse a request for dissolution.[2] In certain circumstances, he argued, a governor's exercise of this discretion might be the only constitutional check on the first minister. The power to refuse dissolution, in other words should not be rejected as illegitimate or improper from a democratic perspective. Indeed, the essential role of the Crown under responsible government is to protect and preserve the constitution of responsible government itself.

The Canadian convention, however, also allows a governor almost complete discretion in the exercise of the Crown's power to grant dissolution. Ironically, if not perversely, the discretion to grant dissolution in almost any circumstance has served to undermine the potency of the governor's check on a first minister. The reason is simple. Since governors are expected to grant dissolution in virtually all circumstances, a governor who refused dissolution in any other circumstance other than the one exception noted above would risk politicizing the matter of the Crown's powers. To make matters worse, refusal to grant dissolution even in this one exception would be equally fraught with the risk of politicization, since the governor would need to define the period of time required for the first minister to regain the right to dissolution and that definition, naturally, would inevitably be subject to political debate. The legacy of the 1926 King-Byng affair would merely add fuel to the fire.

The New Zealand Solution

As in Canada, the essential principle of responsible government in New Zealand is that the Governor General acts in accordance with the advice of the prime minister or the prime minister and ministers so long as they have the confidence of the House of Representatives.[3] If the government loses this confidence in New Zealand, however, the prime minister advises the Governor General that the government will resign. In this situation, the Governor General must ascertain whether a new government can be formed with the confidence of the House. If one can be formed, the defeated government resigns and the new government assumes office. If a new government is not possible, an election is called, and the incumbent government continues in office, but only as a "caretaker government". The responsibility of the Governor General in this circumstance is "to ascertain where the support of the House lies"; it is "not the role of the Governor General to form the government or to participate in any negotiations" leading to the possible formation of a new government.

The crucial difference between the Canadian and New Zealand traditions is that the New Zealand convention requires the prime minister of a defeated government to offer its resignation, and then to wait to see whether a new government can be formed from the legislature. In New Zealand, in short, the prime minister does not have a right to dissolve the House following a loss of confidence, even if the government has been in office for some time. In Canada, in contrast, it is assumed that a first minister whose government has been defeated in the House has a virtual right to dissolution, unless it had been granted dissolution in the recent past (which, as noted, is

an undefined period of time). In other words, once a minority government has survived for some undefined period of time it has every right to dissolve the legislature if it is defeated. It need not worry about the possibility of another government being formed from the same legislature.

The Canadian Convention: One More Democratic Deficit?

Given the likelihood of electoral reform in the near future, and the resulting increase in the occurrence of minority governments, Canadians should debate whether the first minister of a defeated government should have the virtual right to dissolve the legislature. Surely if it is appropriate to debate fixed election dates that would remove from the first minister the right to call an election at her or his discretion when the majority or minority government which he or she leads has the confidence of the House then it is even more pressing to pose the question of a first minister whose government no longer enjoys the confidence of the legislature. In posing this question, moreover, it is necessary to consider the wisdom of the Crown possessing an undefined discretion to grant or refuse dissolution in a representative democracy.

In our view, the Canadian tradition is defective on three fronts.

First, the Canadian convention is not effective in addressing the possibility of "a diet of dissolutions", as would occur if the first minister of a continuously defeated government sought continuously to go to the polls in the hope of a better electoral outcome. (In somewhat the same vein, the current convention is obviously not effective in checking a first minister who times an election merely for partisan-political purposes.) The Canadian convention forces a governor to refuse dissolution in order to check a first minister as a matter of the governor's discretion. There is no established rule or protocol for a governor to follow or to insist that a first minister follow. As a consequence, the Canadian convention inevitably also forces a governor to state her or his reasons for refusing dissolution, thereby drawing her or him into the vortex of partisan politics in what will often, if not invariably, be a confusing or complicated political situation.

Second, the Canadian convention does not constrain the discretion of a governor in granting dissolution. A governor can grant dissolution in virtually any circumstance and, in this case, can do so without the need to give reasons. The convention of no constraints on a governor's discretion to grant dissolution can thereby result in a legislature being denied the opportunity to support the formation of a new government after it has explicitly withdrawn its confidence in the incumbent government.

Third, the Canadian convention is defective as it relates to political practice because it creates a disincentive for members of the opposition (or even the members of a minor party in a coalition government) to defeat a government on a vote of confidence even when a majority of the legislature favours a change in government but when a majority do not want an election to be held simply to determine the fate of the government. On the assumption that there can be democratically valid reasons for a majority in the legislature not wanting to have an election at a particular point in time when it also wants a change in government, the Canadian convention works against good government.

(Conversely, there is no public purpose served in a first minister being able to use the threat of dissolution against opposition parties, or even against one or more minor parties in the coalition government headed by the first minister, to keep these members of the legislature from voting non-confidence in the government. The claim that this power is checked in the sense that the electorate can hold a first minister accountable is technically accurate. But the check in question, namely the electoral defeat of a government, is not an appropriate check. It requires that the electorate focus first and foremost on the first minister's responsibility for the calling of an election rather than on the record of the government. Responsible democratic government is not well served by forcing the issue in this way.)

Changing the Convention: A Proposed Set of Protocols

Fixed election dates deal with one democratic deficit respecting dissolution, namely, the power of a prime minister whose government commands the confidence of the legislature to play partisan-politics with the timing of elections, with all of the perverse consequences for good government that can ensue. Fixed election dates bring their own problems, of course, but they are more easily dealt with than the open-ended discretion of a first minister's discretion to call elections. A new set of protocols to govern what happens when a government loses the confidence of the legislature is required to do what fixed election dates cannot do, namely, stipulate the responsibilities and powers of the first minister and the governor respectively.

The New Zealand model offers an attractive alternative to the Canadian one: it requires that the possibility of a new government being formed from the existing legislature be explored before the legislature is dissolved and an election is called. In doing so, it not only avoids the

possibility that a first minister and a governor become embroiled in a political struggle and perhaps public debate over the proper understanding of the requirements of the constitution of responsible government in the situation at issue, it also avoids the possibility that a governor be seen to have exercised her or his discretion to grant or deny dissolution for partisan-political reasons (including the matter of who appointed her or him governor).

To repeat: the New Zealand protocol is as follows:

1. When a government loses the confidence of the legislature, the prime minister advises the Governor General that the government will resign.

2. The Governor General ascertains from opposition members whether a new government can be formed with the confidence of the House.

3. If a new government can be formed, the defeated government resigns and the new government assumes office.

4. If a new government is not possible, an election is called, and the incumbent government continues in office through the election period, but only as a "caretaker government".

We propose that the Canadian jurisdictions adopt the protocols of the New Zealand model. Coupled with fixed election dates, they offer a democratic reform that respects the formal constitutional structure, the democratic principles of responsible government, and the demand that the excessive concentration of power in first ministers be checked.

If fixed election dates are not accepted as a way to check the power of a first minister whose government has the confidence of the legislature, we propose that dissolution only be granted a first minister whose government has the confidence of the legislature following a resolution in the legislature. This would at least constitute a check on a first minister who heads a minority government. As a consequence, an election called by a first minister in this context would require, at a minimum, the majority opposition approve the resolution and thus also accept responsibility for calling the election. A defeated resolution would require that a minority government either carry on or resign so that a new government could be formed.

Notes

1. See Peter Aucoin and Lori Turnbull, "The democratic deficit: Paul Martin and parliamentary reform," *Canadian Public Administration*, Winter 2003, Vol. 46, number 4, pp. 427-449.
2. Eugene Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (Toronto: Oxford University Press, 1943).
3. See New Zealand, Department of the Prime Minister and Cabinet, Cabinet Office, *Cabinet Manual 2001* (Wellington: Cabinet Office, 2001), Part 4, Elections, Transitions and Government Formation, pp. 53-62.