Fixed Election Dates and the Governor General's Power to Grant Dissolution

by Edward McWhinney, Q.C.

An Amendment to the Canada Elections Act assented to by the Governor General on May 3, 2007, establishes a new, four-year term limit for the House of Commons with its stipulation that federal general elections are to be "held on the third Monday of October in the fourth calendar year following polling day for the last general election". This article considers whether the new law has any effect on the traditional powers of the Governor General to dissolve Parliament for an election.

The previous five year ceiling limit for the term of a Parliament had been constitutionally entrenched in s.4 [1] of the *Constitution Act* of 1982. There is no constitutional reason why the new, four year limit should not be established now by statute, even if it may appear somewhat inelegant from the legislative drafting viewpoint to join it to the provision of a fixed date (the third Monday of October) for the holding of future general elections.

The junction of the new ceiling limit for the House with a fixed election date every four years may explain the suggestion in some quarters that the recent Amendment to the *Canada Elections Act* may have, intentionally or otherwise, created by legal indirection limitations on the Reserve, Prerogative powers of the Governor General as to the granting or refusal of a Dissolution. That this is not so is put beyond legal doubt by the express, "saving" declaration to the Amendment itself:

> S.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".

The decision by Governor General Romeo LeBlanc in 1997, and then by Governor General Adrienne Clarkson in 2000, to accede to Prime Minister Chretien's requests for Dissolution in each case after only three and a half years of the then five year term and without any prior defeat of his government brought some public criticisms of a claimed "democratic deficit", and may have contributed politically to the eventual adoption of the *Elections Act Amendment* of 2007. Certainly one did not hear any very persuasive constitutional grounds put forward by the government to support otherwise premature Dissolutions in 1997 and 2000. In the first case, the facetious comment was offered that an early, June election would allow a summer free to play golf; in the second, more seriously, that the existing political rules of the game allowed a government to go to the polls early to profit from the political inexperience of a newly chosen Opposition leader, Stockwell Day.

Mr. Chretien has taken the opportunity of restating, in his memoirs, the traditional post 1926 view of the constitutional relationship between elected Prime Minister and non-elected Governor General that there is "nothing under our rules and traditions to prevent a Canadian prime minister from holding a snap election at any time, except the risk of being punished for political opportunism".[1] That, of course, was Prime Minister Mackenzie King's position on his confrontation with Governor General Lord Byng in 1926. This particular constitutional interpretation of a Prime Minister's powers vis-à-vis the Governor General persisted for very long after the events of 1926, in spite of the very strong contrary arguments of the eminent constitutional historian, the late Eugene Forsey.

Contemporary reexamination of its claims as constitutional precedent for today, however, might see King-Byng as rooted in its own historical time dimension as a political power contest of the mid-1920s between an Imperial agent or representative still effectively chosen and appointed by the British government of the day, and

Edward McWhinney is a former Member of Parliament and author of "The Governor General and the Prime Ministers. The Making and Unmaking of Governments [2005]" and other works.

an unusually astute Canadian politician who was fully prepared to make political capital against a British official in the climate of local, Canadian nationalism of the period that would lead on, within a few years, to Dominion Status and sovereignty as recognized in the Statute of Westminster of 1931.

Governor General Clarkson, in her own post-retirement memoirs published in 2006, chooses to embrace a latter-day approach to King-Byng claims to status as contemporary precedent for contemporary constitutional conflicts or differences between Prime Minister and Governor General. She accepts the Forsey thesis that Governor General Lord Byng was perfectly correct constitutionally in refusing to grant the dissolution requested by King, but that Lord Byng was simply, as a "British Governor General", out-manoeuvred politically by King in the subsequent general elections when King's hapless successor as Prime Minister, Arthur Meighen, who had been mandated by Byng after he had refused a Dissolution to King, was defeated in general elections fought in part on the issue of Byng's decision.[2]

Since 1952, with Vincent Massey's appointment, Canadian Governors General have all been Canadian citizens and, as such, part of the internal, Canadian, system of constitutional checks and balances. Political inhibitions, supposedly stemming from the past Imperial connection, as to the exercise of the Governor General's constitutional role today in relation to the Prime Minister and other, coordinate federal governmental institutions, have no relevance in contemporary constitutional terms. In this context, former Governor General Clarkson now looks back on a question that, she says, arose during the Paul Martin minority government after the 2004 general elections: whether, if requested by the Prime Minister for a Dissolution in his government's early, post-elections difficulties, she should grant the Dissolution. Her conclusion, under constitutional advisement, on the then hypothetical question: certainly not immediately, but only after the government should have lasted at least six months. In her words: "To put the Canadian people through an election before six months would have been irresponsible, and in that case I would have decided in favour of the good of the Canadian people and denied dissolution."[3]

The overall position expressed there is clear that the Governor General today is not constitutionally bound automatically to accept a Prime Minister's advice as to Dissolution: that the Governor General today does still retain a certain discretion constitutionally. The former Governor General's pragmatic summation, with its inbuilt counsel as to a prudent self-restraint in exercise of Reserve, discretionary powers: "I think only a very astute and politically conscious Governor General would be about to exercise this [Reserve] authority. And it would be justifiable only in the most exceptional of circumstances. When all is said and done, the Governor General usually acts upon the advice of the prime minister."[4]

When coupled with the principle, accepted in the Westminster Parliament by the later 1920s, and applied in other former and present Commonwealth Countries that retain the Westminster-style constitutional system today, that not every defeat of a government in a House of Commons vote (and possibly only a defeat on a formal No-Confidence motion or on a vote on the Budget as a whole) constitutionally warrants a Prime Minister in requesting a Dissolution, or for that matter a Governor General calling a Prime Minister in for constitutional discussion, we reach a situation where minority government at the federal level is seen as a politically viable solution even perhaps to the limits of the new four year statutory ceiling term. A Prime Minister would still retain the right, according to the existing long-standing Constitutional Conventions, after suffering a succession of defeats in House votes on non-substantial legislative measures – a "death of a thousand cuts" – to approach the Governor General to request a Dissolution: the Governor General, under the same long-standing Conventions, would retain the right to consult with the Opposition as to the possibilities of forming an alternative government without the need for a Dissolution and fresh general elections.

In the latter situation, existing well-established practice in Commonwealth constitutional Law and Conventions suggests that the Governor General, before acting to withdraw the mandate from an incumbent Prime Minister, is entitled to be satisfied, beyond reasonable doubt, of the political capacity of Opposition parties to be able to form, and then maintain for a sufficient time period, an alternative government that commands the support of a numerical majority of House members. The developed practice is to insist on formal commitments to that effect, in writing, which would include any conditions attached by Opposition forces to their support for a proposed new government, the time duration of such support, and also, crucially, the number of votes that are being committed sufficient to constitute a new, continuing majority in the House.

Notes

1. Jean Chretien, *My Years as Prime Minister*, 2007, p. 199.
2. Adrienne Clarkson, *Heart Matters,* 2006, pp, 191-2.
3. *Ibid.*, p. 192.
4. *Ibid*.