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# Fixing Our Fixed Election Date Legislation

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by Adam Dodek

*In 2008, the Prime Minister sought and received a dissolution of Parliament despite the passage of legislation in 2007 establishing a fixed date for elections every four years. The date established in the law for the next election was October 19, 2009. Instead, an election was held on October 14, 2008. This article looks at the fixed election date legislation. It examines the question of whether it still mandates that an election be held in October of 2009 and suggests that the legislation should be re-examined.*

When the Prime Minister went to the Governor General in September of last year to seek a dissolution of Parliament, he was clearly acting against the spirit of his own fixed election date legislation that mandated that the next election be held on October 19, 2009.<sup>1</sup> That decision has been the subject of previous commentary<sup>2</sup> and current court action.<sup>3</sup> This article addresses a different issue: notwithstanding the October 2008 election, is an election still scheduled for 2009? The answer, I submit, is not clear and warrants Parliament's clarification.

The basic problem with the fixed election date legislation is that it fails to directly address what was a predictable if not probable situation: that the minority government of Stephen Harper would not last until the scheduled election date in October 2009 – a full 45 months from when it was elected back in January 2006. The average duration of the minority governments that preceded Stephen Harper's was 20 months.<sup>4</sup> When the fixed election date legislation (Bill C-16) was debated in the House, there was much discussion about how

it would come into play in a minority government situation, however, the bill itself is silent on this issue.

The key provisions of Bill C-16 added 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.

(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.

There are two ways to interpret this section after the 2008 election. Each is problematic in its own way. Any interpretation is based upon a parsing of the three clauses that make up subsection 56.1(2) of the Act: (1) that any scheduled date is made subject to the powers of the Governor General, i.e. that she can dissolve Parliament prior to the fixed date; (2) that 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; and (3) that the first general election after this section comes into force is to be held on Monday, October 19, 2009. Whether an election is scheduled for October 19, 2009 hinges on whether the

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first clause modifies only the second clause or both the second and the third.

Driedger's "modern rule" of statutory interpretation is well-known and has been embraced by the courts:

"Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."<sup>5</sup>

The quintessential problem with the modern or "contextual" approach is that when everything counts, it is difficult to discern what is determinative. That problem arises here.

Essentially, there are two possible interpretations to Bill C-16 respecting the date of the next scheduled federal elections. The first interpretation is what I would term "the Accepted Orthodoxy." It assumes that the first scheduled ("fixed") election date would have been October 19, 2009 but the exercise of the Governor General's power to dissolve Parliament under subsection (1) pre-empted this and re-calibrated the fixed date so that it is now four years following October 14, 2008, i.e. October 15, 2012.

This interpretation gives primacy to the first two of our relevant clauses while essentially rendering the third clause – "with the first general election after this section comes into force being held on Monday, October 19, 2009" – nugatory. In fact, it treats this provision as spent, despite the fact that the specified date has not yet occurred.

The second interpretation which I would term the "Rogue Election" because it raises the specter of the paradox of an unexpected scheduled election within the rubric of so-called fixed election date regime. The Rogue Election interpretation gives credence to each of the three clauses that work together in this inelegant electoral code, but places emphasis on the explicit naming of October 19, 2009 as an election date. It attempts to give meaning to each provision ("the law is always speaking" . . .), by interpreting the first clause ("subject to [the Governor General exercising her discretion to dissolve Parliament earlier]") as modifying only the words "the first" in the last clause. It emphasizes the language of this clause that states that the election will "be held on Monday, October 19, 2009." Such an election would not be the first – that is modified by the actions of the Governor General – but it would still give the most meaning to the language of that provision. And then from October 19, 2009 onwards we apply the second clause – every four

years – which was held in abeyance by the "subject to subsection (1)" until that first scheduled election date.

Neither of these interpretations are particularly satisfactory and they reflect the problem in trying to merge two different types of elections – scheduled and non-scheduled elections – within a single statutory provision.

Under either interpretation, we do not have a problem once October 19, 2009 is reached because then that clause will truly be spent. But what now?

A review of the debates in Hansard indicates that MPs were well aware that the bill would not prohibit the Prime Minister from seeking an early dissolution. MPs on both sides of the aisle erred, however, in their estimation of the political cost that would be exacted on a Prime Minister who sought an early dissolution.

It is unfortunate that Parliament failed to address this foreseeable issue. The debates in Hansard did not directly address situation we are now in – the need for some transition mechanism to address a possible non-scheduled election called before the first scheduled election date. However, the debates in the House of Commons do reference legislation in Ontario and British Columbia that served as models and they are instructive on this issue.

The federal act most clearly mirrors the British Columbia legislation, although the B.C. legislation is less ambiguous. Their key provision provided<sup>6</sup>:

(2) Subject to subsection (1), a general voting day must occur on May 17, 2005 and thereafter on the second Tuesday in May in the fourth calendar year following the general voting day for the most recently held general election.

It is not surprising that the majority government of Gordon Campbell did not provide for an explicit transition clause if the Lieutenant Governor dissolved the Legislative Assembly before that first scheduled election date because the prospect of a government holding 77 out of 79 seats falling either by design or by accident, was rather far-fetched.

However, in Ontario the McGuinty Liberals with a comfortable majority in the legislature, did provide for an explicit transition clause. Ontario's fixed date legislation provides<sup>7</sup>:

9.(1) Nothing in this section affects the powers of the Lieutenant Governor, including the power to dissolve the Legislature, by proclamation in Her

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Majesty's name, when the Lieutenant Governor sees fit.

(2) Subject to the powers of the Lieutenant Governor referred to in subsection (1),

(a) a general election shall be held on Thursday, October 4, 2007, unless a general election has been held, after the day on which the Election Statute Law Amendment Act, 2005 receives Royal Assent and before October 4, 2007, because of a dissolution of the Legislature; and

(b) thereafter, general elections shall be held on the first Thursday in October in the fourth calendar year following polling day in the most recent general election.

Subsection 9(2)(a) of Ontario's act states explicitly what everyone implicitly thinks the federal legislation says.

What is the significance of this? Court action is less likely to compel a fall 2009 election than it is to declare the last election unconstitutional. Should we just simply ignore the uncomfortable fact that we have legislation on the statute books stating that a general election is to be held this October and embrace the Accepted Orthodoxy? Should we dismiss the Rogue Election interpretation under the absurdity principle?

Herein lies the significance. Legislation that was intended to provide certainty and bolster public confidence in politics has had precisely the opposite effect. It is purposely vague and problematically ambiguous. It demonstrates the difficulty of trying

to fuse a fixed election date system onto our existing parliamentary system.

At the least, Parliament should go back and correct the flawed fixed election date legislation. It should amend the legislation to reset the clock to October 2012 and include an explicit transition clause along the lines of the Ontario model to address the possibility indeed the probability that Parliament is dissolved before that date. This will also provide an opportunity for MPs to revisit the policy and the application of the idea of fixed election dates which to many seemed like a good idea in theory, but in practice it does not seem to be working smoothly.

#### Notes

1. *An Act to Amend the Canada Elections Act*, S.C. 2007, c. 10 (Bill C-16).
2. See Guy Tremblay, "The 2008 Election and the Law on Fixed Election Dates" (Winter 2008-2009) *Canadian Parliamentary Review* p. 24.
3. See *Conacher v. Canada (Prime Minister)*, 2008 FC 1119 (3 October 2008) (Docket T-1500-08)(dismissing a motion to expedite the hearing of an application impugning the legality of the actions of the Prime Minister, the Governor in Council and the Governor General culminating in the calling of the October 14, 2008 election).
4. See Peter Russell, *Two Cheers for Minority Government* (Toronto: Emond Montgomery, 2008) p. 61.
5. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21 (citing Elmer A. Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983).
6. *Constitution Act*, R.S.B.C. 1996, c. 66, s. 23.
7. *Election Act*, R.S.O. 1990, C. 6, s. 9.