THE DISSOLUTION OF PARLIAMENT

Memo for Workshop on Constitutional Conventions
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After listening to what has been said here and there in the media, I would say that this is a long overdue seminar on the constitutional rules pertaining to our system of parliamentary democracy . Let us hope that this meeting will help shed some light on how our institutions have operated and how they should operate and, in particular, provoke a fuller discussion on how to make those institutions be more representative. In fact, the British parliamentary system has evolved through a constant transfer of jurisdiction from the Crown to Parliament, in which elected representatives participate. That evolution gave rise to two cardinal principles of British constitutional law.

First there is the principle of "parliamentary sovereignty", which holds that the will of Parliament is above that of the other branches of the government, including the executive. The battle for parliamentary sovereignty was hard-won through the gradual attrition of the Crown's discretionary powers. .

Second there is the principle of "responsible government", which holds that the government must be accountable to Parliament and cannot legitimately govern unless it enjoys the confidence of the elected members of the House of Commons.
These two principles can be read as part of a movement towards an always greater importance given to democracy as the main legitimising force behind our public institutions. This means, for example, that according to the modern principle of "responsible government", the government is responsible to *Parliament*; we no longer have what used to be known as a *dual Parliament* in which the government was responsible to both the elected officials *and* the monarch at the same time. Today's concept of "responsible government" holds that the government is responsible solely to the elected officials.

This leads us to a first issue that will, I think, explain much of the disagreement about the proper meaning of the rules applicable to dissolution – as well as the other topics to be discussed at this wrokshop.

1. Who represent the People in our system of government?

Two viewpoints seem to inform the positions taken in recent discussions of the issues. Let's call them the *traditional view* and the *reformist view*.

a. The traditional view

The traditional view on the proper use of the dissolution powers stems from the two above-mentioned principles. Both the principles of Parliamentary sovereignty and that of Responsible government -- principles which were taken to be at the heart of our constitutional system -- stem from the idea that political legitimacy is in the hands of the elected members of Parliament. The MPs are elected to deliberate in the name of the People who have chosen them in their respective ridings. It is the collective result of these individual elections that will determine who ought to form the government. In other words, the executive's democratic legitimacy is only indirect, it resides solely in the fact that the executive enjoys the confidence of the elected MPs. In this sense the House of Commons functions as an electoral college in determining who will govern.

From those two principles, flow the claim of a majority of Canadian constitutional scholars that the PM's legitimacy, not being directly elected, nor enjoying the monarchical legitimacy that used to justify the powers of the King, is wholly dependent on the fact that he or she enjoys the confidence of the elected House and thus, only while enjoying that confidence ought he be able to bind the Governor General to his or her advice. Thus, after a general election, the Governor General of Canada normally asks the leader of the party that has gathered a majority of seats in the House of Commons to become Prime Minister and to form a government. According to the principle of responsible government, the government must enjoy the confidence of the House of Commons in order to govern legitimately. Our Constitution thus requires that the Prime Minister and the cabinet, not being elected directly by the people, enjoy the support of a majority of the elected members of Parliament.

When the general election does not return a majority of seats to any one party, the Governor General will then have to appoint as Prime Minister a Member of Parliament who is able to gather enough support to sustain the confidence of the House for a reasonable period of time. If the person who was Prime Minister prior to the dissolution of the House of Commons has not yet resigned and it is unclear which party or parties could gather sufficient support from the members of Parliament to lead a government after a fresh election, the Governor General may let that person try to govern until it is made clear that he or she does not enjoy the support of the House. Therefore, in a minority situation, the Prime Minister cannot claim to have "won" a right to govern. At best, he or she can claim to have the right to try to sustain the confidence of the House.

According to such traditional views of parliamentary democracy, when a minority government loses the confidence of the House, the Governor General is no longer bound by the advice of the Prime Minister. The Governor General may then exercise what is known as her "personal prerogatives" or "reserve powers". If the election has been held relatively recently (opinions range between 6 and 9 months), and the Governor General believes that the leader of another party has a reasonable chance of forming a government that would enjoy the confidence of the House of Commons, she may ask that leader to form a government. That government might be a single party government or a coalition government. The same may be true if the Prime Minister of a minority government were to request a dissolution of the House soon after an election even though his government

has not lost a confidence vote. In fact, certain authorities, such as Eugene Forsey, claim that "[i]f a government asks for dissolution whilst a motion of censure is under debate it is clearly the Crown's duty to refuse".

While, in our parliamentary system, as is the case in the Commonwealth in general, the Governor General (or the person fulfilling a similar role in other jurisdictions) may offer the opposition leader the opportunity to form the government in such circumstances, other parliamentary systems give the opposition the right to form a new government (i.e. Spain's and Belgium's constitutions) and, in the case of Germany, the constitution even makes it an obligation in certain circumstances.

Such rules are thought necessary to avoid creating an incentive for minority government Prime Ministers to make successive calls for elections until one party gathers sufficient support to form a majority government. Successive elections can be quite disruptive, if only because without a functioning Parliament to vote on matters of supply, unelected officials are forced to adopt special measures to pay for the operations of government. There is also the danger of the citizens losing their respect for parliamentary elections if they are asked to go to the polls after such short intervals.

When the Governor General exercises her reserve powers and decides whether to refuse an incumbent's advice to dissolve Parliament and call on an opposition party leader to form a new government, she must act with total impartiality. In such circumstances, he or she must be guided by her duty to protect the Constitution and, in particular, the principles of democracy and responsible government. In other words, as in other parliamentary systems, the Head of State (or her representative), acts as a guardian of the Constitution and a protector of parliamentary democracy.

b. *The reformist view*

However, scholars have recently questioned the traditional view on *descriptive* and *normative* grounds. For example, Jean Leclair and Jean-François Gaudreault-DesBiens point out that

> Citizens no longer vote for a particular member of Parliament, they vote for the only members of Parliament whose existence they are aware of: the leaders of the different political parties. Television has made possible a tête-à-tête between the citizen and the head of each party, rendering the local representative's mediation unnecessary, or, at best, an incidental concern. [1]

Thus, Leclair and Gaudreault-DesBiens question the underlying factual assumptions behind the traditional views. This could lead one to wonder if the facts that lead to the development of our current constitutional conventions no longer prevail. Is it possible

[1] Jean Leclair and Jean-François Gaudreault-DesBiens, "Of Representation, Democracy, and Legal Principles", in Lorne Sossin and Peter Russell, ed., *Parliamentary Democracy in Crisis*, Toronto : University of Toronto Press, 2009, p. 111.

that those conventions may now have lost one of the three key elements necessary for their existence, their "raison d'être"[2]?

This is, in short, the argument that Tom Flanagan defended in a 2009 article he published in the Globe & Mail:

> Canada has inherited the antiquated machinery of responsible government from the pre-democratic age of the early 19th century, when most people couldn't vote and political parties were only parliamentary cliques. But a lot has happened since Benjamin Disraeli last took tea with Queen Victoria….
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> The most important decision in modern politics is choosing the executive of the national government, and democracy in the 21st century means the voters must have a meaningful voice in that decision. Our machinery for choosing the executive is not prescribed by legislative or constitutional text; rather, it consists of constitutional conventions - past precedents followed in the light of present exigencies. The Supreme Court has said it will expound these conventions but will not try to enforce them. The virtue of relying on conventions is that they can evolve over time, like common law, and can be adapted to the new realities of the democratic age.[3]

This view supports two of the ideas put forward in November, 2008 by Prime Minister Harper. First, that parliamentary elections result in the election of a Prime Minister, and second, that the Prime Minister cannot be replaced by the leader of another party without an election. At that time Prime Minister Harper added a third idea: that a coalition government has to campaign as such before being allowed to form government and its leader must have the most seats.[4]

One might be tempted to say that these positions are closer to the rules applicable to a presidential system than a parliamentary system.

It is possibly also in that spirit that one has to read the position advocated by what I may call the *École de Québec* composed of Henri Brun, Guy Tremblay and Eugénie Brouillet who have constantly argued during the debates surrounding the prorogation of 2008 that the Governor General is *always* bound by the advice of the Prime Minister. The two main reasons evoked in support of that view are that (1) the Governor General enjoys no legitimacy of her own[5] so she must <u>always</u> follow the advice of the PM (except in circumstances akin to a *coup d'État* where the PM would refuse to resign after having lost the general election to another party with a majority in the House of Commons or after losing a confidence vote), and (2) the capacity of the executive to bind the Governor

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[2] The two other necessary conditions for the existence of a constitutional conventions being (1) the existence of a practice, and (2) a shared view among the relevant actors that such practice is binding upon them.

[3] Tom Flanagan, "Only voters have the right to decide on the coalition", Globe & Mail, January 9, 2009, A13.

[4] Peter Russell "Learning to live with Minority Governments" in Lorne Sossin and Peter Russell, ed., *Parliamentary Democracy in Crisis*, Toronto : University of Toronto Press, 2009, p.141.

[5] See Marjorie Beauchemin, "Vers une crise constitutionnelle? La situation pourrait relancer le débat sur le rôle de la gouverneure générale", La Presse, December 4th, 2008, A7.

General - including an advice given by a censored government to the Governor General to call a new election – is seen as a "counterweight" to the principle of responsible government.[6] But for this second reason to make sense in light of the first, it seems that the executive must be regarded as having some source of democratic legitimacy which must come from having won the largest number of seats or garnered the largest share of the popular vote.[7] At any rate, according to Brun, Tremblay and Brouillet, since there is no proper constitutional arbiter between Parliament and the executive, conflicts between those two branches ought to be settled "by the electorate."[8]

These two views lead us to ask ourselves a series of questions in order to avoid the difficulties that we've had over the last few years over the specific issue of the power to dissolve Parliament and, more generally, with the powers of a minority government to advise the Governor General.

2. Issues to examine:

a) How can the Governor General inform himself as to whether or not the current Prime Minister and his cabinet still enjoy the confidence of the House?

Is it sufficient to rely on the presumption that once the Prime Minister has obtained the confidence of the House on a first vote of confidence, he is presumed to enjoy such a confidence up until another vote of confidence has actually taken place or is there (or should there be) ways to rebut that presumption without such a formal non-confidence vote? For example, if a vote of confidence is pending, should it be considered to annul the presumption, thus either requiring the Governor General to wait until the result of the vote of confidence is known before acceding to the PM's request? Alternatively, if the Governor General does not have to wait for the results of such vote, does he or should he otherwise be required to ascertain by other means whether or not the PM still enjoys the confidence of the House? If the presumption still holds while awaiting a vote of confidence, can or should the Governor General be able to consider other sources of information as to whether or not the House still has confidence in the PM? For example. have the Lascelles Principles been fully incorporated in Canada, thus allowing the Governor General to "be free to seek informal advice from anybody whom he thinks fit to consult"?[9] If so, could the "informal advice" received count as relevant information to

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[6] See Guy Tremblay, « La gouverneure générale doit accéder à la demande de Harper », Le Soleil, December 4, 2008, 33

[7] This view, however, is problematic in light of the well-established convention to the effect that after a general election, if no political party has won a majority of seats, the party that formed the government in the previous Parliament may try to form a new government and gain the confidence of the House despite the fact that it may not be the party which has won the largest number of seats in the most recent election.

[8] *Supra* note 5.

[9] Letter from Sir Alan Lascelles, the King's private secretary, to the Times, reproduced in Geoffrey Philip Wilson, *Cases and Materials on Constitutional and Administrative Law*, 2nd ed.. Cambridge : Cambridge University Press, 1976, p. 22-23 :

> To the Editor of The Times:
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> Sir,—It is surely indisputable (and common sense) that a Prime Minister may ask—not demand—that his Sovereign will grant him a dissolution of Parliament; and that the Sovereign, if he so chooses, may refuse to grant this request. The problem of such a choice is entirely personal to the Sovereign, though he is, of course, free to seek informal advice from anybody whom he thinks fit to consult.
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> In so far as this matter can be publicly discussed, it can be properly assumed that no wise Sovereign—that is, one who has at heart the true interest of the country, the constitution, and the Monarchy—would deny a dissolution to

rebut the presumption of confidence? Could/Should the letter signed by all the Liberal, NDP and Bloc Québécois MPs and addressed to the Governor General have been formally considered by her?

b) Can a government that has just lost a confidence vote still offer *binding* advice to the Governor General to dissolve Parliament?

If so, is this power to offer binding advice on dissolution only available to the Prime Minister after a certain period since the last general election?

The *Byng-King Affair* is relevant here. It is subject to at least two opposing interpretations. According to one view, King's success in the election that followed Byng's refusal to grant him the dissolution that he had requested and the fall of the Meighen government that was called to replace King, ought to be seen as the People's verdict in favour of King's arguments. Those taking the opposing view will often question the importance of the conflict between Byng and King. They highlight the fact that Meighen did not campaign on that issue (he rather campaign on a corruption scandal) while King's arguments to the electorate about the constitutional imbroglio mainly had to do with the fact that Byng was an envoy of Britain and not a Canadian rather than the fact that he was unelected.[10]

Thus, according to this second view, the 1926 debate had little to do with the proper role of the Governor General *within* the Canadian political system. And to the extent that it had to do with the proper role of the Governor General within our parliamentary system, King himself wrote that:

> [...] as to which political party <u>had the right to govern</u>, that was a matter which I as I had pointed out after the last general elections, it was <u>for Parliament to decide</u>, if Parliament were in a position so to do; that when <u>Parliament</u> ceased to be in a position to make a satisfactory decision as to which party should govern, it was then for the people to decide.[11]

The proponents of the second reading of the 1926 events would point out that this could hardly be read as the assertion of an absolute Prime ministerial prerogative to request dissolution. If the House was clearly ready to support an alternative government – which

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> his Prime Minister unless he were satisfied that: (1) the existing Parliament was still vital, viable, and capable of doing its job; (2) a General Election would be detrimental to the national economy; (3) he could rely on finding another Prime Minister who could carry on his Government, for a reasonable period, with a working majority in the House of Commons. When Sir Patrick Duncan refused a dissolution to his Prime Minister in South Africa in 1939, all these conditions were satisfied: when Lord Byng did the same in Canada in 1926, they appeared to be, but in the event the third proved illusory.
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> I am, &c.,
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> SENEX.
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> April 29.

[10] The irony here being that it was King who pressed Byng to consult London on King's request for a dissolution and it was Byng who refused to seek advice from London on the matter invoking the autonomy of the Dominion!

[11] Reproduced in Roger Graham, *Arthur Meighen: a Biography*, Vol. 2, Toronto, Clarke & Irwin, 1965, p. 462.

was not the case with the Meighen government that lost the House's confidence by a single vote[12] - it seems that King was ready to accept its judgment.

c) Under what conditions can or should the Governor General call upon opposition parties to try to form the government instead of calling a new election?

Should it be possible only if the incumbent government fails to garner the support of a majority on the first Throne Speech? Would it be possible within 3, 6, 9, etc. months of the last general election? Is it legitimate for the new government to be a coalition that was not disclosed as a possibility in the election campaign?

d) How can we ensure that the use of the dissolution power by the Governor General will be based on agreed upon principles and more predictable rules?

A number of suggestions have been put forward:

Formal constitutional amendment. In light of s. 41 *Constitution Act, 1982* and the current political climate, no matter what the intended amendment would provide, it seems hard to imagine being able to go through that route.

Legislation. The possibility was raised of distinguishing between the duty of the Governor General in this area and her other functions so that the use of the prerogative could be amended through legislation. That might be a possible option, but I fear it is a very risky one – to say the least.

Securing a consensus among the relevant political actors on the constitutional conventions governing the issue. This appears to be the most practical approach. A House resolution supported by all parties or a Cabinet Manual similar to New Zealand's recording rules and principles known to have the support of party leaders are two possible ways of doing this.

[12] Roger Graham, *The King-Byng Affair, 1926 ; A Question of Responsible Government*, Toronto, Copp Clark Publishing Company, 1967, p.4 : "[t]he climax came on July 1st when J. A. Robb, a member of the former administration, presented a motion which, in the sum and substance of its ingenious wording, questioned the legality of the Meighen Government. This motion was voted on early in the morning of july 2nd and carried by a margin of one, when T. W. Bird, a progressive supporting the Liberals, voted in violation of a pair he had made with D. M. Kennedy, also a Progressive but at that juncture sympathetic to the Conservatives. As a result of this defeat Mr. Meighen later in the same day advised Lord Byng to dissolve Parliament and this advice was accepted."