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.[1]

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,"[2] 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.[3] 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

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1 Sir William Blackstone, *Commentaries on the Laws of England in Four Books. Notes selected from the editions of Archibold, 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.

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

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

parliament dissolves automatically when it has reached its maximum lifespan, as defined by law, without any intervention on the part of the Crown. In Canada, at the federal level and in all the provinces, dissolution by efflux of time remains a theoretical possibility. In practice, however, the Parliament of Canada has never been dissolved by efflux of time, though it was almost allowed to do so in 1896, amidst considerable controversy.

This article will outline the legal process through which parliaments are dissolved and summoned and general elections are called in both Canada and the United Kingdom, explore how a dissolution by efflux of time would be promulgated in Canada, and describe how fixed-date election laws in Canada and the *Fixed-Term Parliaments Act, 2011* of the United Kingdom affect the Crown's authority over dissolution.

1. HOW PARLIAMENTS ARE DISSOLVED AND ELECTIONS ARE CALLED IN THE UNITED KINGDOM

Until the Tudor period, English parliaments typically lasted, at most, one year, and "parliament"did not sit permanently and regularly as they do today. Instead, the Sovereign summoned "a parliament" only when necessary. Parliament's transition from count noun to a mass noun reflected its growing importance. Not until Thomas Cromwell and the Henrician Reformation of the 1530s did the civil service emerge as a separate entity from the king's household and parliament emerge as a policy-making body beyond obtaining supplies.[4] Henceforth, parliament would play a regular, ongoing, and active role in the modern State as opposed to its sporadic and *ad hoc* function in the medieval State. In the Middle Ages, a parliament could dissolve automatically upon the demise of the Crown without causing disruption to the Realm. If anything, this principle gave the new Sovereign more room to manoeuvre and pursue his own aims.

Parliament started to emerge as the permanent institution that we know today after the Glorious Revolution of 1689 and the *Triennial Act* of 1694. Blackstone's second method comes into play at this stage. Parliament modified the medieval, common-law custom of automatic dissolution "by a demise of the Crown" through the *Succession to the Crown Act, 1707*, which instead allowed the parliament to continue for up to six months after a demise of the Crown. Finally, the Westminster Parliament abolished this principle altogether through the *Representation of the People Act, 1867* so that a parliament would continue irrespective of a demise of the Crown. Similarly, the United Province of Canada abolished the principle of automatic dissolution upon the demise of the Crown in 1843, and the Dominion of Canada re-affirmed its abolition in new legislation in 1867.[5]

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4 Geoffrey Elton, *The Tudor Revolution in Government: Administrative Changes in the Reign of Henry VII* (Cambridge University Press, 1953).

5 Audrey O'Brien and Marc Bosc, *House of Commons Procedure and Practice*, 2nd Ed. (Ottawa: House of Commons and Editions Yvon Blais, 2009) at 386.

The statutory elimination of what Blackstone lists as the second method of dissolution fits a general legislative pattern over the 17th, 18th and 19th centuries whereby the Westminster Parliament has passed statutes which modify common law principles so that overall English and British law reconciles with the fact that the Crown is a corporation sole, which Blackstone also pointed out in this treatise.[6] Laws like the *Succession to the Crown Act, 1707* and the various *Crown Estates Acts* therefore replaced the Sovereign's personal capacity with the Sovereign's legal capacity as the default authority of State functions. In other words, the Sovereign now summons parliaments in his or her perpetual legal capacity, which transfers intact to his or her successor upon a demise of the Crown, and no longer in his or her mortal personal capacity.[7]

In England and the United Kingdom, the legal status of dissolution by the sovereign's will has fluctuated multiple times since 1641, with statutes variously putting that prerogative authority into abeyance, fully restoring it, regulating it, and finally, putting it into abeyance once again in 2011. The *Fixed-Term Parliaments Act, 2011* – a piece of legislation whose radicalism is frequently under-estimated – has put Blackstone's first method of dissolution, that by the sovereign's will, into abeyance again, such that the British Crown no longer plays any role whatsoever in dissolving parliament. As of 2011, all that remains in the United Kingdom of the three means of dissolving parliament is what Blackstone identified above as the third method of dissolution by efflux of time.

The new British procedure includes three steps for dissolving the parliament, issuing the writs of election, and summoning the next parliament, but all three now flow from the authority of *The Fixed-Term Parliaments Act* itself and no longer stem from the executive authority of the British Crown.

First, Parliament dissolves by efflux of time in accordance with s. 3(1) of the Act:

> The Parliament then in existence dissolves at the beginning of the 17th working day before the polling day for the next parliamentary general election as determined under section 1 or appointed under section 2(7).

Second, pursuant to s. 3(3), the Lord Chancellor and the Secretary of State issue the writs of election for the United Kingdom of Great Britain and Northern Ireland's 650 constituencies:

> Once Parliament dissolves, the Lord Chancellor and, in relation to Northern Ireland, the Secretary of State have the authority to have

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6 *Supra* note 1, at 469.

7 In contrast, the Sovereign owns certain properties like Sandringham and Balmoral in his or her natural capacity, so they do not automatically transfer to the Sovereign's heirs and successor's upon a demise of the Crown, but instead in accordance with standard laws on wills and inheritance of property.

> the writs for the election sealed and issued (see rule 3 in Schedule 1 to the Representation of the People Act 1983).

Third and finally, the prime minister advises the Queen to issue a proclamation summoning the next parliament on a certain date, now in accordance with s. 3(4)(a):

> Once Parliament dissolves, Her Majesty may issue the proclamation summoning the new Parliament which may — (a) appoint the day for the first meeting of the new Parliament.

As the Cameron-Clegg government stated in this press release in 2015, "Parliament has been prorogued and will automatically dissolve on 30 March under the *Fixed-term Parliaments Act*."[8] It adds, "The prime minister will ask Her Majesty to summon the new Parliament to meet on Monday 18 May," which means that the Queen still summons the new parliament on the prime minister's advice — but this authority now flows from s. 3(4)(a) of the Act and no longer from the prerogative. The *Fixed-Term Parliaments Act, 2011* put the executive authority over dissolution into abeyance; the Westminster Parliament can now ordinarily be dissolved only by efflux of time, or in two extraordinary circumstances set out in the statute, by the will of the House of Commons itself. The Queen no longer dissolves parliament on the advice of the prime minister or under any circumstances whatever.

2. HOW PARLIAMENTS ARE DISSOLVED AND ELECTIONS ARE CALLED IN CANADA

In Canada, Blackstone's first means of dissolution remains in full force; the authority to dissolve parliament rests with the Crown of Canada by virtue of ss. 9 and 50 of the *Constitution Act, 1867*. As in the United Kingdom, dissolving parliament, issuing the writs of election, and summoning the next parliament are promulgated through three separate proclamations.[9] First, the governor general dissolves the parliament on and — apart from exceptional circumstances, in accordance with — the advice of the prime minister. Second, the governor general issues the writs of election on the advice of cabinet. Third, the governor general summons the first session of the next parliament *pro forma* on the advice of the prime minister.

The documents in the *Canada Gazette* show that the Government of Canada still follows essentially the same procedure that the *Manual of Official Procedure of the Government of Canada* described in 1968 by issuing three separate proclamations: the dissolution of the old parliament, the issuing of writs of election, and the *pro forma* summoning of a new parliament.[10] For

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8 United Kingdom, Prime Minister's Office, 10 Downing Street, "Press Release: State Opening of Parliament to Take Place on 27 May 2015," 26 March 2015 [Emphasis added].

9 Canada. Privy Council Office, *Manual of Official Procedure of the Government of Canada*, Henry F. Davis and André Millar. (Ottawa: Government of Canada, 1968) at 407.

10 *Canada Gazette*, "Proclamation Dissolving Parliament," 28 March 2011; *Canada*

example, in 2011, the governor general issued the *Proclamation Dissolving Parliament* "by and with the advice of Our prime minister of Canada", based on the prime minister's Instrument of Advice, which he provides the governor general individually without reference to Cabinet.[11] The Governor-in-Council then issued the *Proclamation Issuing Writs of Election* "by and with the advice of Our Privy Council for Canada," which means that Cabinet (with a minimum quorum of four) advised the governor general through an Order-in-Council.[12] Finally, the governor general issued the *Proclamation Summoning Parliament to Meet on 30 May 2011* "by and with the advice of Our prime minister of Canada", again through a unilateral prime ministerial Instrument of Advice.[13]

Dissolution by efflux of time would only account for the *first* of those three proclamations that the governor general normally issues on the advice of the prime minister or cabinet. In effect, a dissolution by efflux of time would require that the governor general issue a proclamation acknowledging that the dissolution of parliament has already occurred, not on the advice of the prime minister, but instead pursuant to the authority of s. 50 of the *Constitution Act, 1867*. However, the governor general would still have to issue the proclamations promulgating the writs of election on the advice of cabinet and summoning the next parliament *pro forma* on the advice of the prime minister — since neither of these pertains to the dissolution of parliament itself, but rather, from the consequences that necessarily flow from dissolution. Downing Street's aforementioned press release from 2015 also illustrates how these three pieces of advice must be promulgated by three different legal instruments when parliament dissolves by efflux of time.

3. FIXED-DATE ELECTION LAWS SET A NEW BASELINE FOR DISSOLUTION BY EFFLUX OF TIME IN CANADA

(a) Maximum Life of the Parliament

The proponents of fixed-date election laws in Canada used to argue that they would impose certainty in the timing of general elections and ensure that parliaments lasted a regular four years.[14] In principle, this argument flowed from a fundamental misreading of how our system of government works, and, in practice, precedents have disproven it time and again. The various federal and provincial fixed-date election laws failed to achieve that objective because

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Gazette, "Proclamation Issuing Writs of Election," 28 March 2011; *Canada Gazette*, "Proclamation Summoning Parliament to Meet on 31 May 2011," 28 March 2011.

11 *Canada Gazette*, "Proclamation Dissolving Parliament," 28 March 2011.

12 *Canada Gazette*, "Proclamation Issuing Writs of Election," 28 March 2011.

13 *Canada Gazette*, "Proclamation Summoning Parliament to Meet on 31 May 2011," 28 March 2011.

14 Peter H. Russell, *Two Cheers for Minority Government: The Evolution of Canadian Parliamentary Democracy* (Toronto: Emond Montgomery Publications Limited, 2008) at 134-142; Henry Milner, "Fixing Canada's Unfixed Election Dates," *Institute for Research on Public Policy: Policy Matters* 6, no. 6 (December 2005) at 3.

they all deliberately preserved the authority of the governor general and lieutenant governors to dissolve the House of Commons and legislative assemblies, thereby also preserving the established constitutional positions of the governors and the first ministers, including the authority of the first ministers to advise snap elections. Since 2008, five first ministers have advised early dissolutions without first having lost the confidence of the assembly: Prime Minister Stephen Harper in 2008, Premier Pauline Marois of Quebec in 2013, Premier Kathleen Wynne of Ontario in 2014, Premier Jim Prentice of Alberta in 2015, and Premier Wade MacLaughlin of Prince Edward Island in 2015. Even Andrew Heard would therefore have to grudgingly accept that this practice has become a convention.[15]

There is a question as to whether the statutory authority that forms the baseline for dissolution by efflux of time would continue to rest on s. 50 of the *Constitution Act, 1867* or, alternatively, on s. 56.1 of the *Canada Elections Act*, which contains the Parliament of Canada's fixed-date election law.

Section 50 of the *Constitution Act, 1867* set the maximum lifespan of the Parliament of Canada at five years:

> Every House of Commons shall continue for Five Years from the Day of Return of the Writs for choosing the House (subject to be sooner dissolved by the governor general), and no longer.

Section 4(1) of the *Constitution Act, 1982* reaffirms the aforesaid s. 50 and applies the same five-year maximum lifespan to the provincial legislative assemblies:

> No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.

Section 56.1 of the *Canada Elections Act* contains the federal fixed-date elections law:

> 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.

Fixed-date election laws therefore do not — either in principle or in practice — prevent first ministers from calling early elections because they do not impose a *minimum* lifespan of a parliament or legislature. However, one of the few concrete effects of these laws is that they do reduce the *maximum*

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[15] Andrew Heard, "*Conacher* Missed the Mark on Constitutional Conventions and Fixed Election Dates," *Constitution forum constitutionnel* 19, no. 1 (2010) at 21-32; Andrew Heard, "Constitutional Conventions: The Heart of the Living Constitution," *Journal of Parliamentary and Political Law* 6, no. 2 (August 2012) at 319-338

lifespan of a parliament or legislature from five years to something between four and five years.[16] These statutes have thus become the new points of reference for the automatic dissolution of a parliament or legislature once it reaches its maximum life.

This is because statute law can exceed the minimum standards that the *Constitution Acts* set as supreme law; in this case, the minimum threshold is a maximum lifespan, and the fixed-date election statutes lower the maximum life of the parliament. In contrast, increasing the maximum life of the parliament would require a constitutional amendment to s. 50 of the *Constitution Act, 1867*. The new maximum life of a parliament cannot be defined precisely as four years, but rather only on a range of four to five years, because the fixed-date election provision of the *Canada Elections Act* mandates that the election occur every fourth October, and not precisely every four years down to the month of the previous writs of election. For instance, the 41st Parliament lived from May 2011 to August 2015. But if the fixed-date election law did set the date of the next election precisely four years after the writs for the previous general election, then the 42nd general federal election would, by necessity, have occurred in May 2015 instead of in October 2015.

The next possible dissolution of the Parliament of Canada by efflux of time could occur in 2019. For instance, if Prime Minister Trudeau forgot to advise the governor general to dissolve the 42nd Parliament with respect to the election currently scheduled for 21 October 2019, then, under the current statute, the 42nd Parliament would dissolve by efflux of time on Sunday 19 September 2019 so that the writ would last for the minimum 36 days. Cabinet would then have to remind him that they must present an Order-in-Council to the governor general, who would then issue a proclamation on their advice promulgating the writs of election. (At this stage, Cabinet would no longer be able to choose a longer writ!) The prime minister would then have to advise the governor general to summon the 43rd Parliament *pro forma* on a date of his choice.

No first minister has over attempted to advise a late dissolution relative to a fixed-date election law on the authority of the *Constitution Acts*, though we have of course seen five instances where the first minister has advised an *early* dissolution relative to the next general election scheduled by fixed-date election laws.

(b) Legislating Minimum and Maximum Durations of the Writ

Section 57(1) of the *Canada Elections Act* regulates the writs of election and mandates that the writ period must last, at minimum, 36 days. However, the Act currently places no limit on the maximum duration of the writ period,

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[16] Audrey O'Brien and Marc Bosc, *House of Commons Procedure and Practice*, 2nd ed. (Ottawa: House of Commons and Editions Yvon Blais, 2009) at 386. O'Brien and Bosc say, "Since 2007, the *Canada Elections Act* has contained provisions limiting the duration of a Parliament to four years." However, the experience of the 41st Parliament shows that the maximum life of the parliament is in fact not precisely 48 months.

which remains at the discretion of the prime minister and cabinet. In light of the 42nd general election, which lasted a near-record 78 days,[17] New Democrat MP Alistair MacGregor has introduced a bill that would also prescribe a maximum writ of 46 days.

> 57 (1) The Governor in Council shall issue a proclamation in order for a general election to be held.
> 1.2 The proclamation or order shall
> (a) direct the Chief Electoral Officer to issue a writ to the returning officer for each electoral district to which the proclamation or order applies;
> (b) fix the date of issue of the writ; and
> (c) fix the date for voting at the election, which date must be at least 36 days after the issue of the writ.[18]

As ParlInfo shows, the 42nd general election lasted the longest of all elections on which the writs for all ridings were made returnable on the same day; the only general election that went on longer was that of 1872 (up to 89 days), when the governor general's proclamation specified that the return of writs for some ridings, like Algoma and Saguenay, would occur later.[19] In principle, if parliament is competent to set the minimum number of days of the writ, then it could also specify a maximum duration of the writ because, in both cases, the statute law regulates the exercise of the Crown's authority at the margins and does not substantially alter it. Notwithstanding how the *Canada Elections Act* regulates the duration of the writ, only the governor general, on the advice of the prime minister or cabinet, can issue the executive instruments to summon, prorogue, and dissolve parliaments. If, however, parliament or a provincial legislature wanted to pass legislation like the *Fixed-Term Parliaments Act, 2011*, they would find themselves *ultra vires* of s. 41(a) of the *Constitution Act, 1982*, because only a constitutional amendment under that unanimity formula could abolish the authority of the Crown to summon, prorogue, or dissolve parliament or a legislature.

4. NEAR-PRECEDENT OF DISSOLUTION BY EFFLUX OF TIME OF THE 7TH PARLIAMENT OF CANADA IN 1896

The 7th Parliament of Canada lived for 4 years, 11 months, and 31 days and, if it had lived for just one day more, would have dissolved by efflux of time on 25 April 1896.[20] However, Prime Minister Senator Mackenzie Bowell intervened at the last minute and advised that Governor General Lord

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17 Parliament of Canada, ParlInfo, "Length of Federal Election Campaigns," 26 August 2016.

18 Alistair MacGregor, ["Bill C-279, An Act to Amend the *Canada Elections Act* (length of election period)"], Canada, Parliament of Canada, 42nd Parliament, 1st Session, 31 May 2016.

19 *Supra* note 17.

20 Parliament of Canada, ParlInfo, "Key Dates for Each Parliament, 1867 to Present," 3 December 2015 [accessed on 20 August 2016].

Aberdeen dissolve it on 24 April 1896. While this incident might seem obscure and immaterial, it in fact holds great relevance to the interpretation of electoral law and the Crown's authority over dissolving parliaments and issuing the return of writs of election.

(a) Overview of the *Debates*

Charles Tupper served as the Government Leader in the House of Commons until the day after dissolution, when Senator Mackenzie Bowell resigned as prime minister and Lord Aberdeen appointed Tupper in his place.[21] Prior to that, Tupper represented the Bowell government during a debate on "the duration of parliament" on 16 March 1896, which centered on a disagreement between Her Majesty's Canadian Government and Her Majesty's Loyal Opposition over the meaning of s. 50 of the *British North America Act*, which sets the maximum life of a parliament at "Five Years from the Day of Return of the Writs for choosing the House (subject to be sooner dissolved by the governor general), and no longer." In particular, the debate — which takes up 16 pages in *Hansard* — centred on the meaning of "the day of return of the writs" and whether this phrase refers to the governor general's proclamation that had set the return of writs for 25 April 1891, or, alternatively, to 3 June 1891, the day on which the Returning Officer for the riding of Algoma returned the last writ to Rideau Hall, after having delayed the vote in that riding in accordance with the *Dominion Elections Act*. Liberal MP James Edgar, Liberal MP David Mills, and Liberal MP Louis Davies contributed learned and sound arguments to the debate.

At the outset of the debate, Edgar noted that the governor general issued four proclamations in relation to the 7th federal general election, in order to do the following:

1. Dissolve the 6th Parliament;
2. Issue the writs of election, "to be returnable on the 25th day of April next";
3. Summon the 7th Parliament *pro forma* on 25th April 1891, and;
4. "Prorogue" the 7th Parliament to 29th April 1891 for the despatch of business.[22]

First, Edgar's statements from the *Journals* of the House of Commons show that the procedure for dissolving a parliament and calling elections has remained unchanged since at least 1891, though he ought not to have described the proclamation postponing the summoning of the first session as a "prorogation," since, by definition, there is no session to prorogue if

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[21] Tupper retains the singular distinction of being the only prime minister of Canada whose tenure coincided purely with a writ period. While he did not have to contend with Parliament, John Turner was appointed prime minister the same day that the 32nd Parliament went into summer recess and was adjourned, rather than having been appointed upon its dissolution as Tupper was.

[22] Canada, Parliament of Canada, House of Commons. *Debates*. 7th Parliament, Sixth Session, Monday, 16 March 1896, 3599-3600.

parliament has not yet been convened. Instead, the fourth proclamation that Edgar describes merely extended the intersession between the 6th and 7th Parliaments. Second, the wording of the proclamation issuing the writs of election shows clearly that "the return of writs" means the day on which the writs are "returnable", not the date on which they are in fact returned. As Edgar pointed out, "If Parliament dies on 3rd June, 1896, at the age of five years, it must have been born on 3rd June 1891."[23]

However, Charles Tupper, a wily and experienced political operator, kept insisting that the 7th Parliament would not dissolve by efflux of time until 3 June 1896 on the grounds that a parliament is born not when the last writ is made returnable, but instead, when the last writ is returned. He showed a level of commitment to his assertion that would have been admirable if it had not been so mendacious: he took his absurd suggestion all the way to its logical extension and claimed that the 7th Parliament had met unlawfully on 29 April 1891 because the writ for Algoma had not yet been returned.[24] Tupper then went as far as to assert that "section 50 of the *British North America Act* does not definitely fix the life of Parliament at five years,"[25] when in fact, it does. Tupper claimed that a parliament could not meet until *all* the writs had been returned — a suggestion that Davies also refuted by pointing out that s. 48 of the *British North America Act* defines a quorum in the House of Commons as 20 MPs, who can then elect a Speaker and conduct all other business.[26] Tupper had even suggested that the government might refer the question of when the 7th Parliament would dissolve by efflux of time to the Supreme Court as a reference case, which Mills rightly dismissed "because it is a question of parliamentary law, [...] not a proper question to refer to the courts"[27] and, as a practical matter, because the court would not be able to issue a ruling before 25 April. Lastly, Tupper complained that all the Liberals who believed that the 7th Parliament would dissolve by efflux of time on 25 April opposed the *Remedial Bill* that the Bowell government had tabled in an effort to resolve the Manitoba Schools Question, while the Conservatives who supported his view that the 7th Parliament would last until 3 June all supported the *Remedial Bill*.[28] While the Liberals did indeed oppose the *Remedial Bill* in favour of Laurier's "Sunny Ways", Mills and Edgar were also correct in their interpretation of when the 7th Parliament would dissolve. Finally, Tupper accepted defeat:

> I would like to see this Parliament live long enough to deal comprehensively with the measure, but if there is any reasonable doubt amongst legal minds as to our power, no advocate of the measure [the *Remedial Bill*] would wish to run any risk.[29]

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[23] *Ibid.*, at 3602.

[24] *Ibid.*, at 3624.

[25] *Ibid.*, at 3624

[26] *Ibid.*, at 3619.

[27] *Ibid.*, at 3609.

[28] *Ibid.*, at 3625.

(b) Return of Writs Refers to the Date Set in the Proclamation

In short, "the return of writs" refers to the day on which the governor general's proclamation makes the writs *returnable* rather than the day on which the Returning Officers in fact *return* their papers to Rideau Hall. Therefore, the "return of writs" occurred on 25 April 1891, in accordance with the governor general's proclamation, and not on 3 June 1891, and the 7th Parliament would thus dissolve by efflux of time on 25 April 1896. In other words, the life of the parliament depends only on the date (or, in the general elections of 1867 and 1872, dates) on which the governor general's proclamation assigns the return of writs, because only the governor general, on cabinet's advice, has the authority to summon and call together a session of parliament. The life of the parliament cannot depend on the decision by a civil servant, if even he did act correctly and in accordance with statute law. As Mills pointed out:

> It is not the period when, as a matter of fact, the last writ is returned, by the period fixed in the proclamation for the return of the writ, that determines the question. Why, it could not be otherwise. How comes this House together? By what authority does it meet? Why it meets by the authority of the Crown. [...]
> I say that expression "return of the writs" has in parliamentary law received a well known and settled interpretation: it means the time from which the last write by the Royal proclamation is made returnable. It does not mean anything else.[30]

While a returning officer can, based on powers delegated to him under the *Canada Elections Act*, delay the return of the writ from his electoral district under some exceptional circumstances, delaying the return of his writ does not retroactively change the date on which the governor general made his writ returnable under the terms of the proclamation. Furthermore, to allow a returning officer to set the life of a parliament would run contrary to the principle of the rule of law, because it would permit an arbitrary and *ex post facto* administrative decision to supersede the Crown's authority. Returning officers do not make laws of their own; they must respect the law established by the governor general's proclamation.

Mills also pointed out that in the Dominion's first two general elections in 1867 and 1872, the proclamation issuing the writs of election did make the writs for some ridings returnable at a later day than the others,[31] which explains why the 1st and 2nd general elections were staggered and lasted longer than most other general elections. Davies characterized those first two federal general elections, with their staggered writs, as anomalous and contrary to the intent of s. 50, which contemplates only one "day" (singular) for "the return of the writs" (plural).[32]

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[29] *Ibid.*, at 3625.

[30] *Ibid.*, at 3613-3614.

[31] *Ibid.*, at 3614.

History and precedent have since demonstrated the correctness of Mills's interpretation that under parliamentary law "the return of writs" refers to the date on which they are returnable in accordance with the governor general's proclamation. For instance, the 12th, 17th, and 19th Parliaments were all dissolved by proclamation "just before the anniversary of the dates for the return of writs."[33] More importantly, the *Constitution Act, 1982* now codifies this interpretation as supreme law in s. 4(1):

> No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members (emphasis added).

The above provision means that the governor general's or lieutenant governor's proclamation identifies one calendar day as the date on which the writs are returnable. Prior to the passage of the various provincial and federal fixed-date election laws, this date served as the point of reference for the maximum lifespan of the parliament or legislature. At this stage, the fixed-date election laws themselves now contain the dates that serve as the point of reference for the maximum lifespan of the parliament or a legislature, usually in the fourth October or November following the return of writs from the previous general election.

5. SPECIAL CIRCUMSTANCES WHERE PARLIAMENTS AND LEGISLATURES CAN PROLONG THEIR LIVES

As the debates from 1896 show, s. 50 only applied to the Parliament of Canada and therefore did not set a maximum lifespan for the provincial legislatures. In 1896, s. 50 strictly limited the life of the Dominion Parliament to five years; only the Westminster Parliament had the authority to prolong the life of a particular Canadian Parliament, or set a new maximum lifespan of parliament in general, through an amendment to the *British North America Act*. In 1916, Canada tested this principle and requested that Westminster Parliament extend the life of the 12th Parliament by one year because of the impracticality of holding a general election while the Dominion remained firmly on a war footing.

While s. 85 of the *British North America Act* once limited the maximum life of the legislatures of Ontario and Quebec to four years, those provinces were free, under their respective provincial constitutions, to prolong the life of an existing legislature or to set a new general maximum lifespan of their respective legislatures.[34] Before the *Constitution Act, 1982* entered into force, the

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[32] *Ibid.*, at 3620.

[33] Canada. Privy Council Office, *Manual of Official Procedure of the Government of Canada*, Henry F. Davis and André Millar (Ottawa: Government of Canada, 1968) at 408.

[34] Every Legislative Assembly of Ontario and every Legislative Assembly of Quebec shall continue for Four Years from the Day of the Return of the Writs for choosing the same (subject nevertheless to either the Legislative Assembly of Ontario or the

provinces remained free to amend their provincial constitutions at will, provided that they did not attempt to alter the Office of the Lieutenant-Governor.[35] Sir Oliver Mowat — the great champion of provincial jurisdiction who, as Premier of Ontario, advanced numerous federal-provincial disputes to the Judicial Committee of the Privy Council and left his mark on the jurisprudence on the division of powers — noted as much in March 1896:

> The Dominion Parliament had no power to extend the term for which the House should endure, but the province [of Ontario] had power to extend the term for which the assembly should endure, larger powers having been granted to the provinces than to the Dominion in that respect.[36]

Section 4(1) of the *Constitution Act, 1982* therefore imposed the maximum life of five years on all provincial legislatures and reaffirmed the same for the Parliament of Canada, while also clarifying the meaning of the "date fixed for the return of the writs", with the "date" being in the grammatical singular so that Canadians in all electoral districts vote on the same day.

Section 4(2) of the *Constitution Act, 1982* outlines the special circumstances during which a parliament or legislature might lawfully exceed the normal maximum lifespan:

> In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

This provision remains untested, and the only comparable example occurred in 1916. I would argue that only an act of parliament — and not merely a motion of a provincial legislative assembly, not a motion of the House of Commons, and not a joint resolution of the House of Commons and Senate — could promulgate this provision into force because it treats the two-thirds super-majority in the House of Commons or legislative assembly of a province as a necessary condition, but not as a sufficient condition, that would in turn allow a "House of Commons" to "be continued by Parliament or a legislative assembly" to "be continued by the legislature". By the definition provided in s. 17 of the *British North America Act*, a "parliament" refers to the full Crown-in-Parliament: Queen, Senate, and Commons; similarly, a legislature of a province consists of the Lieutenant-Governor and the legislative assembly. Presumably, the Senate would only have to support such a bill by a simple majority where the House of Commons would have support it by a two-thirds super-majority.

Legislative Assembly of Quebec being sooner dissolved by the Lieutenant Governor of the Province), and no longer.

35 *Supra* note 22, at 3602.

36 *Ibid.*

The fixed-date election laws have lowered the maximum lifespan of Parliament and the provincial legislatures to somewhere in between four and five years; while in their wording they do not explicitly limit the lifespan of a parliament or legislature, they do so indirectly and necessarily reduce the life of the parliament or legislature by providing a fixed schedule for the next general election. Therefore, if Parliament or a legislature wanted to invoke the procedure under s. 4(2) today, it would have to include a provision in the bill to extend its lifespan suspending the application of the fixed-date election law for that particular parliament or legislature. Interestingly, the provision does not specify by how much time a parliament or legislature can prolong its life during a time of real or apprehended war, and it leaves open the possibility that they could turn themselves into something like the Long Parliament or the Cavalier Parliament and continue prolonging their terms indefinitely, provided that at least two-thirds of elected members agreed to do so.

CONCLUSION

An hour of debate in the House of Commons and one near-precedent of dissolution of by efflux of time in 1896 clarified how this procedure would work in Canada, and its implications reverberated for decades and carried over into s. 4 of the *Constitution Act, 1982*, a full 86 years later.

However, it is unlikely that dissolution by efflux of time would ever occur by default in Canada as it does in the United Kingdom under the *Fixed-Term Parliaments Act*. It would happen automatically. But in practice, dissolution is unlikely to occur by efflux of time because the governor general normally issues the proclamations for dissolving one parliament, issuing the writs of election, and summoning the next parliament *pro forma* together, the latter two of which would always require ministerial advice. So if ministers need to take the operative steps and tender advice for two of the three proclamations, then they might as well take responsibility for dissolving the parliament as well.

However, it is unlikely that dissolution by efflux of time would occur *by necessity* in Canada as it now does in the United Kingdom. Section 41(a) of the *Constitution Act, 1982* states:

> An amendment to the Constitution of Canada in relation to [the office of the Queen, the governor general and the Lieutenant Governor of a province] may be made by proclamation issued by the governor general under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province.

Since the "office" includes the powers and authorities of the Crown,[37] only a constitutional amendment pursuant to this unanimity formula could impose

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[37] Warren J. Newman, "Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions During a Parliamentary Crisis", National Journal of Constitutional Law 27 (2009): 229.

an effective fixed-date elections law in Canada which mimics the British *Fixed-Term Parliaments Act, 2011* and eliminates the Crown's authority over dissolution. In other words, if the House of Commons wanted to impose a British-style *Fixed-term Parliaments Act*, it would need the approval of the legislative assemblies of all ten provinces, and any one of those ten assemblies could prevent the House of Commons from obtaining its desired policy. (The House of Commons could wait out the Senate's suspensive veto). Similarly, if any province wanted to enact similar reforms to limit the authority of its Lieutenant-Governor, it would also need the consent of every other province. This procedure might seem like an inherently unfair and arbitrary infringement on self-government, federalism, and the division of powers, but it does in fact rest on solid ground. Section 41(a) places the offices of Queen, Governor General, and the Lieutenant Governors in the same section because even though there are 11 constitutionally entrenched executives and legislatures within Canada, there is only one indivisible Crown of Canada, and thus only one source of executive authority in and over Canada, which acts, as the case may be, as the Crown of Canada in right of the Dominion of Canada, and as the Crown of Canada in right of each of the ten provinces.[38] Therefore, in a highly unlikely event that the political will to implement a British-style *Fixed-Term Parliaments Act* in Canada ever emerged, it is possible that one constitutional amendment would have to abolish the Crown's executive authority over dissolution in Canada and all the provinces.

In an age of Responsible Government, where Ministers of the Crown take responsibility for all acts of the Crown,[39] dissolution by efflux of time is, by definition, irresponsible, because it occurs automatically and independently of ministerial advice. Prior to the introduction of fixed-date election laws or fixed-term parliaments, it was a general maxim that first ministers who waited out the parliamentary term for the full term reek of political desperation — which explains why the Parliament of Canada has never dissolved by efflux of time. Recent experience with New Labour in 2010 and the Progressive Conservatives in 1993 bear this out. But under a Continental European model of parliamentarism — which the United Kingdom has been increasingly adopting since 1997, first for the devolved assemblies and now for the Westminster Parliament — codified constitutions and statutes strictly

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[38] Ontario, Ministry of Natural Resources, "Disposition of Government Land to Other Governments and Government Agencies, Policy PL 4.09.01," 24 January 2006; Paul Lordon, *Crown Law* (Ottawa: Ministry of Supply and Services, 1991) at 283. As Lordon writes, "A transfer of property between the federal government and a province is not done by ordinary conveyance, because of the principle of indivisibility of the Crown. Her Majesty is the owner of the property whether in right of Canada or the province and cannot grant to Herself. Only administrative control of property passes. The transfer is, therefore, made by reciprocal Orders in Council and is confirmed by statute where third-party rights are involved."

[39] Sir John George Bourinot, *Parliamentary Procedure and Practice*, 4th ed. (Montreal: Dawson Brothers Publishing, 1916) at 102; R. Macgregor Dawson, *The Government of Canada*. 5th ed. (1970), revised by Norman Ward (Toronto: University of Toronto Press, 1947) at 175.

constrain executive authority, there is no equivalent to prerogative authority, and the parliaments, rather than the monarchs or presidents, directly control who becomes first minister through constructive non-confidence and dissolution by efflux of time became the norm out of necessity. In short, dissolution by efflux of time would not become the norm in Canada unless we first abolished the Crown's executive authority over dissolving parliaments.