An Ineffective Reform:

The Failed Experiment with Fixed Date Elections in Canada

by

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Abstract

Fixed date election legislation has been enacted throughout most of Canada by the federal government and governments of British Columbia, Saskatchewan, Manitoba, Ontario, New Brunswick, Prince Edward Island, Newfoundland and Labrador, and the Northwest Territories. The two most common reasons used for adopting fixed dates were to reduce the power of first ministers to manipulate election dates and to improve rates of voter turnout. Due to the non-binding nature of this reform it is unlikely that it will have much impact on the power of first ministers. Four out of the first five Canadian elections to be held on fixed dates saw decreases in the rates of participation. Despite the importance of the issues that this reform was intended to address, it seems that this is an insufficient approach. In order for real improvements to take place, a concerted effort on the part of legislators, academic researchers, and the public will be required.

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Chapter 1 – Introduction

The Issue

This thesis explores the adoption of fixed date elections in Canada. It is motivated by my bewilderment at how a seemingly innocuous reform could have spread across the country so rapidly, as well as my scepticism about the claims justifying this reform that seemed to grow more numerous and diverse with each legislature in which it was introduced. This thesis focuses on the question of whether or not fixed date election legislation can be used to regulate election requests from first ministers and if it is capable of improving rates of electoral participation.

In an attempt to combat the trend of growing disengagement and declining electoral participation the federal government and a majority of provincial governments, including British Columbia, Saskatchewan, Manitoba, Ontario, New Brunswick, Prince Edward Island, Newfoundland and Labrador, and the Northwest Territories, opted to switch to a system of fixed dates for elections. The hope was that a system of fixed dates would provide a regular schedule for elections and confer a number of benefits on the Canadian electoral system. Fixed date elections have been promoted as a way to improve the "certainty and predictability" of electoral processes and "encourage greater fairness and trustworthiness" with regard the timing of election.[1] This legislation was introduced as part of an effort to "reinvigorate democracy."[2] It was claimed that fixed dates would

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1 Hansards: Hon. G. Plant. Legislative Assembly of British Columbia. 2nd Session, 37th Parliament. Vol. 2 No. 21, August 20th, 2001. Pg 612.

2 Hansards: M. Harris. Newfoundland and Labrador House of Assembly, 1st Session, 45th General Assembly. House of Assembly Proceedings Vol. XLV No. 53, December 7th, 2004.

provide greater levels of "transparency" and "accountability" in elections.[3] Fixed dates were intended to serve as an "important step" in strengthening democratic norms and encouraging people to engage in the electoral process.[4] Improved levels of voter participation would result by reducing the degree of "scepticism"[5] with which many Canadians view politics and elections. It was also claimed that fixed dates would offer "improved administration of the electoral machinery"[6] by contributing to "efforts to improve voters' lists and planning related to the enumeration process".[7]

The most significant and commonly cited improvement that fixed date elections would bring to the Canadian electoral system is the impact it would have on the power of First Ministers. It was claimed that removing the ability to unilaterally determine the date of elections would result in a "palpable diminution of the first minister's power."[8] The concern about flexible dates for elections is that the system has a "built-in advantage held by governing parties."[9] Flexible election dates enable First Ministers to select "a propitious time for an election to renew the government's mandate."[10] The ability to decide when an election will be held affords a "massive tactical advantage"[11] to

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3 Hansards: R. Ghiz. Legislative Assembly of Prince Edward Island. 3rd Session, 62nd General Assembly. May 4th, 2006. Pg 2400.

4 Hansards: L Broten. Legislative Assembly of Ontario. 1st Session, 38th Parliament. No. 67B, June 23rd, 2004. Pg 3217-3218.

5 Hansard: Hon. S. Jamieson. Legislative Assembly of New Brunswick. 1st Session, 56th Assembly. May 29th, 2007. Pg 30.

6 Hansards: Hon. R. Nicholson. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 47. September 18th, 2006. Pg 2876.

7 Hansards: Hon. S. Ashton. Legislative Assembly of Manitoba. 2nd Session, 39th Legislature. May 12th, 2008. Vol. LX No. 39. Pg 2051.

8 Graham White. *Cabinets and First Ministers*. (Vancouver: UBC Press, 2005), 176.

9 Hansards: Hon. D. Morgan. Legislative Assembly of Saskatchewan. 1st Session, 26th Legislature. March 10th, 2008. Vol. 50 No. 9A. Pg 232.

10 Hansards: Hon. R. Nicholson. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 47. September 18th, 2006. Pg 2876.

11 Bryan Schwartz and Andrew Buck. "Fixed Date Elections" *Underneath the Golden Boy: A Review of Recent Manitoba Laws and How they Came to Be*. Vol.5 (Winnipeg: University of Manitoba, Faculty of Law, 2008), 1-2

incumbents over opposition parties. The problem with flexible date elections is that First Ministers are able to call an election when it is "in the political interests of the incumbent governing party"[12] and this ability has been used to the detriment of a genuinely fair election. It was declared that too often "the public interest in certainty and predictability" had been "subordinated to the private political interests of the Premier."[13] Fixed dates for elections would solve this problem and "help to level the playing field" among every candidate competing in an election.[14] However, some doubt that fixed dates will actually work because there are no sanctions against a first minister who ignores the rules and requests an early dissolution.[15] Unless enforceable sanctions can be imposed, it is not possible for fixed dates to be enforced as a law.[16]

The Hansard Debates

To address the question of why Canada has adopted fixed date elections it is important to explore the arguments provided in support of fixed date legislation in each jurisdiction in which this type of legislation was introduced. The Hansard debates provide a means of explaining why fixed dates were adopted, the motives behind introducing this reform, as well as justifications for why fixed dates should become law. The arguments

[12] Hansards: Hon. M. Bryant. Legislative Assembly of Ontario. 1st Session, 38th Parliament. No. 59A, June 9th, 2004. Pg 2745.

[13] Hansards: Hon. G. Plant. Legislative Assembly of British Columbia. 2nd Session, 37th Parliament. Vol.2 No.22, August 21st , 2001. Pg 678.

[14] Hansards: Hon. R. Nicholson. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 77. November 6th, 2006. Pg 4729.

[15] Don Desserud. "Fixed Date Elections: Improvement of New Problems?" *Electoral Insight* Vol. 7 No. 1 (2005): 51. Available at http://www.elections.ca/res/eim/pdf/insight_2005_01_e.pdf (accessed on May 1st, 2011).

[16] Eugene Forsey. "Extension of the Life of Legislatures." *Canadian Journal of Economics and Political Science.* Vol. 26 No. 4 (1960): 609.

made in support of fixed dates serve as a basis upon which this reform may be evaluated and offer some insight into how this reform was intended improve Canadian democracy. It is worth noting that wherever fixed date elections were legislated it was the result of a bill that was introduced by a member of the governing political party. This section provides an overview of the statements made by governing party members in support of adopting fixed dates in their respective jurisdiction.

British Columbia was the first Canadian jurisdiction to adopt fixed date elections. The primary motivation behind introducing fixed dates was to remove the potential for election dates to be manipulated by a Premier "if it suits their political strategy."[17] It was hoped that this reform would address the concern that "Premiers use their power to determine the timing of an election as an aspect of their re-election strategy."[18] This was viewed as a problem because election date manipulation means that "the public interest in certainty and predictability in the conduct of public affairs has been subordinated to the private political interests of the Premier."[19]

Removing the ability for the First Minister to unilaterally determine the date of elections was a common concern in many other jurisdictions that introduced fixed dates. In each instance the arguments were very similar to those made in BC, that fixed dates would promote "certainty and predictability" and "serve to make government more responsible and accountable" as well as "encourage grater fairness and trustworthiness in the political life of the province."[20] When fixed dates were introduced in Newfoundland

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17 Hansards: Hon. G. Plant. Legislative Assembly of British Columbia. 2nd Session, 37th Parliament. Vol.2 No.22, August 21st , 2001. Pg 678.

18 Ibid.

19 Ibid.

20 Ibid., August 20th, 2001. Pg 612.

and Labrador, it was argued that this reform would remove the advantage the governing party holds when the Premier possesses the "ultimate authority to call a snap election."[21] In Ontario it was argued that the Premier's decision to hold an election is determined by the "political interests of the incumbent governing party."[22] Fixed dates were legislated federally by the House of Commons to remove the Prime Minister's "prerogative" to determine "a propitious time for an election to renew the government's mandate" based on "what is in the best interests of his or her political party."[23] It was assumed that enacting fixed date legislation would mean that the governing party no longer has "the advantage of determining when the next election would take place."[24] In Prince Edward Island, it was explicitly stated that fixed dates were introduced because "a governing party preoccupied by partisan concerns should not control the timing of our most important democratic function."[25] Arguments made promoting this reform in Saskatchewan claimed that fixed dates would "remove the guesswork and political opportunism" as well as "the built-in advantage held by governing parties" that comes with the incumbent government determining the date of the next election.[26] It was claimed that the main benefit to be derived from adopting fixed dates is that it would "give all parties and candidates equal opportunities to foresee upcoming elections."[27]

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21 Hansards: E. Byrne. Newfoundland and Labrador House of Assembly, 1st Session, 45th General Assembly. House of Assembly Proceedings Vol. XLV No.53, December 7th, 2004.

22 Hansards: Hon. M. Bryant. Legislative Assembly of Ontario. 1st Session, 38th Parliament. No. 59A, June 9th, 2004. Pg 2745.

23 Hansards: Hon. R. Nicholson. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 77. November 6th, 2006. Pg 4729.

24 Ibid.

25 Hansards: R. Ghiz. Legislative Assembly of Prince Edward Island. 3rd Session, 62nd General Assembly. May 4th, 2006. Pg 2400.

26 Hansards: Hon. D. Morgan. Legislative Assembly of Saskatchewan. 1st Session, 26th Legislature. March 10th, 2008. Vol. 50 No. 9A. Pg 232.

27 Ibid..

Another common justification which many jurisdictions shared in promoting the adoption of fixed dates was that it would "improve voter turnout."[28] There were essentially two ways in which it was explained that fixed dates would contribute to improving voter turnout. The first was related to removing the potential for election date manipulation. Preventing First Ministers from holding elections at times that would benefit their own re-election prospects should reduce the degree of cynicism with which many Canadians view politics and elections, and this would result in higher levels of voter turnout. The second way fixed dates would improve voter turnout was that the certainty of the date of the upcoming election would enable voters and election administrators to plan for the election far in advance.

In Ontario it was claimed that fixed dates would provide certain dates on which elections would take place and this would result in "greater confidence in our electoral system"[29] for all potential voters. In New Brunswick it was stated that fixed dates would "take away a lot of speculation and scepticism from the political and electoral processes" in the province.[30] A similar argument was also made in the House of Commons, which made a link between cynicism, voter apathy, and low rates of participation. "The most cited reason for this lack of participation is cynicism of the political process ... with manipulation of election dates increasing voter apathy."[31] It was claimed that fixed dates would reduce cynicism because the date on which elections would take place would be a

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[28] Hansards: Hon. R. Nicholson. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 77. November 6th, 2006. Pg 4729.

[29] Hansards: Hon. M. Bryant. Legislative Assembly of Ontario. 1st Session, 38th Parliament. No. 59A, June 9th, 2004. Pg 2745.

[30] Hansard: Hon. S. Jamieson. Legislative Assembly of New Brunswick. 1st Session, 56th Assembly. May 29th, 2007. Pg 30.

[31] Hansards: C. Skelton. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 48. September 19th, 2006. Pg 2942.

decision that would no longer be made "behind closed doors."[32]

The potential for electoral participation to be planned well in advance of the election, it was assumed, would make a positive impact on voter turnout in a number of ways. In Ontario it was claimed that, with fixed dates, citizens would be able to plan their participation in the electoral process further in advance.[33] In Alberta, where fixed dates were introduced although not successfully legislated, it was argued that participation would be improved because voters would be able to "plan and co-ordinate vacations, travel and business activities around the election date."[34] In the House of Commons it was claimed that fixed dates would result in "higher voter turnout rates" because elections would be scheduled to take place in October, a time of generally favourable weather across the country.[35] This argument was echoed in the North West Territories because the certainty of election dates would mean that voters would not be requested to endure Canada's notoriously harsh winter weather to cast their ballots.[36] The ability to pre-plan electoral participation took a different tone in Manitoba. It was claimed that fixed dates were "consistent with the Chief Electoral Officer's efforts to improve voters' lists and planning related to the enumeration process".[37] Holding elections on set dates is beneficial for the process of enumeration and compiling voters' lists which are part of a

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32 Hansards: Hon. R. Nicholson. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 77. November 6th, 2006. Pg 4729.

33 Hansards: L. Berardinetti. Legislative Assembly of Ontario. 1st Session, 38th Parliament. No. 59A, June 9th, 2004. Pg 2746-2747.

34 Hansards: K. Allred. Legislative Assembly of Alberta. 1st Session. 27th Legislature. April 28th, 2008. Pg 265.

35 Hansards: Hon. R. Nicholson. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 77. November 6th, 2006. Pg 4729.

36 Hansards: S. Lee. North West Territories Legislative Assembly. 5th Session, 15th Assembly. Day 18. October 30th, 2006. Pg 587.

37 Hansards: Hon. S. Ashton. Legislative Assembly of Manitoba. 2nd Session, 39th Legislature. May 12th, 2008. Vol. LX No. 39. Pg 2051.

process that is considered to be "an important element in ensuring participation of voters."[38]

There were additional benefits that many legislators associated with the adoption of fixed date elections. Although these benefits varied from one jurisdiction to the next, in each case they were based on the assumption that fixed date legislation would offer certainty in the date of upcoming elections. Such legislation would assist all political parties in "the process of candidate selection."[39] Fixed dates would allow for more effective campaign planning for candidates from every political party.[40] It would provide certainty that would assist anyone planning to run for election.[41] As a result, political parties could "attract more high-calibre candidates to seek public office."[42] It was also claimed that knowing the date of elections in advance would make it possible to increase the presence of under represented groups through candidate selection and provide for a "more diverse Legislative Assembly."[43] Other arguments included enabling all political parties to have better planning, fund raising, and co-ordination of volunteers around election time.[44] "Political parties would also likely save money as they would not have to remain on an election footing for extended periods of time."[45]

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38 Ibid.

39 Hansards: E. Byrne. Newfoundland and Labrador House of Assembly, 1st Session, 45th General Assembly. House of Assembly Proceedings Vol. XLV No.53, December 7th, 2004.

40 Hansards: R. Ghiz. Legislative Assembly of Prince Edward Island. 3rd Session, 62nd General Assembly. May 4th, 2006. Pg 2400.

41 Hansards: S. Lee. North West Territories Legislative Assembly. 5th Session, 15th Assembly. Day 18. October 30th, 2006. Pg 587.

42 Hansards: Hon. F.L. Morton. Legislative Assembly of Alberta. 1st Session. 27th Legislature. April 28th, 2008. Pg 270.

43 Hansard: Hon. S. Jamieson. Legislative Assembly of New Brunswick. 1st Session, 56th Assembly. May 30th, 2007. Pg 37.

44 Ibid.

45 Hansards: Hon. R. Nicholson. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 77. November 6th, 2006. Pg 4729.

It was claimed that the increased degree of certainty attributed to fixed date elections would "establish some form of efficiency in conducting elections: efficiency for candidates, efficiency for electoral offices, and efficiency for the voting public."[46] Because the date of the next election would be known in advance this would provide ease of planning for election administrators.[47] Such legislation would allow for more efficient election administration as officials would be better prepared to train workers and rent office space for polling stations.[48] Also, the increased certainty that ought to accompany a fixed date schedule should extend to other legislative business. It was claimed that fixed dates would assist in both economic and public policy planning.[49] As well, because the duration of legislative sessions would be known by all, it was assumed that this would result in better parliamentary planning and assist committees in setting out agendas well in advance.[50]

To sum up, fixed dates were introduced with the assumption that a number of important benefits would result from enacting this type of legislation. While it may be debated that any one particular benefit may or may not result, the arguments above provide some insight into the intentions behind those who supported enacting fixed date legislation. On my interpretation it seems odd how such a simple reform could offer so many potential benefits. If it was possible that this quick-fix solution would cause such

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46 Hansards: K. Allred. Legislative Assembly of Alberta. 1st Session. 27th Legislature. April 28th, 2008. Pg 265.

47 Hansards: Hon. M. Bryant. Legislative Assembly of Ontario. 1st Session, 38th Parliament. No. 59A, June 9th, 2004. Pg 2745.

48 Hansard: Hon. S. Jamieson. Legislative Assembly of New Brunswick. 1st Session, 56th Assembly. May 30th, 2007. Pg 37.

49 Hansards: Hon. M. Bryant. Legislative Assembly of Ontario. 1st Session, 38th Parliament. No. 59A, June 9th, 2004. Pg 2745.

50 Hansards: Hon. R. Nicholson. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 77. November 6th, 2006. Pg 4729.

diverse and numerous improvements to the Canadian political system then it would be utterly ridiculous not to implement this reform. However, since fixed dates cannot be enforced it raises the question as to whether or not these improvements, all of which are dependent upon the date of the next election being a certainty, could come to fruition unless the fixed date schedule was adhered to. If fixed date legislation can be disregarded and the First Minister remains free to select an election date of his or her choosing, then, it is logical to conclude that the benefits associated with a fixed date election schedule will not materialize.

The most commonly cited reason to enact fixed dates which legislators provided was to remove the potential for election date manipulation at the hands of the First Minister, thereby reducing public cynicism and improving voter turnout as a result. I argue that these two issues at the heart of the discussion of fixed dates are of central importance to any further discussions of improving the Canadian political system. First, the misuse of power by a single individual at the top of the Canadian political system and, second, the high degree voter apathy and disengagement from established political institutions must be addressed before more meaningful discussions can take place. Neither of these two crucial issues can be adequately addressed by fixed date legislation. As I argue, since there is no means by which this legislation may be enforced any benefit associated with this legislation cannot materialize. Even if there were some way for a fixed date schedule was maintained, this type of reform is a mere window dressing that is completely insufficient for alleviating concerns such as abuse of power and public distrust of political institutions, both of which are legitimate concerns that jeopardize the

structure of the Canadian political system.

The Plan for the Thesis

This thesis is primarily a comparative study with a focus on established political institutions. It not only compares rates of voter turnout in elections held on fixed dates, it also contrasts the various arguments related to this type of legislation in each jurisdiction in which it was introduced. Although framing this thesis around statements made by legislators may appear to place exclusive emphasis on elite opinion, this perspective must not be overlooked because it provides a valuable means of insight into the intentions of those introducing reform. It is important to note the language used by legislators discussing this reform. The criticisms of abuse of power and manipulation of election dates, which stand as the most significant source of this type of condemnation, claim that this regulation is necessary to guide the actions of premiers and prime ministers in the future. The discussions surrounding fixed dates not only characterize elected representatives in a particularly negative light, but also serve to illustrate how MPs and MLAs view their colleagues and other politicians.

The focus of this thesis is to consider whether a regulation on the potential misuse of government power can help reduce the degree of cynicism with which many Canadians view their political system. By this measure fixed date legislation constitutes a beneficial reform in theory, however, in practical terms it is incapable of offering any significant benefits. This thesis is structured around three general questions. First, since

all First Ministers make a request of the Crown's representative to provide for an election on a specific date, can the Crown serve as a potential mechanism to enforce fixed date legislation? Second, do fixed date elections actually serve to reduce the power of First Ministers and limit their ability to hold an election on a date of their choosing? Finally, what has been the effect of fixed dates with regard to voter participation?

To answer these questions I will draw upon a variety of academic literature. I will include reference to the Hansard debates from each legislature in which this electoral reform was introduced. Exploring fixed dates through this approach offers insight into the intentions of the legislators who introduced this kind of legislation and a means of explaining why fixed date legislation was enacted. This approach offers a direct means of explaining what legislators hoped to achieve through fixed dates, an explanation that would be difficult to articulate if the Hansards were not considered. Also, the legislative debates illustrate the predominant concern which legislators were trying to address, that being a potential for abuse of power at the hands of a single individual and the impact that has on the political system as a whole.

Chapter Two explores the constitutionality of fixed date elections. In order for fixed date legislation to stand it cannot infringe on the Crown's capacity to dissolve a sitting legislative assembly. Fixed date elections are constitutional because they do not prevent the potential for the Crown to exercise the power of dissolution at any point, nor do they offend the Royal Prerogative by regulating the use of discretion. This legislation leaves the unlimited discretion of the Crown intact. However, long standing tradition dictates that this capacity is to be exercised at the request of an elected minster. The vast

power of the Crown is only used upon the advice of a representative of the masses. Should the Crown receive such advice, dissolution would occur, an election would be held, and fixed date election legislation would be completely ineffective.

Chapter Three explores the effect of fixed date legislation on the office of First Ministers. First ministers are the most powerful elected representatives in Canadian government. Among the variety of ways in which they can influence the political environment they are also entitled to advise the Crown when dissolution should occur and an election will be held. The power to decide when they will have to face re-election comes simply by virtue of holding office. Since the Crown acts on the advice of elected ministers, and a government has license to govern with the consent of the legislative assembly, the ability to advise the dissolution of legislative assemblies can be a very powerful tool in the hands of a single individual. The potential for this power to be used for partisan interests was one of the primary motivating factors behind the introduction of fixed date legislation. When First Ministers request an election for the explicit purpose of improving their own chances of re-election they are acting in a way that undermines positive democratic norms. If the power to request an election can be regulated to follow a set schedule then it is less likely to be used to the detriment of the democratic process.

Chapter Four explores the claims that fixed date elections will result in reduced voter cynicism and improved rates of voter turnout. This chapter takes into account the first five federal and provincial elections held on a fixed date. This includes all fixed date elections from British Columbia in 2005 until the most recent federal election in 2011, and contrasts each with rates of participation in previous elections. Does the manipulation

of election dates by an ambitious First Minister impact the Canadian public by making them feel cynical and turn away from electoral participation? The growing trend of disengagement from political institutions poses a threat to Canadian democracy. If this trend could be reduced by holding elections on set dates then the symptom would not be nearly as malignant as it seems.

Chapter Five will conclude this thesis and argues that fixed dates are not only an indirect approach to reaching the numerous goals for which such legislation was intended, but they also leave the date of future elections in the hands of First Ministers. Since fixed date elections cannot be enforced they may have no real impact on the power of first ministers. Although a routine and orderly schedule for elections is possible, it is not likely to offer the positive benefits of improved voter turnout and reduced feelings of cynicism among the Canadian public. The discussions surrounding fixed dates have vastly overstated the importance of this reform, and yet the issues at the heart of these discussions are of immense importance to the Canadian political system. It is my hope that this thesis will contribute to declaring the specific date of elections, whether fixed or not, a completely irrelevant issue. It is only by turning away from these types of vapid, superficial discussions that we can finally accept that this country has a problem and begin discussing the real impediments to the development of a healthy and vibrant democracy in Canada.

Chapter 2 – Fixed Dates and the Crown

Introduction

This chapter explores the relationship between the Crown's representatives and fixed date elections. It argues that, since the power to dissolve a sitting legislative assembly belongs to the Crown's representative, the only way fixed date election legislation can be enforced against the advice of a First Minster is by use of the royal discretion. However, because the Crown's representative always acts in accordance with historical convention and provides assent to ministerial advice, the Crown will not uphold fixed date legislation against the advice of a First Minister and fixed date elections remain completely unenforceable. Fixed date legislation still requires the first minister to request dissolution in order for an election to be held on a fixed date, the Crown assents the advice of the first minister, and provides dissolution so that an election may follow. Although any request for an election is subject to the discretion of the Crown, neither Lieutenant-Governors nor Governors General can be expected to enforce a four-year term because the proper role of the Crown's representative is to assent to advice given by first ministers. Thus, even with fixed date legislation, elections will always occur in accordance with the advice given by the First Minister

Every jurisdiction in Canada that has implemented fixed date elections has had to make provisions within the legislation to specifically state that the powers of the Lieutenant-Governor, or Governor General, remain untouched. This means that elections

will be held at the same time every four years unless the Crown's representative decides otherwise. Fixed date election legislation deals with the dissolution of a sitting legislature, it attempts to regulate when a given assembly will be dissolved. Concern about whether or not this legislation imposes itself on the Crown's representative arose in a number of legislatures that debated fixed dates. Specifically, would this legislation force the hand of the Crown to call an election every four years, or could the power of dissolution be employed prior to the fixed date? Also during legislative debates on fixed dates, concern was voiced as to whether the Lieutenant-Governor would "acting completely independently" or strictly on the advice of the premier.[1] Concern was also raised whether or not a constitutional amendment would be necessary to "decouple the Governor General acting on the advice of the Prime Minister."[2] Both issues were raised by members of the opposition.

What is at stake in these debates is the ability of the Crown's representatives to use a degree of discretion in exercising their powers, and how that relates to upholding a fixed date electoral cycle. Since Canada was created the Crown has remained at the pinnacle of power in the country. The constitution states that "The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen."[3] The Crown is the highest point in the land from which all power flows. Although the Crown has an immense amount of power, vested in the Governor General or Lieutenant-Governors, the decision to exercise those powers is not made by the royal

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1 Hansards: R. Grimes. Newfoundland and Labrador House of Assembly, 1st Session, 45th General Assembly. House of Assembly Proceedings Vol. XLV No.53, December 7th, 2004.

2 Hansards: K. Redmen. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 77. November 6th, 2006. Pg 4734.

3 Constitution Acts, 1867 to 1982. Section 9. Department of Justice. http://laws-lois.justice.gc.ca/eng/Const/Page-2.html (accessed on May 1st, 2011).

representative. Section 9 of the Constitution Act, 1867 places executive power and authority in the hands of the Queen. Section 10 allows for the Governor General to serve as "carrying on the Government of Canada on behalf of and in the Name of the Queen."[4] Although constitutional theory places power in the Crown's hands, contemporary convention sees power exercised by different hands. Today, the Crown's power is exercised on the advice of elected government ministers. Ministers of the government advise the Crown when and how to exercise power. The power to dissolve a sitting legislature rests with the Crown but is exercised only upon the advice of the first minister. To some it would seem as though the Crown has no discretion at all and serves as a mere rubber stamp to authorize government action. This is not a new development, the Canadian version of responsible government has gradually evolved so that the power of the Crown is used only by elected officials.

The language in the Constitution and the actions of contemporary government seem at odds with one another. Jennifer Smith once wrote "the Canadian genius is to write the paper description of the constitution and then start down a different path."[5] She goes on to explain that it is the divergent application of our formal written constitutional documents and our informal conventions that renders us without a "default position" which should be our ideal situation.[6] Smith's comments speak not only to the adaptability of the Canadian constitution but also to its ambiguity. This adaptability explains how Canada can maintain its traditional Westminster parliamentary system while adding new

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4 Constitution Acts, 1867 to 1982. Section 10. Department of Justice. http://laws-lois.justice.gc.ca/eng/Const/Page-2.html (accessed on May 1st, 2011).

5 Jennifer Smith. "The Constitutional Debate & Beyond." in *New Trends in Canadian Federalism,* ed. Francois Rocher and Miriam Smith. (Peterborough: Broadview Press, 2003), 45.

6 Ibid.

innovations adopted from other political systems, such as fixed date elections. As the Canadian system continues to grow, changes can be made to address new problems as they arise. The ambiguity of the Canadian situation also explains why there can be debate and misunderstanding about the proper and actual status of the Crown's use of discretion; how a Governor General can hold power yet it is the prime minister who will decide how it is used. If Canada has no "default position"[7] then proper constitutional roles become unclear and without a proper understanding of the Governor General's role it can be difficult to determine when they overstep the boundaries of their power, or when legislation illegitimately limits the Crown's use of discretion.

Fixed date legislation can be seen as an encroachment on the power of dissolution properly held by the representatives of the Crown as easily as it can be seen to coincide with conventional practices. Disputes over the validity of fixed date elections are based on differing interpretations of whether or not this legislation infringes upon the Crown's discretion by forcing the Crown to provide dissolution on the fixed date or restricting dissolution by preventing early elections. Forsey argues that fixed dates would be unconstitutional if the Crown was forced to act one way or the other without regard for the Royal Prerogative. Since the Crown's representative possesses "the legal power to dissolve the legislature at any moment"[8] any piece of legislation that infringes upon this power could not stand as law, without a constitutional amendment. Fixed date elections would "destroy responsible government by preventing any appeal to the people except at stated times."[9] In short, it is not legal to restrict the Governor General's capacity to

[7] Ibid

[8] Eugene Forsey. "Extension of the Life of Legislatures." *Canadian Journal of Economics and Political Science.* Vol. 26 No. 4 (1960): 609.

[9] Forsey. "Extension of the Life of Legislatures," 609.

provide dissolution only once every four years. Desserud argues that a rigid four year term is not desirable because elections are "the means by which parliamentary deadlocks and stalemates are resolved."[10] The assumption made in both of these arguments is that a fixed date cycle would not allow early elections at any point. If election dates are rigidly fixed on a four year cycle then the Governor General would not be able to dissolve the House prior to the determined date and there would be no ramifications for a government that lost the confidence of the House. On this view, maintaining the confidence convention means allowing for elections prior to the four year mark which would make it impossible to adhere to a fixed date cycle. Even if this legislation could be passed it would be "worthless"[11] and could not be enforced as there are "no sanctions"[12] against a first minister who decided to ignore this legislation and request an early election. Because there is no way to enforce a fixed date cycle, and early elections must remain a possibility "election dates cannot be fixed, not in any meaningful sense."[13]

Those who argue in favour of fixed date elections contend that it does not impose any restrictions on the Governor General's power and there is no conflict between a fixed date cycle and the potential for elections prior to the legislated date. Seidle states that elections would still be required if the government were to lose the confidence of the House.[14] Schwartz and Buck claim that there is no reason why fixed date elections would exclude the possibility of an early election.[15] Further, fixed date elections do not conflict

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[10] Don Desserud. "Fixed Date Elections: Improvement of New Problems?" *Electoral Insight* Vol. 7 No. 1 (2005): 51. http://www.elections.ca/res/eim/pdf/insight_2005_01_e.pdf (accessed on May 1st, 2011).

[11] Forsey. "Extension of the Life of Legislatures," 609.

[12] Desserud. "Fixed Date Elections," 52.

[13] Ibid.

[14] Leslie F Seidle. "Expanding the Federal Democratic Reform Agenda" *Policy* Options Vol. 25 No. 9 (2004): 50.

[15] Bryan Schwartz and Andrew Buck. "Fixed Date Elections" *Underneath the Golden Boy: A Review of*

with the discretionary power of the Governor General because the impact of the legislation, which merely sets the lifespan of Parliament, is beyond the scope of the Crown's powers.[16] Fixed dates do not affect the Crown's powers or use of discretion and, as Hogg claims, should be viewed as a regulation on the first minister's ability to request an election.[17] Fixed date elections should be considered constitutional because there is no conflict with the Crown's powers and responsible government is upheld because early elections remain a possibility.

The dispute between the proponents and opponents of fixed date elections is based on differing interpretations of the Crown's discretionary power and definitions of fixed and flexible election date systems. One's position on fixed dates will be significantly influenced by how they define a fixed-date electoral system. Those who oppose fixed date elections view the issue in either-or terms; election dates are either rigidly fixed or else they are not fixed at all. The proponents of a fixed date cycle do not see things as a black-vs-white debate. Milner contends that election dates can be fixed to varying degrees, and electoral systems can have "fixed, unfixed, and flexible-fixed" election dates.[18] Those who view fixed dates as a rigid cycle are less likely to agree that it fits into a parliamentary system such as Canada's. The Crown must be able to exercise the power of dissolution at any point, in the event that the government were to lose the confidence of the House, and a rigid cycle of one election every four years would remove early elections as and option and place restrictions on when the Crown may act. The

Recent Manitoba Laws and How they Came to Be. Vol.5 (Winnipeg: University of Manitoba, Faculty of Law, 2008), 7.

16 Ibid., 8.

17 Peter W Hogg. *Constitutional Law of Canada*. 5th ed. (Scarborough: Thomson Carswell, 2005): 281.

18 Henry Milner. "Fixing Canada's Unfixed Election Dates: A political season to reduce the democratic deficit." *IRPP Policy Matters*. Vol.6 No.6 (2005): 16.

major flaw in this position is that fixed dates in Canada do not impose a rigid electoral schedule.

The federal election of 2011, as well as the previous one in 2008, demonstrate that election dates in Canada can remain flexible even with fixed date legislation in place. Despite the fact that fixed date legislation was passed in the House of Commons in 2006,[19] an election occurred in 2008 one year prior to the legislated date. Following the 2008 election the next federal election should have occurred in 2012, but instead took place in 2011 after the government lost a vote of confidence in the House of Commons.

Each legislature that enacted fixed date legislation did so on the condition that election dates still remain flexible to some degree. When fixed date elections were debated in the House of Commons it was made clear that early elections would remain a possibility because the legislation would be "structured to meet certain constitutional realities of responsible government."[20] Fixed date legislation in British Columbia was written to set of the date of all future elections "subject to the right of the Lieutenant-Governor to prorogue or dissolve the Legislative Assembly as the Lieutenant-Governor sees fit."[21] In the Legislative Assembly of Saskatchewan it was stated that fixed dates would not "alter the constitutional power of the Crown to prorogue or dissolve the Legislative Assembly in advance of the fixed election date."[22] In Newfoundland, it was explained that some flexibility with regard to election dates was necessary because "the

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19 James R Robertson. "Bill C-16: An Act To Amend The Canada Elections Act" *Legislative Summary.* (Ottawa: Library of Parliament, Parliamentary Information and Research Service, 2007), 8.

20 Hansards: Hon. R. Nicholson. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 47. September 18th, 2006. Pg 2876.

21 Hansards: Hon. G. Plant. Legislative Assembly of British Columbia. 2nd Session, 37th Parliament. Vol.2 No.22, August 21st , 2001. Pg 677.

22 Hansards: Hon. D. Morgan. Legislative Assembly of Saskatchewan. 1st Session, 26th Legislature. March 10th, 2008. Vol. 50 No. 9A. Pg 232.

ability to call an election under an extraordinary circumstance is absolutely essential"[23] in the Canadian political system.

Even though elections prior to the legislated date remain a possibility, some legislators still debated whether or not fixed date legislation is constitutional. In order for the power of dissolution to be exercised at any point, the Crown's representative must be able to receive such advice at any point. This means that even with fixed date legislation, first ministers "retain the ability"[24] and the "prerogative to advise"[25] dissolution. The reason for the constitutionality of fixed date elections to be questioned is based on differing interpretations of the role of the Crown and the use of discretion with regard to providing dissolution. Concerns were raised as to whether the Crown's representative would be "acting completely independently"[26] when contemplating a request for dissolution.

Forsey made the strongest and most compelling argument in opposition to the constitutionality of fixed dates. He argued that this legislation would not pass the legal and constitutional tests because the Constitution Act prohibits legislatures from touching on the office of the Queen's representative.[27] Since the "legal power to dissolve the legislature at any moment" belongs to the office of the Queen's representative, the only way to curtail this power is by a constitutional amendment.[28] To strengthen the argument,

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23 Hansards: R. Grimes. Newfoundland and Labrador House of Assembly, 1st Session, 45th General Assembly. House of Assembly Proceedings Vol. XLV No.53, December 7th, 2004.

24 Hansards: Hon. D. Morgan. Legislative Assembly of Saskatchewan. 1st Session, 26th Legislature. March 10th, 2008. Vol. 50 No. 9A. Pg 232.

25 Hansards: Hon. R. Nicholson. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 47. September 18th, 2006. Pg 2876

26 Hansards: R. Grimes. Newfoundland and Labrador House of Assembly, 1st Session, 45th General Assembly. House of Assembly Proceedings Vol. XLV No.53, December 7th, 2004.

27 Forsey. "Extension of the Life of Legislatures," 609.

28 Ibid.

Forsey refered to the Manitoba Initiative and Referendum Act, which would have allowed referendums and voter initiatives to supplement the legislative process as a way to enact laws. The act was struck down by Judicial Committee as it would have "taken away from the Lieutenant-Governor the power to withhold or reserve the royal assent in respect of bills passed by the process of initiative and/or referendum."[29] Forsey's claim was that the exact same reasoning should apply to any attempt to curtail the power of dissolution, no piece of legislation can take away from the powers of the Crown enshrined in the constitution. Forsey argues that the Crown's capacity for independent action is an "absolutely essential part of our parliamentary system."[30] On this view, the reserve power of the Crown is sacrosanct, "especially the power to force or refuse dissolution" which is the only "safeguard" the Canadian system has to prevent against Cabinet or Prime Ministerial absolutism.[31] Fixed dates would take away "the power to withhold or reserve royal assent"[32] by legislating specific times when the Crown would be required to provide dissolution.

Others have interpreted the role of the Crown very differently. Dawson contended that there is no need to be concerned with the use of discretion because the Crown should be viewed as an "automaton"[33] incapable of taking any independent action whatsoever. The Crown is obliged to assent to any ministerial requests. Alderman and Cross argued that, although an election is presented as "advice" to the Crown, the reality is that the

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29 Ibid.

30 Eugene Forsey. *The Royal Power of Dissolution of Parliament in the British Commonwealth*. (Toronto: Oxford University Press, 1968), 259.

31 Ibid.

32 Forsey. "Extension of the Life of Legislatures," 609.

33 R MacGregor Dawson. "The Constitutional Question" *Dalhousie Review*. Vol. 6 No. 3 (1945): 332-337 in *The King-Byng Affair, 1926: A Question of Responsible Government*. ed. by Roger Graham. (Toronto: The Copp Clark Publishing Company, 1967), 95.

decision to have an election rests with the prime minister.[34] Marshall claimed that acts of the state should no longer be considered to be subject to the personal discretion of the Royal representative. The act of dissolution, once one of the personal prerogatives of the Crown, has now become "no more personal than ... the many other activities performed by ministers on behalf of the Crown."[35]

Others hold a more moderate interpretation that the use of Royal discretion should be viewed in varying shades of grey. Heasman claims that the Crown generally provides assent to requests for dissolution except in the most rare and extreme conditions.[36] More recently, Smith has recognized the Crown as an impartial umpire who guarantees the "fair operation of the rules" and only exercises discretionary power when it is necessary.[37] Russell argues the independent exercise of discretionary power is appropriately used to "safeguard parliamentary democracy."[38] On this view, the Crown's discretionary power exists in a technical sense and is only employed under the most exceptional circumstances.

Fixed Dates Are Constitutional

Forsey's long standing arguments could not be questioned if election dates were fixed in stone. Legislation that brought about a rigid schedule of fixed dates would be in

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34 R K Alderman and J A Cross. "The Prime Minister and the Decision to Dissolve" *Parliamentary Affairs*. Vol. 28 (1974): 387.

35 Geoffry Marshall. "What Are Constitutional Rules?" *Parliamentary Affairs*. Vol. 38 No. 1 (1985): 36.

36 D J Heasman. "The Monarch, The Prime Minister, and the Dissolution of Parliament" *Parliamentary Affairs*. Vol. 14 (1960): 94-95.

37 David E Smith. *The Invisible Crown*. (Toronto: University of Toronto, 1995), 24.

38 Peter H Russell. *Two Cheers for Minority Government*. (Toronto: Edmund Montgomery Publications, 2008), 138.

violation of the Crown's power to dissolve a sitting assembly at any point. It is even doubtful whether such a system would be desirable. As Desserud points out, considering the potential the Canadian electoral system has to produce minority governments, a rigid schedule of election dates could leave Parliament in a state of virtual gridlock for four years.[39] However, whenever fixed dates have been brought into place in Canada the legislation has not brought about the kind of rigid American-style regime that has tightly regulated election schedules. The Canadian approach to fixed dates is to legislate an election date that need not be adhered to, this is one reason why they are constitutional.

Schwartz and Buck argue that fixed date legislation is completely constitutional because it "does not remove the ability of the Queen's representative to call a premature election" which would be necessary in the event of a vote of non-confidence and that "the law could only be unconstitutional if it forces the Queen's representative to call an election in a manner that offends the Royal Prerogative."[40] The Canadian approach to fixed date elections still allows for an early election to be held prior to the fixed election date. This happened in the federal elections of 2008 and 2011 when, in both instances, the Governor General consented to dissolve the House of Commons one year prior to the date set for the next election. Further, fixed dates no more offend the Royal Prerogative than a first minister does any time dissolution is advised. It is a long standing convention in Canada that when a first minister advises dissolution the Crown's representative will assent to this advice. Aside from the odd exception, the general relationship between a Governor General and a prime minister can be said to be one of compliance. This view

[39] Desserud. "Fixed Date Elections: Improvement of New Problems?," 52.
[40] Schwartz and Buck. "Fixed Date Elections," 7-8.

lead Dawson to comment that it is "a well established constitutional principle... that the Governor General has no right to refuse a dissolution when it is advised by [a] Prime Minister."[41] If this relationship can exist in a manner that does not offend the Royal Prerogative then legislation regulating when advice will be tendered should not impact how that advice will be received.

Another reason why fixed dates are constitutional in Canada is because the legislation does not curtail the powers of the Crown. Whenever fixed dates have become law the legislation always includes a provision making it subordinate to the powers of the Crown. In British Columbia, for example, the legislation included a clause stating that fixed dates would only be employed "subject to the right of the Lieutenant-Governor to prorogue or dissolve the Legislative Assembly."[42] Not only do fixed dates avoid infringing on the power that properly belongs to the Crown, but fixed date legislation derives its efficacy as a legislative power and does not in any way impact executive power. Fixed dates do not conflict with the Royal Prerogative because this legislation is "nothing more than a ceiling for that particular Parliament's life"[43] and legislatures have the ability to set their own life span. The constitution sets the maximum permitted life span of Parliament. Section 50 of the Constitution Act, 1867, as well as section 4(1) of the Constitution Act, 1982, declare the term limit for Parliament to be five years and no longer.[44] This limit is subject to the Governor General dissolving Parliament sooner than the maximum time allowed. The five year maximum term is also in place in every

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41 Dawson. "The Constitutional Question," 95.

42 Hansards: Hon. G. Plant. Legislative Assembly of British Columbia. 2nd Session, 37th Parliament. Vol.2 No.22, August 21st , 2001. Pg 677.

43 Schwartz and Buck. "Fixed Date Elections," 8.

44 Constitution Acts, 1867 to 1982. Section 50. Department of Justice. http://laws-lois.justice.gc.ca/eng/Const/ (accessed on May 1st, 2011).

province and territory. When viewed from this perspective, fixed date legislation abides by the requirements of the constitution. The four year term is under the five year maximum and the date set for an election serves to regulate when the first minister will request or advise dissolution. As Schwartz and Buck argue, since section 50 of the Constitution Act, 1867 is located under the heading of "Legislative Power", and section 4(1) is located under the heading of "Democratic Rights" in the 1982 Charter, these sections do not pertain to the office of the Queen's representative or the exercise of executive power. Because the legislative powers are differentiated from the executive powers they are to be considered mutually exclusive, meaning that one may not overlap or infringe upon the other. Logically, references to these powers "would be located in the same section if they were intended to be inclusive of each other."[45] Since the duration for which a legislative assembly may sit is defined as a legislative power, setting dates for future elections is well within a legislature's jurisdiction.

Above all, fixed dates are constitutional because the legislation does not impede the Crown from dissolving a sitting legislature prior to the date of the next scheduled election. So far, at the time of writing, there have been five provincial elections that have taken place on fixed dates and more are soon to follow. In none of these cases was any alarm raised about the looming election potentially forcing the Lieutenant-Governor to exercise power. In only one other case, the federal election of 2008 of which more will be said below, was fixed date legislation breached and an early election held.[46] The federal case, however, demonstrates that the Governor General does, in fact, have the capacity to

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[45] Schwartz and Buck. "Fixed Date Elections," 8.

[46] 'Judge to rule if 2008 Harper election call legal'. CTV News. September 8th, 2009. http://www.ctv.ca/CTVNews/Canada/20090908/election_date_090908/ (accessed on May 1st, 2011).

exercise the power of dissolution prior to the scheduled election date. This power is exercised only on the advice of the First Minister, and that fact raises implications about the capacity of the use of discretion by representatives of the Crown. It is to this topic that the current study now turns.

At the Discretion of the Crown

The Crown retains an extensive array of powers to make government efficient. Cabinet ministers offer advice as to how the Crown's powers can be used in order to keep government accountable. If a bad decision is made it is the government or the minister who must face the consequences, not the Crown's representative. Although the Crown has been largely excluded from the processes of governance it has not been completely removed. Section 17 of the Constitution Act, 1867 states "There shall be One Parliament for Canada, consisting of the Queen, an Upper House… and the House of Commons."[47] A rather obvious inference to be drawn from this is that the Crown still has a role to play in the governance of Canada. What is less obvious is the kind of role that should be. The position taken in this study is that the Crown possesses discretionary power but it exists in only the most minimal sense. The power to act in contradiction to advice of ministers exists, but it is exceptionally rare for it to be used and incredibly difficult to adequately justify its use.

There are some who would contend that the Crown's use of discretionary power

[47] Constitution Acts, 1867 to 1982. Section 17. Department of Justice. http://laws-lois.justice.gc.ca/eng/Const/Page-2.html (accessed on May 1st, 2011).

has no place in the contemporary Canadian political system and that a Governor General must always assent to a prime minister's advice. Dawson contended that the Crown has "no public will of his own" and that independent action has become "a relic of history".[48] The use of discretionary power, exercised against the advice of a prime minister, would be considered an unwelcome interference in the electoral process. Even the most staunch advocates of the Crown accept the fact that the Crown's discretionary powers only exist in the most minimal capacity. Forsey, defender of the Crown's supremacy, accepted that "In legal theory the discretion of the Crown is absolute... but the actual exercise of the power is everywhere regulated by conventions."[49] The common ground shared by both of these arguments is that the Crown's use of discretionary power has no place in the normal, routine operations of Canadian government.

The reason why Forsey maintained that there is still the potential for the Crown to use some measure of discretionary power is in the event of some extreme circumstance that goes beyond the normal, routine operations of government. Exceptional circumstances could be, in Forsey's words, the dangers of "Cabinet absolutism" or "Prime Ministerial absolutism".[50] Forsey's fears include situations where a government would cling to power far beyond its mandate or demand repeat back-to-back elections to obtain a House with a favourable composition. "Against that danger the reserve power of the Crown, and especially the power to force or refuse dissolution, is in some instances the only safeguard."[51]

The power to force dissolution at the Crown's discretion should not be a

[48] Dawson. "The Constitutional Question," 95.
[49] Forsey. *The Royal Power of Dissolution of Parliament in the British Commonwealth,* 3.
[50] Ibid., 259.
[51] Ibid.

contentious one as it could only be employed in the most drastic conditions when constitutional law had clearly been violated. In Russell's words, "to safeguard parliamentary democracy, it is appropriate for the Crown or its representative ... to act independently in exercising a discretionary power."[52] For example, if a government were to stay in office beyond the maximum five year limit, without being able to claim any of the exceptions such as insurrection or war that are detailed in Section 50 of the Canadian constitution, then this would be a legitimate condition for the Crown's representative to intervene, act independently, and force dissolution. What is not as clear are the grounds upon which assent may be withheld from a request for dissolution. Heasman argues traditional British literature on this subject accepts that a request for dissolution should automatically receive assent, unless three conditions are met simultaneously.[53] Heasman contends that the Crown ought to grant dissolution unless the existing parliament is still "vital, viable, and capable of doing its job" in conditions where an election would be detrimental to national welfare, and another prime minister is able to carry on government with a "working majority" for a reasonable period of time.[54]

In Canada it is almost unheard of for a request for dissolution to be refused because most First Ministers have not abused their power in such a way that has required an intervening action by the Crown. Since Confederation, there has only been one notable exception wherein the Crown's representative disregarded the advice of a first minister and withheld dissolution. This exception to the conventional norm is the King-Byng Affair. The King-Byng Affair is notable not only for being the exception to the trend of

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52 Russell. *Two Cheers for Minority Government,* 138.
53 Heasman. "The Monarch, The Prime Minister, and the Dissolution of Parliament," 94.
54 Ibid., 95.

history, but also for the unique circumstances under which events took place. The federal election in October of 1925 resulted in the reigning Liberal party losing their plurality in the House of Commons. Despite the Liberals no longer being the largest party in the House, W.L. Mackenzie King refused to resign as prime minister. "He would meet the new House of Commons and see whether it would give him its confidence."[55] King and the Liberal party were able to retain the confidence of the House through the support of the Progressive Party, and thus remain the governing party, until June 1926. After losing the support of the Progressives, King requested Governor General Byng to dissolve Parliament. Lord Byng refused and King shortly thereafter resigned as prime minister. A subsequent change of government occurred and the Conservative Party took office, without the need for an election. In his correspondence with Lord Byng, Mackenzie King warned:

> As a refusal by a Governor General to accept the advice of a Prime Minister is a serious step at any time, and most serious under existing conditions… I fear, by the refusal on Your Excellency's part… a grave constitutional question without precedent in the history of Great Britain for a century and in the history of Canada since Confederation.[56]

King's warning should be taken seriously. For if historical precedent is as much a part of our constitution as textual documents then the Governor General's actions have the potential to change the constitution, or at the very least our interpretation and application of it. The question of whether or not Lord Byng acted unconstitutionally has been the topic of much debate. Strong cases have been made on both sides of the argument. The

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[55] Roger Graham. *The King-Byng Affair, 1926: A Question of Responsible Government*. (Toronto: The Copp Clark Publishing Company, 1967), 2.

[56] Letter from W.L Mackenzie King to Lord Byng of Vimy, June 28, 1926. in *Correspondence With Governor General Re Dissolution of Parliament 1926* (Ottawa: F.A. Acland, Printer To The King's Most Excellent Majesty, 1927).

important point to note, however, is the reason behind Lord Byng's actions. Byng's justification for denying dissolution was that Arthur Meighen, leader of the party with the most seats in the House, had "not been given a chance of trying to govern".[57] Dissolution was not granted because Byng believed that there was still a viable government. The Conservatives supported by the Progressives would have constituted a majority in the House. There is no doubt that Lord Byng believed these actions to be constitutional. It is also likely that Lord Byng viewed the initial refusal of dissolution to Mackenzie King as a means of allowing parliament to return to a state of normality under the stewardship of the party with the largest plurality. Thus, Byng acted with the intention of allowing the legislature to govern its own affairs, and not be subject to the absolute discretion of one prime minister.

Had Mackenzie King stepped down as Prime Minister after the 1925 election, as would have been consistent with conventional practice, then Lord Byng would not have been put in the position where interventionist action was necessary. Heasman offers the best explanation as to why interventionist action by the Crown is such a rare event. He claims that the Crown usually provides assent to ministerial requests because most minsters are scrupulous enough to shield the Sovereign from the necessity of having to make any debatable use of royal discretion.[58] By this measure, Mackenzie King can be seen to be at fault for putting Byng in a position where it was difficult to maintain his impartial position. Byng's questionable use of discretion was intended to counteract the prime-ministerial absolutism that was being exhibited by Mackenzie King. However, the

[57] Letter from Lord Byng of Vimy to W.L. Mackenzie King, June 29, 1926. in *Correspondence With Governor General Re Dissolution of Parliament 1926* (Ottawa: F.A. Acland, Printer To The King's Most Excellent Majesty, 1927).

[58] Heasman. "The Monarch, The Prime Minister, and the Dissolution of Parliament," 103.

actions of Lord Byng cannot be judged on intention alone. The vast majority of conventional practice in Canada has been for a first minister's request for dissolution be met with assent. As Mackenzie King stated, Lord Byng's actions were those "without precedent"[59] in the history of Canada, and that has held true until today.

Lord Byng's actions were not consistent with the principles of impartial non-intervention that are typically practised by representatives of the Crown. Smith claims that the Crown ought to be viewed as the primary organizing principle in Canadian politics, and distinguishes this from an interventionist position.[60] Viewed in this manner, the position of the Crown provides the structure to Canadian government and enables a form of strong executive dominance. The dominance Smith speaks of is that of the prime minister and cabinet, as they are the ones held responsible by Parliament for the use of the Crown's power. As such, the Crown should not intervene in the exercise of power. This view certainly coincides with Dawson's interpretation, that the Governor General must play an "unobtrusive role". Dawson's view is more extreme than that put forth by Smith. In claiming that the Crown is bound to accept advice tendered by the PM even if this means offering assent to 'bad bills'[61] Dawson leaves no room for the Crown to exercise any power independently of ministerial advice. On this interpretation of the proper role for a representative of the Crown, a request for dissolution of a sitting legislature would only be met with assent.

Although the Crown retains the power to dissolve a sitting legislature at its

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[59] Letter from W.L Mackenzie King to Lord Byng of Vimy, June 28, 1926. in *Correspondence With Governor General Re Dissolution of Parliament 1926* (Ottawa: F.A. Acland, Printer To The King's Most Excellent Majesty, 1927).

[60] Smith. *The Invisible Crown,* 113.

[61] Dawson. "The Constitutional Question," 97.

discretion, this power exists on the assumption that it will not be employed under normal and routine conditions. It is one thing for the constitution to afford this power to the Crown but it is an entirely different matter for the Crown's representative to exercise this power under his or her own volition. This divergence between formal written rules and conventional practices helps to explain Jennifer Smith's statement that Canada can "write the paper description of the constitution and then start down a different path."[62] The disparity between written law and conventional practice is the reason why there is confusion regarding the proper use of the Crown's discretion. The Crown holds the title to power and is capable of exercising discretion in its use. Discretion entails the ability to think independently, in order that the good may be discerned from the bad. While the Crown is able to think independently, it is generally expected that the Crown will not act independently. In order to maintain a non-interventionist position the Crown must not impede the course of action desired by the elected government, this means providing routine assent to all ministerial advice.

The Crown's representative does not exercise any influence over the normal processes of government, but still has the right to accept or reject ministerial advice. The Crown's power is held in reserve and does not apply to the routine operations of government, but rather, is employed like a release valve to disperse the pressure that builds in the rare circumstances where the normal operations of government break down. Should the House of Commons become divided and unable to carry on in its normal capacity the First Minister would likely request either dissolution or prorogation, and in this case the Governor General is equally empowered to either grant or reject this request

[62] Smith. "The Constitutional Debate & Beyond," 45.

based on his or her own best judgement. Should a government attempt to stay in office past the constitutionally prescribed limitation, then a Governor General is capable of forcing dissolution independently. While conventional practice restrains the Crown's power to a rubber stamp merely used to authorize the bulk of ministerial advice, the Crown's capacity for independent action exists and must be respected and preserved for those rare instances when it is required to enforce the norms of responsible government.

Fixed Dates Under the Crown

The implementation of fixed date legislation poses a new twist on this conversation. This legislation provides, in technical terms, a regulation on when and how the power of dissolution will be used. Fixed date legislation is constitutionally permissible because it does not encroach on the Royal Prerogative by forcing the Crown's representative to provide dissolution at a specific point. Rather, fixed dates are rightly viewed as a timetable that dictates when a first minister ought to make such a request, and the Crown's representative is still able to exercise discretion whenever a request for dissolution is made. In the event that a First Minister wishes to hold an election prior to the legislated date, a problem arises as to whether or not the First Minister is bound to act in accordance with fixed date legislation. If fixed date legislation is constitutional because it does not restrict the powers of the Crown but instead serves as a regulation on first ministers, then the only way a fixed date can be enforced is to have first ministers be denied their election requests if they come prior to the legislated date.

This would require the Crown's representative to act independently of the advice of the First Minister in order to uphold fixed date legislation.

The Crown is seldom entitled to exercise its powers of discretion independently, this has been argued above. Very little of this capacity changes with regard to fixed date elections. When fixed date legislation calls for an election date the Crown is to provide dissolution and call an election. Convention dictates that dissolution should be granted whenever it is requested by a First Minister, this would also be the case if the request came prior to a scheduled election date as exemplified by the federal election of 2008. One reason that fixed date elections are constitutional is because election dates are not actually fixed, at no point does the legislation force the Crown's hand. Neither does fixed date legislation abridge the right of first ministers to request an early election. Because a Prime Minister can advise a Governor General to dissolve a sitting legislature at any point, fixed date legislation amounts to little more than a recommendation for future election dates. The only way for this new convention of a four year term to be enforced would be to dramatically alter the centuries old convention that the Crown ought not intervene in the governance of Canada.

The notion that a representative of the Crown could enforce a fixed date for an election is not a ludicrous concept for some scholars. Forsey argues that a Governor General is completely permitted to withhold dissolution, and the thought that such a refusal is becoming obsolete is "completely without foundation."[63] Russell has acknowledged that under fixed date legislation Governors-General will not acquiesce so

[63] Forsey. *The Royal Power of dissolution of Parliament in the British Commonwealth,* 66.

readily to a request for an early election.[64] In Newfoundland's House of Assembly it was argued that the Lieutenant-Governor should be "acting completely independently" when contemplating a dissolution request.[65] When fixed date legislation was being debated in the House of Commons the Minister of Democratic Reform told the House that any request for an early election would be subject to the discretion of the Governor General.[66] These arguments indicate that the Crown still has a discretionary role to play. However the thought that a first minister's advice for an early election would be met with anything other than immediate assent is a dreadful heresy to those who would propose that the Governor General "has become an automaton"[67] or that dissolution should be "automatic"[68] in order for the Crown to maintain neutrality. Marshall argues that the Crown has been subject to a diminution of discretionary power by conventional practice,[69] and so ought to act in accordance with historical convention. Although it is not contested that the Crown technically has the legal power to refuse a request for dissolution, it is widely accepted that automatic assent is the contemporary norm.

Fixed date elections present a logical problem. Fixed date legislation does not, and legally cannot, affect the ability of the Crown's representative to either grant or withhold dissolution. Also, fixed date legislation attempts to impose a precise four year term for which governments will serve. And yet, fixed dates do not, and legally cannot, alter the right of a first minister to request the dissolution of a sitting legislative assembly at any

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64 Russell. *Two Cheers for Minority Government,* 140.
65 Hansards: R. Grimes. Newfoundland and Labrador House of Assembly, 1st Session, 45th General Assembly. House of Assembly Proceedings Vol. XLV No.53, December 7th, 2004.
66 Hansards: Rob Nicholson. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 77. November 6th, 2006. Pg 4729.
67 Dawson. "The Constitutional Question," 95
68 Heasman. "The Monarch, The Prime Minister, and the Dissolution of Parliament," 94.
69 Marshall. "What Are Constitutional Rules?," 36.

point. Although some would argue that fixed dates should be viewed as a regulation on the behaviour of first ministers,[70] the legislation can no more limit the ability of first ministers to request dissolution than it can infringe upon the Crown's discretion. This contention means that fixed date legislation cannot be legally enforced, even though it has become electoral law. To make this situation even more convoluted, the only way fixed dates could conceivably be enforced would be for the representative of the Crown to cast aside the centuries long tradition of assenting to the advice of first ministers. The Crown's representative would have to become the long arm of the law that would be required in order for the actions of first ministers to be regulated and, if necessary, corrected.

If we accept the argument that the Crown is the primary organizing principle of Canadian government[71] then this contention takes on another face. Through the process of convention, precedent, and historical practice, the Crown has enabled the House of Commons to exercise its power. This power allows the House of Commons, an elected body of the people, to pass legislation and laws in the interest of good governance in the land. The Crown's power enables self-governance, it is how the people may govern themselves. With the passage of fixed date legislation, the House of Commons has passed a law that will recommend when it is proper for the prime minister to exercise the power to request an election. The only way this recommendation can be regulated is for the Governor General to decide whether or not to accept the advice of the prime minister. Since the prime minister wields the Crown's power with regard to calling an election, and

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[70] Hogg. *Constitutional Law of Canada,* 281.
[71] Smith. *The Invisible Crown.* 113.

the only way to regulate when an election will be called is for the Crown to exercise its power, this legislation is tantamount to entrusting the Crown to keep its own power in check. Essentially, the House of Commons evolved through a history that has seen the people ask the Crown to step out of the affairs of governance so that the people may govern themselves but, with the passage of fixed date legislation, it appears that the House of Commons has asked the Crown to step back in so that the people may govern properly.

The contention between fixed dates and the discretion permitted under the Royal Prerogative can only result in one of two outcomes. Either fixed dates require enforcement from the Crown to become effective law or this legislation will be the equivalent of an electoral scoff law. Fixed date legislation should only be considered to be actual law if it can be enforced. To expect that the actions of the Crown can be used to uphold this legislation poses a problem for Westminster democratic systems. Heasman aptly summarizes the problem:

> The difficulty here is ... the onus for ensuring the proper function of parliamentary institutions falls on a person whose position is likely to be regarded as an anachronism in a democracy if it allows that person the power of independent decision.[72]

Fixed date election legislation is permissible because at no point does the legislation force the Crown to act one way or another. However, any attempt to imply that a Lieutenant-Governor could play a role in enforcing this legislation after a premier has requested a premature election is in direct conflict with the convention that the Crown assents to the wishes of the first minister. If we accept Heasman's argument, the reason

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[72] Heasman. “The Monarch, The Prime Minister, and the Dissolution of Parliament,” 96.

why the Crown usually assents is because most ministers are scrupulous enough to shield the Crown from the necessity of making any debatable use of royal discretion.[73] This implies not only that ministers must avoid putting the Crown in a situation that may jeopardize the position of neutrality but also that the Crown would be unable to uphold any legislation if that action was seen to be an interference in the normal functioning of government. Denying a request for dissolution from one party leader so that another may be able to govern is an act that is in opposition to both conventional practice and the impartial position of the Crown. Heard claims that long standing constitutional conventions must be interpreted as "rules of critical morality in order to pose meaningful constraints and obligations."[74] This means that historical and conventional practices hold more influence in guiding the actions of the Crown than a single piece of legislation whose application seems to be at odds with historical practice. As such, the Crown is in a position where there is no other alternative but to follow in accordance with precedent and history, this means offering assent to any request for dissolution.

The position argued above is directly applicable to the events surrounding the federal elections of 2008 and 2011. Although the federal election of 2011 did not take place in accordance to the legislated fixed date schedule, it was preceded by a vote of non-confidence in the government by the House of Commons. The 2011 election ought to be viewed as how an early election would take place properly under a fixed date schedule. The 2008 federal election is unique for two reasons. It was the first nation wide election to take place after fixed dates had been legislated at the federal level, and it

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[73] Ibid., 103.

[74] Andrew Heard. "Just What is a Vote of Confidence? The Curious Case of May 10, 2005" *Canadian Journal of Political Science*. Vol. 40 No. 2 (2007): 396.

remains the only election to take place in Canada where fixed date legislation has been disregarded.[75] The bill that turned fixed dates into law was passed by the House of Commons in 2006, received royal assent in 2007, and stated that the first fixed date federal election was to be held in 2009.[76] Despite this, and the fact that the government had not lost the confidence of the House, Prime Minister Harper approached Governor General Jean in 2008 to request that dissolution be granted and an election be held one year before the fixed term had expired. Once Harper approached the Governor General to advise an early election the only way that fixed date legislation could have been maintained was for the Governor General to withhold assent. However this was not the case, convention prevailed and assent was granted. As a result, the legislated date for the next federal election proved to be a mere recommendation. Since it did not fit with the interests of the reigning prime minister this particular piece of electoral law was ignored and prime ministerial advice prevailed.

Harper should not be condemned for ignoring the recommended fixed date for two reasons. First, since there is absolutely no means by which this legislation can be enforced, breaching unenforceable legislation is not a serious enough offence to warrant condemnation. Second, Prime Minister Harper was merely following in accordance with historical practice. He did as every other preceding prime minister has done and requested an election date that suited his interests but left the final decision in the hands of the Governor General. Where Harper's actions should be judged is on the basis that he put the Governor General in a position where the impartial position of the Crown could

[75] CBC News. 'Harper's 2008 election call challenged in court'. September 8, 2009. http://www.cbc.ca/news/canada/story/2009/09/08/democracy-watch008.html (accessed on May 1st, 2011).

[76] Robertson. “Bill C-16: An Act To Amend The Canada Elections Act,” 8.

have been jeopardized by use of the royal discretion. Worse yet, the request for an early election was not done out of necessity, the government had not lost the confidence of the House and there was no major divisive issue of national interest impeding Parliament from functioning. The Governor General was put in a situation where she was faced with one of two options, either assent to an early election or be seen to favour one party over and thus compromise the neutrality of her position. Fortunately, Governor General Jean acted prudently and not only disregarded fixed date legislation but also followed the tradition of assenting to the advice of the first minister. Harper's actions set the precedent that fixed date legislation does not need to be respected in any way.

Because fixed date elections cannot be maintained in any serious capacity, this legislation amounts to little more than electoral scoff law. The power to dissolve a legislature and call an election is "exclusively a political decision" and as such any breach of this law cannot be subject to legal action because it is "within the exclusive discretion of the executive."[51] It does not impose regulations on when the Crown may exercise the power of dissolution nor when a first minister may request an election. Thus fixed dates amount to, at best, a recommendation for the date of the next election. If fixed date election legislation is to have any real meaning, and actually fix election dates, then it needs to become more acceptable for the Crown to withhold dissolution until the four year cycle has run its course. However this would require the adoption of a new convention that provides more room for the use of the Crown's discretion. This development would not only be undesirable but it poses the problem of legislating a new

[51] Doug Stoltz. "Fixed Date Elections, Parliamentary Dissolutions, and the Court," *Canadian Parliamentary Review.* Vol. 33 No. 1 (2010): 16.

convention to guide political action, and this is the exact conundrum posed by the legislation of fixed date elections.

Conclusion

The assumption that fixed dates for elections will be respected because a request for an early election will be subject to scrutiny by the Crown's representative appears to advocate the position that there is still room for the Crown to exercise a degree of discretion. This, however, is in direct contrast to conventional history in Canadian politics. Although the Crown is the source of power behind Canada's executive, legislative, administrative, and judicial systems, the Crown does not intervene or have any role to play in their routine operations. Independent action on the part of the Crown has become a relic of history and cannot be expected to have any place in contemporary governance. Since the only way a fixed date election cycle can be imposed in a situation where a first minister has advised a premature election is for the Crown to disregard ministerial advice and act independently, it stands to reason that fixed date legislation can have no real force or impact on the Canadian electoral system. Fixed date legislation has the exact amount of influence over the timing of elections that the reigning first minister wants it to have. As such fixed dates amount to little more than a recommendation for the date of the next election. Ultimately, this legislation stands as an unenforceable electoral scoff law.

If fixed dates were to be enforced it could only come about by upsetting the

balance between Crown and minister that enables the Canadian concept of responsible government. The government is capable of advising the Crown how power should be used because governing ministers are held accountable for their advice by the elected legislature. The Crown assents to all ministerial advice to remain impartial and, as a result, avoids being drawn into partisan politics and being held liable for any poor decisions the government may make. The only way a fixed date cycle could be maintained is if it were to factor into the Governor General's decision when contemplating a prime minister's request for dissolution. But this would result in the Crown's representative being drawn into the partisan political debates that the Crown has made great pains to avoid. It is very important that no piece of legislation affect this relationship. The Crown legally retains the power that it does based on the premise that it is an impartial umpire, guaranteeing the "fair operation of the rules"[52] and only exercising discretionary power in order to "safeguard parliamentary democracy"[53] and ensure responsible government when normal political relations deteriorate to the point that government ceases to function. Even if for no other reason than the legal ease of avoiding a constitutional amendment, fixed date elections cannot alter this relationship. This is why legislating a new convention poses such a problem, because a conventional norm can only guide action by making reference to proper action taken in the past. Adhering to convention presupposes any argument by stating: *its just how things are done*. If a new rule is imposed that conflicts with a long standing convention, or *how things ought to be done*, then that new rule will be rendered ineffective. This is the case with fixed date

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[52] Smith. *The Invisible Crown,* 24.
[53] Russell. T*wo Cheers for Minority Government*, 138.

elections. In the end historical precedent will prevail, and the Governors General and Lieutenant-Governors who will be posed with this dilemma will do as they have done throughout Canadian history, and assent will be given to the advice of the first minister.

Since the Crown's representatives cannot be expected to enforce the four year term established by fixed date election legislation, there is nothing that can be done to ensure the full duration passes before a new election is held. First ministers still remain able to request an election at any point, and the conventional wisdom that the Crown will generally provide assent to any such request still holds true. This means that the potential for a first minister to time elections based on re-election prospects, or even based on an arbitrary whim, still remains. This is problematic, for if a single individual is capable of abusing the highly concentrated power of government in order to promote their own exclusive and partisan interests then this will be detrimental to maintaining the support and consent of the governed. First ministers are fully capable of violating fixed date legislation without fear of any institutional sanctions or repercussions being imposed as a result of their actions. The next chapter explores the relationship between first ministers and fixed date legislation, with a specific focus on the contention between the unmitigated ability of first ministers to request an election at any point and the intention behind fixed date legislation.

Chapter 3 – Fixed Dates and First Ministers

Introduction

This chapter explores the relationship between fixed date elections and Canadian First Ministers. Fixed date legislation was introduced in a number of jurisdictions for the explicit purpose of reducing the power of First Ministers and to remove the potential for election date manipulation, however, this chapter argues that such legislation is an insufficient means of reducing the power in the office of First Ministers and is incapable of preventing the manipulation of election dates. Due to the fact that fixed date legislation is ultimately unenforceable it can have no impact on a First Minister who wishes to request an election prior to the legislated date. Fixed date elections constitute a positive reform in theory because such legislation promotes the public interest in fair elections over the ability of a Premier to optimize his or her chances of re-election. Where fixed dates fail is in the potential to enforce the legislated election date over the exclusive interest of the incumbent First Minster.

The discussion that follows is premised on the assumption that a good democratic system will be exemplified by a government that exercises power for the benefit of the governed and not for the explicit benefit of the governor. When the interests of the majority of Canadians are represented, or at least considered, in decision-making processes of government this increases the legitimacy of the Canadian political system. If the power of government is abused by a single individual for the specific purpose of

promoting their own exclusive personal or partisan interests then it is far less likely that this will reflect the interests of most Canadians. Abuse of power for the promotion of partisan interests serves to the detriment of maintaining the support and consent of the governed. Although it is fair to claim that the intentional manipulation of election dates for partisan benefit, a practice that has been common in Canadian political history, is an inappropriate use of governmental power this issue does not seem to galvanize voters in the way one would expect. The 2008 federal election saw the incumbent governing party re-elected, despite their disregard for fixed date legislation. This not only indicates that fixed date elections are an insignificant issue in the mind of the average voter, but also that it is unrealistic to expect that the voting public will hold a government responsible should they hold an election in advance of the legislated date.

Head of Government

Canadian First Ministers wield extensive powers within their governments. Westminster-style political systems, such as the Canadian political system, are notable for an extensive degree of political power and decision-making ability concentrated in a very few number of hands. This problem is "perceived as almost universal"[1] among most western democracies, however it is particularly problematic in Westminster systems. An extensive concentration of power is possible because the executive is capable of dominating the legislature, resulting in a situation where the House of Commons no

[1] John Hart. "President and Prime Minister: Convergence or Divergence?" *Parliamentary Affairs* Vol. 44 (1991): 208.

longer rules but decisions are made by "the government acting through the House of Commons."[2] Sharp claims that it is "the reinforcement of cabinet solidarity and the principle of collective responsibility"[3] that unifies departmental and executive powers into a single focus under the direction of one governing political party, and this is often mistaken as dominance by a heavy handed first minister. Others, such as Savoie, argue that power has been progressively shifting away from "line ministers and their departments" toward the centre, and within the centre power shifts away from Cabinet towards the prime minister and his advisers.[4] According to Hart, this shift in power has occurred to the extent that prime-ministerial government has replaced cabinet government.[5] Heasman claims the prime minister has become an increasingly important and influential position in the Cabinet as well as on the electoral campaign, largely due to "the absence of another public figure to command the centre of the stage,"[6] and that the elevated position of the prime minister over other ministers is more sharply differentiated in Canada than in Britain.[7] White contends that a "massive concentration of power" in cabinets is common to Westminster systems but Canadian cabinets are especially "notable for being dominated by their first ministers."[8]

Due to the nature of the constitution and the way responsible government has evolved in Canada, political power is concentrated in the political executive. Since the

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2 Richard Heffernan. "Why the Prime Minster cannot be a President: Comparing Institutional Imperatives in Britain and America" *Parliamentary Affairs*. Vol. 58 No. 1 (2005): 67-68.

3 Mitchell Sharp. "Decision-Making in the Federal Cabinet" in *Apex of Power: The Prime Minister and Political Leadership in Canada* 2nd edition. ed. Thomas A. Hockin. (Scarborough: Prentice-Hall of Canada, 1977), 67.

4 Donald J Savoie. *Governing from the Centre*. (Toronto: University of Toronto Press, 2004), 7.

5 Hart. "President and Prime Minister: Convergence or Divergence?," 211.

6 D J Heasman. "The Monarch, The Prime Minister, and the Dissolution of Parliament" *Parliamentary Affairs*. Vol. 14 (1960): 101.

7 Ibid.

8 Graham White. *Cabinets and First Ministers*. (Vancouver: UBC Press, 2005), 3.

Crown is to be interpreted as the primary organizing principle of Canadian government[26] the fact that power is heavily concentrated in so few hands ought to be expected. Franks argues that this is "One of the greatest strengths of the theory of the parliamentary cabinet system" because "a small, clearly identifiable group of individuals not only has complete responsibility, but is held directly accountable to parliament."[27] This is part of the inherent nature of the Westminster political system upon which government in Canada is based. This particular political system has evolved to enable a representative government to wield the extensive powers that would have been held by a king or queen. In other words, the Crown is the source of political power in Westminster-style political systems. Generally, this reservoir of immense power is entrusted to the advice of cabinet ministers. However, a growing trend that has been cause for concern is the domination of cabinet and executive decision making processes by first ministers.

Concentrated power is not inherently undemocratic but rather serves to provide an efficient decision-making process within government. However, if decision-making processes are used for the benefit of members of the governing political party, and exclude the interests of the Canadian public, then those decisions can be considered contrary to conceptions of a good democratic system. The problem with excessive power and influence being concentrated in the hands of a single individual, such as a first minister, is that the potential for abuse of power increases significantly. Russell argues that the transition towards prime-ministerial government can be marked by the expression *primus inter pares*.[9] The basic tenet behind the prime-ministerial government thesis is

[26] Smith. *The Invisible Crown*, 113
[27] C E S Franks. *The Parliament of Canada*. (Toronto: University of Toronto Press, 1987): 227.
[9] Peter H Russell. *Two Cheers for Minority Government*. (Toronto: Edmund Montgomery Publications, 2008), 102.

"what is good for the prime minister is good for the government and good for the rest of the country."[10] Russell contends that "prime-ministerial, CEO-style government" has two notable effects on Canadian governance. First, Cabinet government suffers when decision making becomes subject to political staff in the prime minister's office who are not responsible to parliament, and, second, parliamentary government suffers when legislation and policy are orchestrated by the political agenda in the PMO, and then the prime minister presents this vision to the country outside of parliament.[11] Others claim the first minister can no longer be thought of as "*primus inter pares* but just plain *primus*."[12] The power of the first minister's office, used in this fashion, presents a serious problem for Canadian democracy. The increasing tendency for governments to make announcements outside legislative assemblies such as "budgets delivered in infomercial fashion" are direct attempts to avoid institutionalized scrutiny and constitutes the "single largest threat to representative democracy."[13] Governing in this manner shows a lack of respect for the established institutions of governance and is typified by a government that is increasingly "autocratic, centralized, and patronizing".[14]

There are three common themes brought out by this literature. First, executive dominance is a feature common to Westminster systems. Second, there is an immense amount of power concentrated in a single office that is held by a single person, the first minister, and this power is held through the domination of both the governing political party and Cabinet. Finally, there is cause for concern, not for the concentration of power

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10 Ibid., 104.
11 Ibid.
12 Jeffrey Simpson. *The Friendly Dictatorship*. (Toronto: McClelland and Stewart, 2001), 35.
13 David C Docherty. *Legislatures*. (Vancouver: UBC Press, 2005), 177.
14 Hart. "President and Prime Minister: Convergence or Divergence?," 213.

itself, but for the capacity for this power to be used by one person whose interests may not coincide with those of the rest of the country. Democracy may be advanced by reducing the influence one individual, the first minister, has over political and electoral processes. It is my belief that it would not be desirable to attempt to remove all the powers held by cabinet or a prime minister. It is this massive concentration of power that makes government efficient. Rather, the solution lies in a piecemeal approach. Diminishing the excessive dominance which a first minister has in the Canadian political system would be properly addressed by alleviating the condition one symptom at a time.

Fixed date elections constitute one component in the incremental approach to addressing the dominant position of first ministers. Fixed dates were implemented as a small part in the larger attempt to improve Canadian democracy. A reduction in the ability of first ministers to manipulate the date of elections for their own benefit would improve the quality and fairness of the electoral process. Milner argues that reducing the power of first ministers in this way should provide a more fair basis on which all candidates may compete in elections and increases the quality of choice among voting Canadians.[54] Since both are in the interest of the general population fixed dates ought to contribute to improved levels of democracy in Canada.

Why Fixed Dates?

Canadian first ministers have long had the ability to determine the date of

[54] Milner, Henry. "Fixing Canada's Unfixed Election Dates: A political season to reduce the democratic deficit." *IRPP Policy Matters*. Vol.6 No.6 (2005), 20-22.

elections, an ability which other elected individuals do not have. Milner refers to the "special advantage" that allows first ministers to "exploit" conditions that would be favourable to re-election.[15] Simpson declares the ability to determine the date of the next election is "arguably the most precious political advantage of all."[16] White claims that the capacity to unilaterally determine an election date provides an "unfair advantage" that allows incumbents to call an election "at a time most conducive to [their] re-election prospects."[17] Although a substantial concentration of power is not "inherently undemocratic"[18] and alarms concerning high levels of concentration can largely be discounted, the curtailing of first ministers' power "would clearly enhance the quality of democracy" in Canada.[19] Brazier argues that the ability to exercise unilateral control over election dates exemplifies one of the many ways in which First Ministers have the power to dominate government and "changes could and should be made to reduce those powers."[20]

Many in legislative assemblies have also expressed concern that the decision to hold an election has often been made by incumbents to promote their chances of re-election. This is one of the primary arguments behind the movement to adopt fixed date elections in Canada. Fixed dates were introduced in British Columbia because in the past Premiers were able to subordinate the public interest to their own private political interests by using "their power to determine the timing of the calling of an election as an

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15 Ibid., 20.
16 Simpson. *The Friendly Dictatorship,* 30.
17 Graham White. *Cabinets and First Ministers*. (Vancouver: UBC Press, 2005), 176.
18 Ibid., 10.
19 Ibid., 100.
20 Rodney Brazier. "Reducing the Power of the Prime Minister" *Parliamentary Affairs* Vol. 44 (1991): 453.

aspect of their re-election strategy."[21] In the House of Commons a number of members of the governing party argued that Prime Ministers "can manipulate election dates to [their own] partisan advantage."[22] Previous Prime Ministers were accused of taking advantage of the political system by "manipulating voters and manipulating dates to get the most beneficial time for the governing party to call an election."[23] Prime Ministers were accused of using their power at the most "propitious time for an election to renew the government's mandate."[24] It was claimed that fixed dates would reduce the power of first ministers and remove their ability "to call an election when it is good for the government, when it suits the government and when it is damaging to the chances of the opposition."[25]

If the argument that the manipulation of election dates promotes partisan interests is justified then there is cause for concern because it is a problem that has not yet been remedied. Although fixed date elections have been legislated throughout the majority of Canada, the potential for incumbent first ministers to promote their own interests by manipulating the date of elections still remains as there is no means by which fixed date legislation may be enforced. A schedule of fixed election dates can only be maintained by trusting first ministers not to take advantage of their position as they have in the past. As such, fixed date legislation is completely incapable of achieving a regulated schedule for elections and cannot contribute to holding first ministers to account for their decisions

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21 Hansards: Hon. G. Plant. Legislative Assembly of British Columbia. 2nd Session, 37th Parliament. Vol. 2 No. 22, August 21st, 2001. Pg 678

22 Hansards: J. Hill. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 47, September 18th, 2006. Pg 2929.

23 Hansards: T. Lukiwski. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 47, September 18th, 2006. Pg 2888.

24 Hansards: Hon. R. Nicholson. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 47, September 18th, 2006. Pg 2875.

25 Hansards: S. Reid. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 47, September 18th, 2006. Pg 2917.

pertaining to election timing. Since this thesis is premised on the assumption that government ought to promote the interests of the governed and not the exclusive interests of those who wield power, I argue that if first ministers are able to exercise the power of their office in a way that is directed at their own benefit, then removing this power should contribute to promoting positive democratic norms in Canada and ought to increase the legitimacy of the Canadian political system.

At face value, fixed dates seem to be a simple solution that would contribute to improving Canadian democracy. The legislation should reduce the power of first ministers to manipulate election dates without altering other aspects of the decision making process in the Canadian political system, and it would also improve the democratic quality of elections by providing an equal basis on which all parties and candidates could prepare their electoral campaigns. All this, and the legislation permits the possibility of an early election in the event that the government loses the confidence of the legislature. Upon closer inspection, however, the supposed benefits that can be derived from a fixed date cycle may prove to be illusive. I argue that there is little benefit to fixed date legislation due to the fact that there is no way in which this legislation may be enforced.

The Difficulty with Setting a Date

The act of legislating fixed date elections presents a conundrum which David E. Smith articulates quite eloquently. “To those who seek a 'level playing field' by removing

from the prime minister the prerogative to advise dissolution of Parliament and replacing discretion with a fixed date ... the unwritten constitution appears impenetrable and nonsensical."[28] The difficulty to which Smith is referring is the mechanism by which elections are held in Canada. Although it is the Crown's representative who will dissolve a legislature and then declare that election writs be issued, the actual mechanism which allows this process to occur is ministerial advice. In legislating fixed dates for elections it seems obvious to assume that this legislation will allow for the Crown's representatives to dissolve a legislature at any time, but what is less obvious is the fact that this power is exercised upon the advice of ministers which means that in order for the Crown to be able to exercise the power of dissolution at any point the Crown must also be able to receive such advice at any point. Thus, legislation can no more abridge the ability of the Crown to provide dissolution than it can regulate the timing and situations under which first ministers will offer advice. This poses a problem for those who argue that fixed date legislation should be considered as a regulation on the power of first ministers in order to avoid infringing on the powers of the Crown.[29] As such, fixed election dates cannot actually be fixed in any capacity whatsoever, and any legislation that attempts to do so cannot be enforced as a law.

Due to the nature of fixed date legislation, the fact that it cannot be enforced, it is doubtful if this legislation can result in a diminution of the power that first ministers hold over the electoral process. For example, Desserud argues that fixed dates will not work because it is not possible to impose sanctions against a first minister who ignores the

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[28] David E Smith. *The People's House of Commons*. (Toronto: University of Toronto Press, 2007), 90.
[29] Peter W Hogg. *Constitutional Law of Canada*. 5th ed. (Scarborough: Thomson Carswell, 2005): 281.

legislation and requests an early dissolution.[30] In the House of Commons opposition members claimed that even with fixed date legislation first ministers are still capable of requesting an election regardless of whether or not the government has lost the confidence of the legislative assembly.[31] This is where fixed date legislation falls short of delivering on its intended goal, setting the date of future elections, because no piece of legislation can regulate when the Crown's discretionary power will be used. The only way fixed dates are able to stand as legislation is by being effectively impotent. As such, first ministers are required to abide by fixed dates in principle, but are legally entitled to request an election whenever they so choose. This conundrum lead one opposition member of the Legislative Assembly of Manitoba to comment that fixed date legislation amounts to "fixed elections if necessary but not necessarily fixed elections."[32]

Despite the open and non-binding nature of fixed date legislation some argue that it is still possible for fixed dates to be maintained even if a first minister were to desire an early election. In the House of Commons it was claimed that first ministers would abide by a set date out of fear of reprisal from voters expecting the set date to be maintained. The basis of this assumption is that the Prime Minister would not "dare call an election" before the set date as he "would be held accountable by the people" who would expect an election to be held on the legislated date.[33] Russell agrees with this position, arguing that fixed date legislation would diminish the opportunity to call an election on a date in order

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30 Don Desserud. "Fixed Date Elections: Improvement of New Problems?" *Electoral Insight* Vol. 7 No. 1 (2005): 52. http://www.elections.ca/res/eim/pdf/insight_2005_01_e.pdf (accessed on May 1st, 2011).

31 Hansards: P. Szabo. Parliament of Canada. 1st Session, 39th Parliament. No. 47. September 18th, 2006. Pgs 2877-2878.

32 Hansards: K. Goertzen. Legislative Assembly of Manitoba. 2nd Session, 39th Legislature. May 22nd, 2008 Vol. LX No.45B. Pg 2359.

33 Hansards: J. Hill. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 77, November 6th, 2006. Pg 4741.

to maximize electoral advantage since the incumbent may be punished by voters if the election came before the end of the four year cycle.[34] Russell goes further and contends that fixed dates could be upheld by the Crown. In order "to safeguard parliamentary democracy, it is appropriate for the Crown or its representative... to act independently in exercising a discretionary power."[35] Russell's claim is that the independent discreton of the Crown could be employed in the event the Prime Minister were to intentionally breach this legislation.

Neither of these two assumptions constitute valid grounds on which fixed dates would be maintained because they would not prevent the Prime Minister from acting on his desires and requesting an early election. While there may be the potential for an adverse reaction from voters towards a first minister who breached fixed date legislation, this does not constitute a formal impediment. Requesting an election before the legislated date may not be a serious concern for most people contemplating for whom they should cast their vote, this was demonstrated in the 2008 federal election which saw the fixed-date-breaching incumbent re-elected.[36] Also, as has been argued in the previous chapter, the Crown's representative would not disregard the advice of a first minister in order uphold one single piece of legislation. The independent discretion of the Crown is no longer exercised in contemporary Westminster systems. It exists only to serve as a release valve to prevent abuses of power in the most extreme situations of crisis. Requesting an election prior to the date outlined in fixed date legislation does not constitute a situation

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[34] Russell. *Two Cheers for Minority Government,* 136.
[35] Russell. *Two Cheers for Minority Government,* 138.

[36] 'Judge to rule if 2008 Harper election call legal'. CTV News. September 8th, 2009. http://www.ctv.ca/CTVNews/Canada/20090908/election_date_090908/ (accessed on May 1st, 2011).

of crisis, nor does it violate the basic functioning of parliamentary democracy. Thus, the Crown has no role to play in ensuring fixed election dates are maintained. For an example one need look no further than the 2008 federal election to see what little effect fixed date legislation had over the Governor-General's decision to assent to an election request prior to the scheduled date.[37]

Even if it was possible for fixed dates to be rigidly enforced some doubt that this would contribute to improved governance or reduce the potential for government activity to be manipulated for partisan purposes. Flexible, or unfixed, election dates provide two distinct advantages over their fixed date counter parts. First, Westminster systems typically require flexible election dates to relieve major conflicts in legislatures that could potentially impede government. As Desserud argues, "flexible-date elections are the means by which parliamentary deadlocks and stalemates are resolved and majority support is restored."[38] If there were a major piece of legislation, policy, or other grave issue that caused a serious division within a legislative assembly the Prime Minister has the ability to request a dissolution to allow for an election, effectively asking the people to decide what course of action their government should take. This option is not available in systems with rigid and unalterable fixed election dates.

Second, because incumbents generally prefer to put their best foot forward in the lead up to an election campaign they tend to employ policies that distort the public's perception of achievements under their stewardship. Nordaus argues that there is a link between government spending patterns and election cycles. Governments distort the

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[37] Ibid.

[38] Desserud. "Fixed-Date Elections: Improvement or New Problems?," 51.

public perception of their economic management by employing "economic policies during its incumbency which maximize its plurality at the next election."[39] Many have agreed with Nordhaus' claims that there is a link between spending patterns and election cycles. Smith claims that governments employ this deceptive tactic so that "their performance looks good at the time of an election, even if such manipulations lead to lower aggregate performance in the long run."[40] Smith also argues that the practice of distorting the economy for electoral benefit is far less common in systems with flexible election dates. "In systems with fixed electoral terms the incumbent cannot choose elections when conditions are rosy."[41] Others, such as Kayser and Balke, agree with this assertion. Incumbents in fixed-date systems are more likely to attempt to make the economy appear stronger than it really is around election time, whereas in unfixed electoral systems the possibility of opportunistic election timing "diminishes election-motivated economic manipulation."[42] In systems where election dates are not fixed it is more likely that governments are manipulating election dates to "coincide with favourable economic performance" rather than engaging in economic manipulation as elections approach.[43] Similar observations lead Heckelman and Berument to conclude that "election timing is a function of the economy rather than the macroeconomy being driven by elections".[44] One observer commented that since electoral manipulation tends

[39] William D Nordhaus. "The Political Business Cycle" *The Review of Economic Studies*. Vol. 42 No. 2 (1975): 174.

[40] Alastair Smith. "Election Timing in Majoritarian Parliaments" *British Journal of Political Science*. Vol 33. (2003): 404.

[41] Smith. "Election Timing in Majoritarian Parliaments," 404.

[42] Mark Andreas Kayser. "Who Surfs, Who Manipulates?: The Determinants of Opportunistic Election Timing and Electorally Motivated Economic Intervention" *American Political Science Review*. Vol. 99 (2005): 25.

[43] Nathan S Balke. "The rational timing of parliamentary elections" *Public Choice*. Vol. 65 No. 3 (1990): 214.

[44] Jac C Heckelman and Hakan Berument. "Political Business Cycles and Endogenous Elections"

to be a less distortionary practice than governments attempting to interfere in the economy countries such as Canada "might be wise to consider the implications for pre-election macroeconomic management" before adopting a system of fixed election dates.[45]

The literature above, which studies political business cycles within governments, focuses on how incumbents use the powers of their office to provide themselves with advantages over opposition parties in the lead up to an election. Although these arguments focus on economic policy they illustrate that some incumbents are able to manipulate public policy to improve their chances of re-election. The political business cycle argument applies to economic policies employed in systems with rigidly fixed dates which schedule elections far in advance of the day of polling. This theory claims that incumbent governments employ carefully planned budgets, which result in austerity measures soon after entering office and spending sprees in the lead up to an election, that are developed to maximize the potential for re-election and are not directed at providing optimum economic conditions. The potential for electorally motivated economic distortion poses a similar, yet more pernicious, problem as election date manipulation does. With both, the concern is that personal benefit is being derived by one individual who is responsible for discharging state functions. If the goal behind legislating fixed dates was to reduce the ability of first ministers to receive personal benefit from the exercise of their power, it is important to ask whether or not fixed dates are an appropriate solution. If it is true that this type of economic manipulation causes more harm than opportunistic election timing, and electorally motivated economic

Southern Economic Journal. Vol. 64 No. 4 (1998): 987.

[45] Kayser. "Who Surfs, Who Manipulates?," 25-26.

manipulation occurs less in systems with some flexibility for the timing of elections, then it seems that maintaining flexible election dates is the lesser of two evils.

The way that fixed election dates have been legislated in Canada allows first ministers to ensure that the activities of legislative assemblies are not impeded by any substantive divisions as well as to promote their own electoral prospects without having to engage in unnecessary and undesirable economic manipulations. Fixed dates in Canada still afford the benefits that come with flexible dates for elections specifically because election dates are not fixed. Fixed date legislation amounts to little more than a recommendation of when the next election ought to be held, and first ministers are equally free to adhere to or disregard the legislated date. This type of legislation seems to be an incredibly odd approach to reach the intended goal of reducing the power of first ministers and diminishing their capacity to influence the electoral environment in their favour. Because this legislation does not provide any meaningful constraints on the ability of a Premier to call an early election it cannot be said that their power has been diminished in any way. Further, even if this legislation were successful in providing a rigid schedule for election dates it would open up the possibility of other more harmful ways that a Premier could engage in the act of using public policy in an attempt to derive personal benefit in the form of re-election.

The argument that fixed dates will remove the ability of first ministers to use the power of their office as part of their "re-election strategy"[46] is flawed. Within the Canadian electoral system, the ability that first ministers have to advise an election at any

[46] Hansards: Hon. G. Plant. Legislative Assembly of British Columbia. 2nd Session, 37th Parliament. Vol. 2 No. 22, August 21st, 2001. Pg 678.

point cannot be removed. This means that election dates cannot be fixed and any attempt to legislate the date of future elections will have only the amount of influence that the incumbent first minister wants it to have. Election dates remain highly flexible and first ministers cannot be held accountable for violating the legislated fixed dates.

To be Held to Account

Whether or not the dominant position that first ministers occupy has a detrimental impact on Canadian democracy is up for debate. The position taken in this thesis is that it does not negatively contribute to democratic government, however it does allow for the potential abuse of power should a first minister be so unscrupulous as to take advantage of his or her position. The problem with extensive amounts of power being concentrated in one office is that government decisions may serve the interests of a select few over those of the general public. I contend that this problem is one in direct opposition to the purpose of democratic government. If, as Savoie claims, the power of government is being drawn towards Cabinet at the centre, and from within the centre towards the first minister,[47] then the question that arises is how to appropriately address this trend. The ideal solution would be to ensure that democratic norms are promoted without compromising the efficiency of government decision making that concentrated power enables.

Fixed date election legislation was implemented in the attempt to take one small step in the right direction. This legislation was intended to remove the potential for

[47] Savoie. *Governing from the Centre*, 7.

partisan manipulation of election dates without compromising the decision-making abilities of government. Fixed dates have become a legislated regulation across the majority of the country and must be considered by first ministers in their decision to request an election. However, because the legislation can only remain valid if first ministers remain free to request an election at any point, it is debatable whether or not fixed dates can in any way be considered to regulate the power of first ministers. The problem of the potential for abuse of power which fixed dates were intended to alleviate, in this case partisan manipulation of election dates, remains present. The potential for incumbents to manipulate election dates to optimize their own chances of re-election is a problem regardless of whether or not fixed date legislation exists.

Fixed dates were legislated with the intention of improving "transparency" and "accountability"[55] and to "encourage greater fairness and trustworthiness" with regard the timing of election.[56] On my interpretation, this means that fixed dates will serve to improve the electoral system by imposing a set of rules, in this case a pre-determined schedule, which ought to be followed. The implication that follows is that these rules would be obligatory, imposed by an authority, and must be upheld even if they are contrary to the interests of the first minister or governing party. One can be considered to be acting in an accountable manner if they are abiding by the set rules and regulations. This implies acting in a way that is transparent and above-board, and trustworthiness will eventually result from one demonstrating that they follow the rules. In order for first ministers to be accountable for their decisions it must be possible for them to be held

[55] Hansards: R. Ghiz. Legislative Assembly of Prince Edward Island. 3rd Session, 62nd General Assembly. May 4th, 2006. Pg 2400.

[56] Hansards: Hon. G. Plant. Legislative Assembly of British Columbia. 2nd Session, 37th Parliament. Vol. 2 No. 21, August 20th, 2001. Pg 612.

responsible for their actions. It must be an institutional authority that ensures accountability, as they would be the only body capable of setting rules and able to impose some punitive sanction to over any potential transgression. The voting public is not an appropriate body to ensure that first ministers act in accordance with the rules for two significant reasons. First, there is already an institutional body that serves this purpose. It is one of the basic foundations of the Westminster political system that legislative assemblies are the place where members of government are held to account for their actions. Cabinet ministers have licence to govern only if they maintain the confidence of the legislature. Second, it is debatable whether or not the public is willing to, let alone capable of, holding government members accountable. This is a task that requires a solid understanding of parliamentary rules and procedure, which requires an exceptionally high level of political knowledge and is often beyond the scope of the average person. Further, fixed date legislation does not appear to be a significant issue on the minds of voters when they contemplate which party or candidate they should support during the election, as evidenced by the 2008 federal election.

Since first ministers are the individuals who have the power to request an election it is important to consider how this power may be regulated, this is a primary concern within the context of fixed date elections. All Cabinet ministers are entitled to exercise power over their departments because they are held to account by legislatures. However, a different status applies to first ministers and election requests which makes an institutionalized concept of accountability rather difficult. With regard to election requests, there is very little a legislative assembly can do to impact a first minister's

actions. First ministers advise the Crown's representative when an election should be held, and generally the opinions of opposition members are not considered in this decision. If an election is granted the legislature is dissolved so a new one may be formed, if an election request is denied the first minister need not necessarily resign from office. Even if a first minister disregards fixed date election legislation, an action that arguably ignores the will of the legislative assembly by disregarding a law it has passed, there is little recourse that legislatures can take. Governments are entitled to exercise power because they are held accountable to Parliament, but the first minister's ability to call an election seems to be the exception to this rule. Perhaps the ability to make this decision should be subject to the same degree of scrutiny as any other action taken by government. As Docherty argues, "avoiding institutionalized opposition is the single largest threat to representative democracy."[51] If the first minister's power to call an election is to be considered legitimate then the exercise of this power should be subject to some regulation, scrutiny, or oversight from within the legislative assembly. Fixed date legislation constitutes a step in this direction but since it is ultimately unenforceable first ministers are still unable to be held to account in this regard.

Another potential means of holding first ministers to account for the advice they offer the Crown's representative regarding elections could come from the governing political party. Brazier claims that "the most effective means of reducing prime-ministerial powers lie in the hands of political parties themselves."[52] Political parties have the potential to keep first ministers from becoming too domineering. Weller argues that

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[51] Docherty. *Legislatures,* 177.
[52] Brazier. "Reducing the Power of the Prime Minister," 458.

this solution is problematic. Although "Prime Ministers become more accountable – if less stable – when they can be removed"[53] quite often it is felt that the "party does not have the power" to remove a first minister from office.[54] White contends that subservient ministers enable an autocratic first minister[55] and, due to the leadership selection process, Canadian first ministers "are all but impervious to cabinet or caucus revolts" which means that they are "insulated from political pressure from cabinet to a degree unknown in other Westminster systems."[56] Russell argues that when party leaders were chosen by the party caucus, members of parliament had more influence in selecting, and thus control over, prime ministers than is the case when party leaders are selected through "American-style conventions" by the party as a whole. "While this has created a more open and participatory process, it has also increased the prime minister's power and independence from Parliament."[57]

The primary difficulty with expecting the political parties themselves to serve as a balance to the power of the first minister is that they too are feeling the pull from the centre. Strong party discipline encourages all party members, even Cabinet members, to fall in line behind the first minister. Since the first minister has the power to hire and fire ministers, disciplinary actions can be taken against dissident party members. Docherty explains how this "unique paradox"[58] applies to all members of the legislative assembly. While most members may initially intend to serve as legislative watchdogs "Canadian

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53 Patrick Weller. "Party Rules and the Dismissal of Prime Ministers: Comparative Perspectives from Britain, Canada, and Australia" *Parliamentary Affairs*. Vol 47 No. 1 (1994): 143.
54 Ibid. 141.
55 White. *Cabinets and First Ministers*. Pg 98.
56 Ibid. Pg 77-78.
57 Russell. *Two Cheers for Minority Government,* 111.
58 Docherty. *Legislatures,* 58.

Parliament does not encourage government members to scrutinize the cabinet… Instead, it rewards individuals who are loyal to their leader."[59] Not only do first ministers have the ability to determine who will rise through the ranks of their party, they also can decide who will or will not be a candidate under the party banner. Cross argues the Canada Elections Act has "enshrined" the ability that requires all local candidates to have the signature of the party leader on their nomination papers in order to have their name next to the party label on the ballot. The ability to withhold this signature, or to provide it to any candidate of the party leader's choice, "essentially provides the party leader with absolute authority over candidate nominations."[60]

The fact that first ministers are able to dominate their own political party, and thereby avoid public criticism from members of the governing party, is not a new trend in Canadian politics. Attempts by first ministers to exercise the same dominance over all members of legislative assemblies makes this even more problematic. Docherty expresses concern that governments are increasingly attempting to side-step legislative assemblies in an effort to avoid institutionalized scrutiny. "If Legislatures are becoming irrelevant it is because governments want them to be" because governments receive the benefit of an unmitigated use of power.[61] One problem that presents itself in a situation where governments are becoming less responsive to parliament and first ministers are becoming increasingly domineering figures in government is that first ministers are effectively able to unilaterally determine the government's mandate. The position of first ministers allows them to dictate what agenda the governing party will implement and the length of the

[59] Ibid., 70.
[60] William Cross. "Candidate Nominations in Canada's Political Parties" in *The Canadian Federal Election of 2006.* ed. John H. Pammett and Christopher Dornan. (Toronto: Dundurn Press, 2006), 177.
[61] Docherty. *Legislatures,* 177.

government's term in office. Although some measures have been taken in an attempt to slow or reverse the trend of dominance by first ministers, the trend of growing centralization of power continues. Fixed dates were instituted as one small step in a larger effort to diminish the power of first ministers, however, this legislation does not impose any significant regulations on the power of first ministers. Most of the constraints on the power of first ministers amount to little more than "paper tigers"[62] and the same is true of fixed date election legislation. Any legislation that attempts to schedule the date of a future election will only have the effect that the reigning first minister wants is to have because there is no way in which this legislation can be upheld or enforced. As such first ministers are equally free to adhere to or disregard this legislation, meaning that fixed dates will have a negligible impact on the first minister's power.

While it may not seem that the ability to request an election is a particularly significant measure of political power, in actuality it has deep ramifications. Elections alter the composition of legislative assemblies, the most crucial bodies that authorize, legitimize, and review all government action. The ability to determine the date of an election means that the government can directly affect the composition of the legislature, and thereby control the conditions under which institutionalized opposition is formed. This means that the government can influence the very apparatus designed to scrutinize how it uses power. Elections are also the means by which the general public is able to select who will serve as their representatives in legislative assemblies. The ability to determine when an election will occur sets the ground upon which all facets of representative democracy will grow.

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[62] Simpson. *The Friendly Dictatorship,* 4.

Conclusion

At this point it is pertinent to ask an important question of fixed date legislation. If the ability to determine the date of the next election is a powerful tool in the hands of first ministers, then why would they give it up so willingly? Another way to phrase this question is, does the ability to select the date of the next election constitute significant power? This question still remains to be answered. This thesis has found that the legislators who introduced fixed dates, and some academics, would certainly agree that the ability to manipulate the timing of elections is a significant power. There is, however, little empirical evidence to support such claims. Aside from the arguments made in support of this legislation which condemned the past actions of unscrupulous first ministers, these arguments were particularly prevalent in the House of Commons and Legislatures of British Columbia and Ontario, there is little evidence which shows that first ministers derive much benefit from selecting the day on which elections will occur. It may be useful for future research to undertake such a task.

What is good for Canadian democracy may not be a reduction in the power of first ministers or the executive, but an improvement in the ways in which governments are kept accountable. In my view, this could be achieved by requiring more substantive debate and deliberation on policy options to take place within legislative assemblies. If governments are kept accountable to elected representatives then, in theory, government would act with the best interests of all Canadians in mind. In terms of elections, this

would mean that an election would be held when it would be beneficial for the Canadian public and national welfare, which necessarily means not in the exclusive interests of those in office. Fixed date elections were intended to achieve this by instituting a regular cycle on which elections would occur. A regular cycle would mean that first ministers would no longer be able to time an election for a specific moment when they believe they are likely to be re-elected. Fixed dates were legislated on the assumption that elections will be more fair if all political parties will have equal knowledge of the date of the upcoming election. Electoral fairness, in this regard, cannot be improved since the date of any future election is not and cannot be fixed and the governing party still retains the ability to call a snap election, or to postpone the decision past the legislated date, and it is highly unlikely that governments will be subject to punitive action for such a decision. Fixed dates not only fail in their intended goal of reducing the power of first ministers, they also fall short of improving mechanisms of accountability. Fixed dates not only permit a transgression of the legislation, they also do not provide any way in which the transgressor may be held to account.

The only way to improve the level of accountability in Canadian government is to rely on legislatures to serve their intended capacity and provide this function. However, it is not possible to impose restrictions with regard to advising the Crown's representative to dissolve a legislative assembly and hold an election. In order for the Crown to remain free to dissolve a legislature at any point, as is required by constitutional law, first ministers must remain equally free to offer this advice at any point. This means that any attempt to regulate when a first minister may offer this advice is equal to diminishing his

or her capacity to act. One logical question arises: if the first minister cannot advise the Crown, then who will? It seems that it is more problematic to impose restrictions declaring when a first minister may not advise dissolution than the difficulties that arise with legislation that attempts to regulate a cycle of when first ministers ought to offer such advice.

Fixed date legislation falls short of its intended goal to reduce the power of first ministers to unilaterally determine when elections will occur. This legislation provides little more than a recommendation when the next elections should take place. It fails to regulate when elections will be held and does not provide any way for a transgressor to be held accountable. By this measure, fixed dates do not contribute to diminishing the power of first ministers. This does not mean that fixed dates cannot offer positive contributions to Canadian democracy, only that this legislation cannot be expected to influence the actions of the head of government.

Chapter 4 - Fixed Dates and Voter Turnout

Introduction

This chapter explores the relationship between fixed date elections and rates of voter turnout in Canada. Fixed date elections were promoted in a number of Canadian legislatures as a way to increase voter turnout by reducing the cynicism felt by the public when first ministers manipulate the date of elections for their own partisan benefit. In a system where election dates remain flexible the governing party can schedule elections to suit their "political strategy" and often prioritize their re-election over the public's interest in fair elections.[1] This partisan manipulation of election dates contributes to "voter cynicism" which negatively impacts voter turnout.[2] High levels of voter "cynicism" and "voter apathy" result in low levels of voter turnout.[3] It was claimed that preventing the manipulation of election dates will reduce public "scepticism"[4] and increase voter turnout by "hampering voter cynicism."[5] Fixed date elections will "encourage more people to vote" by offering stability.[6] Voters would be able to plan their participation before the election campaign begins[7] and organize their activities and priorities to accommodate the

1 Hansards: Hon. G. Plant. Legislative Assembly of British Columbia. 2nd Session, 37th Parliament. Vol. 2 No. 22, August 21st, 2001. Pg 678.
2 Hansards: T. Lukiwski. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 47. September 18th, 2006. Pg 2888.
3 Hansards: C. Skelton. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 48. September 19th, 2006. Pg 2942.
4 Hansards: Hon. S. Jamieson. Legislative Assembly of New Brunswick. 1st Session, 56th Assembly. May 29th, 2007. Pg 30.
5 Hansards: L. Broten. Legislative Assembly of Ontario. 1st Session, 38th Parliament. No. 67B. June 23rd, 2004. Pg 3217.
6 Hansards: L. Sandals. Legislative Assembly of Ontario. 1st Session, 38th Parliament. No. 67B. June 23rd, 2004. Pg 3215.
7 Hansards: Hon. R. Nicholson. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 47.

act of voting well in advance of the election.[8] Fixed dates can also contribute to the efforts of election administrators by improving their ability to prepare "voters lists and planning related to the enumeration process."[9]

This chapter will argue that the problem of declining electoral participation goes much deeper than a mere distrust over the date upon which an election is held. As such, fixed dates are incapable of improving rates of voter turnout in Canada. Participation is so integral to a system of representative government that it is imperative that this issue be addressed head-on. Since high rates of voter turnout are good for democracy it is important to implement reforms that will have a positive impact in this regard. This was the intention behind fixed date elections.

Fixed Dates and Voter Turnout

Concern about declining rates of voter turnout in Canada is justified. In federal elections there has been a steady decline since 1988 until voter participation reached a low of 60.9% in 2004.[10] Turnout improved to 64.7% for the 2006 election,[11] but then "dropped to the lowest percentage of registered voters ever recorded for a national election in Canada"[12] with 58.8% in 2008. The most recent federal election saw

September 18th, 2006. Pg 2867.

8 Hansards: S. Reid. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 47. September 18th, 2006. Pg 2918.

9 Hansards: Hon. S. Ashton. Legislative Assembly of Manitoba. 2nd Session, 39th Legislature. Vol. LX No 39. May 12th 2008. Pg 2051.

10 Elections Canada. "Report of the Chief Electoral Officer of Canada on the 39th General Election of January 23, 2006," 117.

11 Elections Canada. "Report of the Chief Electoral Officer of Canada on the 40th General Election of October 14, 2008," 30.

12 Andrew Heard. "Historical Voter Turnout in Canadian Federal Elections – 1867-2008" (Simon Fraser University, 2008) available at http://www.sfu.ca/~aheard/elections/historical-turnout.html (accessed on

participation increase slightly to 61.1%.[13] British Columbia, Newfoundland and Labrador, Ontario, and Manitoba have all experienced similar levels of voter turnout in the past two decades, and all have now adopted a schedule of fixed dates for elections in an attempt to improve these results. In Alberta voting rates have been steadily declining since 1993, reaching an all time low of 40.59% in 2008.[14] However, this trend has not been constant in every province. Prince Edward Island, for example, has had voter turnout drop below 80% only once since 1966.[15]

Simpson argues that the competitiveness between the major parties in each election impacts voter turnout. One party dominance over a long term tends to depress turnout, while provinces such as PEI and New Brunswick experience higher than average voter turnout "in part because the Conservatives and Liberals hotly contested so many ridings."[16] Another reason for declining voter turnout could be caused by the Canadian electoral system itself. The single member plurality system (aka first-past-the-post) has been criticized for marginalizing votes cast for anyone who does not win their riding, and this decreases voter turnout because many feel that their vote does not matter.[17] Others have examined a variety of modes of participation in the Canadian political system and found that "there is a recurring pattern: the young, the less educated, and the poor are less likely to be involved."[18] Election timing has also been blamed for depressing voting rates.

June 1st, 2011).

13 Elections Canada. "Report of the Chief Electoral Officer of Canada on the 41st General Election of May 2, 2011," 38.

14 Elections Alberta. "The Report on the March 3, 2008 Provincial General Election of the Twenty-seventh Legislative Assembly" (Edmonton: Chief Electoral Office, 2008): 158.

15 Elections PEI. "Statistics On General Elections From 1966 to 2007" available at http://www.electionspei.ca/provincial/historical/ceoreports/turnout/turnout.pdf (accessed June 1st, 2011).

16 Jeffrey Simpson. *The Friendly Dictatorship*. (Toronto: McClelland and Stewart, 2001), 142.

17 John C Courtney. *Elections*. (Vancouver: UBC Press, 2004): 139.

18 Elisabeth Gidengil, et al. *Citizens*. (Vancouver: UBC Press, 2004), 142.

Turnout tends to lower when provincial and federal elections are held close to one another and when there are long gaps from one election to the next.[19]

Many argue that fixed election dates would improve voting rates and electoral practices in Canada. "A regular cycle of elections has both practical and ethical advantages for the working of our parliamentary democracy."[20] Fixed date elections would improve voter turnout by helping to form consistent habits of voting. Not only would fixed dates allow participants to plan the act of voting well in advance, it would also decrease the likelihood of the date of the election being manipulated for partisan benefit. Some contend that fixed dates would make it easier for certain groups, those with "seasonal constraints" such as students, seniors, or farmers, to make themselves available to vote and there will be a decreased potential for conflict between the dates of federal and municipal elections.[21]

In the Legislative Assembly of British Columbia, the first Canadian legislature to legislate fixed dates elections, the argument was made that fixed dates would improve elections by bringing more "certainty and predictability" to the electoral process.[22] Prior to the introduction of fixed dates in BC in 2001, the three previous provincial elections had taken place five years apart. It was claimed that voter turnout had been dampened because of increased cynicism due to the manipulation of election dates for "political

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19 Donley T Studlar. "Canadian exceptionalism: Explaining differences over time in provincial and federal voter turnout" *Canadian Journal of Political Science* Vol. 34 (2001): 299-319.

20 Peter H Russell. *Two Cheers for Minority Government*. (Toronto: Edmund Montgomery Publications, 2008), 141.

21 Henry Milner. "Fixing Canada's Unfixed Election Dates: A political season to reduce the democratic deficit." *IRPP Policy Matters*. Vol.6 No.6 (2005): 22.

22 Hansards: Hon. G. Plant. Legislative Assembly of British Columbia. 2nd Session, 37th Parliament. Vol.2 No.22, August 21st , 2001. Pg 678.

strategy".[23] The debate about fixed dates in Ontario was based on claims that partisan manipulation of election dates increased voter cynicism and resulted in fewer people showing up to vote. Fixed dates were introduced in the Ontario Liberal Party's 2003 electoral platform, combining fixed date legislation with internet voting as part of an effort to increase voting rates in the province by 10%.[24] Fixed dates were legislated in an attempt to "change a scourge to our democracy, which is a lack of voter turnout."[25] When fixed election date legislation was introduced in the House of Commons it was claimed that fixed dates would result in "higher voter turnouts."[26] It was argued that fixed dates would affect voter turnout in three ways. First, the date set for elections would be in the middle of October, a time of "favourable weather" across the country. Thus, potential voters would not be deterred from going to the polls by harsh winter weather. Second, voters would be able to plan the act of voting around their vacations and work schedules further in advance and be able to take full advantage of advance voting or mail-in ballots. Finally, fixed dates would increase the fairness and transparency of the electoral process. As part of an effort to decrease public cynicism the hope was this would lead to an increase in rates of voter participation.

When fixed dates were introduced in Manitoba one reason was because of recommendations from the Chief Electoral Officer that fixed dates would improve voter

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[23] Hansards: Hon. G. Plant. Legislative Assembly of British Columbia. 2nd Session, 37th Parliament. Vol.2 No.22, August 21st , 2001. Pg 678.

[24] The Liberal Party of Ontario. "Government That Works For You: The Ontario Liberal Plan for a more Democratic Ontario" (2003), 2. Available at: http://www.leonarddomino.com/news/platform-ontarioliberal2003.pdf (accessed on May 20th 2011).

[25] Hansards: J. Wilkinson. Legislative Assembly of Ontario. 1st Session, 38th Parliament. No. 59A. June 9th, 2004. Pg 2749.

[26] Hansards: Hon. R. Nicholson. Parliament of Canada. 1st Session, 39th Parliament. No. 47. September 18th, 2006. Pg 2876.

turnout. The recommendations claimed that holding elections on set dates is beneficial for the process of enumeration and compiling lists of voters which are "important element[s] in ensuring participation of voters."[27] The notion that fixed dates would translate into higher rates of voter participation was not readily accepted in every legislature. Some commented that many people do not vote because "they don't think their vote matters" regardless of what date the election is held, and because they believe that "big money buys or influences elections."[28] Others claimed that more sincere efforts should be made to "determine the root causes of disillusionment among the non-voters."[29]

When fixed date legislation was proposed in Alberta it was stated that voters would be able to "plan and co-ordinate vacations, travel, and business activities around the election date."[30] The argument was based on the concept that participation is the responsibility of the would-be voters. Those who want to vote are expected to plan their participation in advance, and since fixed dates would make this easier it was assumed that the result would be an increase the rates of voter turnout. However, some argued that the claim that fixed dates contribute to higher levels of voting is "unproven" and there is neither certainty nor evidence that fixed dates lead to increased participation.[31]

Where concern has been voiced about voter turnout and decreasing numbers of people showing up on elections day a link has been made to voter apathy. Some view this

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27 Hansards: Hon. S. Ashton. Legislative Assembly of Manitoba. 2nd Session, 39th Legislature. May 12th, 2008. Vol. LX No. 39. Pg 2051.

28 Hansards: Hon. S. Ashton. Legislative Assembly of Manitoba. 2nd Session, 39th Legislature. May 12th, 2008. Vol. LX No. 39. Pg 2051.

29 Hansards: R. Runciman. Legislative Assembly of Ontario. 1st Session, 38th Parliament. November 25th, 2004. Pg 4441.

30 Hansards: K. Allred. Legislative Assembly of Alberta. 1st Session. 27th Legislature. April 28th, 2008. Pg 265.

31 Hansards: Hon. F.L. Morton. Legislative Assembly of Alberta. 1st Session. 27th Legislature. April 28th, 2008. Pg 271.

trend as an unintended side effect of complacency, "the less effort political parties and their candidates make to mobilize voters, the less likely they are to vote."[32] But the rise of the apathetic non-voter may have a more direct and pervasive cause. Voter apathy is a result of cynicism, a distrust in the political process and the belief that politicians act in their own interests and do not serve the interests of the electorate. Canadians may be developing an increasing disdain for their politicians. "Respect for elected officials ... has plummeted to the depths reserved for used-car salesmen and journalists."[33] Milner argues that fixed dates could be used in an effort to improve the number of voters showing up on polling day by reducing voter cynicism.[34] Similar arguments were made in a number of Canadian legislatures. If the governing party has complete discretion to decide the date of an upcoming election then they would be able to "call an election when it best serves the immediate, short-term interest of that government" and this leads to cynicism.[35] Distrust of politicians and general cynicism about political institutions which often results in low voter turnout has been blamed on the manipulation of election dates for partisan interest.[36] The basic argument against the government retaining the ability to determine the date of an election is "a governing party preoccupied by partisan concerns should not control the timing of our most important democratic function".[37] One of the most common reasons why fixed date elections have been legislated across most of Canada is

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32 Gidengil, et al. *Citizens*, 112.
33 Simpson. *The Friendly Dictatorship*, 137.
34 Henry Milner. "Fixing Canada's Unfixed Election Dates: A Political Season to Reduce the Democratic Deficit" *IRPP Policy Matters*. Vol.6 No.6 (2005): 22.
35 Hansards: Hon. F.L. Morton. Legislative Assembly of Alberta. 1st Session. 27th Legislature. April 28th, 2008. Pg 269.
36 Hansards: C. Skelton. Parliament of Canada. 1st Session, 39th Parliament. No. 48. September 19th, 2006.
37 Hansards: R. Grimes. Legislative Assembly of Prince Edward Island. 3rd Session, 62nd General Assembly. May 4th, 2006. Pg 2400

to reduce voter cynicism and apathy, by removing the potential for partisan influence over the timing of an election, as part of an effort to improve the number of people showing up on polling day.

Since fixed date elections were implemented in an attempt to improve voter turnout it is important to understand if it has had this intended effect. To date, four provinces have held elections on fixed dates. In most cases, fixed dates have not resulted in the kind of improvements in voter turnout that it was claimed this legislation would offer. Fixed dates have not resulted in higher levels of participation and have not had a positive impact on levels of cynicism or public perceptions of politics.

Fixed Date Election Results

British Columbia was the first province to implement fixed date legislation, it has held two elections on fixed dates including the first ever provincial fixed date election in Canada. Fixed date elections were proposed by the Liberal Party in their 2001 electoral platform.[38] The Liberals, the official opposition at the time, promoted fixed dates as a way to increase voter turnout, although their primary argument in favour of this reform was to decrease the power of the premier to manipulate election dates for partisan gain. According to Elections BC voter turnout for the 2001 election was 55.44% of eligible voters, down from 59.11% in the previous election in 1996.[39] Prior to the first fixed date

[38] The Liberal Party of British Columbia. "New Era for British Columbia" (2001) Pg 4. Available at http:/bc2009.com/platforms (accessed June 11th, 2011).

[39] "General elections statistics in comparison: 1928-2009" Elections BC. Available at http://www.elections.bc.ca/index.php/resource-centre/statistics-and-surveys/ (accessed on June 11th, 2011).

election, the three previous elections in BC had taken place at five year intervals. While the total number of voters showing up at the polls had been on the rise, increasing every year since 1986, the overall percentage of eligible voters actually participating was declining. Voter turnout had been steadily falling since the 1983 election when participation was at 70.5% of eligible voters, dropping to 55.4% in 2001.[40] Under the first fixed date election in 2005 voter turnout was 58.19% of eligible voters, with 1,774,269 votes cast.[41] This was the first improvement in overall voter turnout in six elections. Unfortunately, the improved turnout did not last and the 2009 election turnout declined to 50.99% of eligible voters.[42] With only 1,651,567[43] votes cast, more than 110,000 fewer people voted than in 2005, marking the first decrease in total votes in over two decades.

The decreased voter turnout of 2009 coincided with an increased percentage of eligible voters registered, marking the "first time in provincial history that an improvement in the quality of the voters list was accompanied by a decline in voter turnout."[44] Voter turnout was low among nearly every age group. It was below 50% for those 18-44 years of age, and the 65-74 years age group was the only one above 70%.[45] In a survey conducted on behalf of Elections BC found that 36% of non-voters "cited disengagement of pessimism as their mean reason for not voting"[46] in the 2009 election. Although Elections BC agreed that fixed date elections offered significant administrative

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40 Ibid.
41 Ibid.
42 Ibid.
43 Ibid.
44 Elections BC. "Report of the Chief Electoral Officer on the 39th Provincial Election and Referendum on Electoral Reform, May 12, 2009," 38. Available at http://www.elections.bc.ca/index.php/resource-centre/reports/ (accessed on June 11th, 2011).
45 Ibid.
46 Ibid., 39

benefits[47] it appears that this reform did not offer any benefits with regard to voter turnout. Low voter turnout in is not due to issues of accessibility or voters who wished to vote being prevented from doing so, but rather low voter turnout is part of a "broader societal issue beyond the scope of Elections BC's mandate."[48]

In Newfoundland and Labrador fixed dates were implemented to improve the regularity of the election cycle. The issue of voter turnout was not discussed in relation to fixed date elections in Newfoundland's House of Assembly. Newfoundland had experienced three elections in a six year span, 1993, 1996, and 1999. This was followed by a four year and seven month gap until the election in 2003. In 1996 Newfoundland recorded a 74.4% voter turnout for the provincial election.[49] The number of voters showing up at the polls fell to 69.57% for the 1999 election.[50] In 2003, the election immediately prior to the implementation of fixed dates, the voter turnout was 72.52%[51] with 278,328 votes cast.[52] The first fixed date election in Newfoundland was on October 9, 2007. With only 221,289 ballots cast, 2007 election saw voter turnout drop to 60.2%.[53] One possible explanation for these results is that knowing the date of the election in advance did not influence voter turnout in a positive manner. Another potential reason for

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47 Ibid., 40.

48 Ibid., 41.

49 Elections Newfoundland and Labrador. "Report of the Chief Electoral Officer on the General Election for the Forty-Third General Assembly February 22nd, 1996," 1. Available at http://www.elections.gov.nl.ca/elections/reports.asp (accessed on June 11th, 2011).

50 Elections Newfoundland and Labrador. "Report of the Chief Electoral Officer on the General Election for the Forty-Fourth General Assembly February 9th, 1999," 1. Available at http://www.elections.gov.nl.ca/elections/reports.asp (accessed on June 11th, 2011).

51 Election Newfoundland and Labrador. "October 21st, 2003 Provincial General Election Report' Office of the Chief Electoral Officer," 2. Available at http://www.elections.gov.nl.ca/elections/reports.asp (accessed on June 11th, 2011).

52 Ibid., 12.

53 Election Newfoundland and Labrador. "October 9th, 2007 Provincial General Election Report' Office of the Chief Electoral Officer," 13. Available at http://www.elections.gov.nl.ca/elections/reports.asp (accessed on June 11th, 2011).

the significant drop in the number of votes cast could be related to the competitiveness of the election. "Based on preliminary results on election night, Newfoundlanders and Labradorians knew that they had returned the previous government with a very large majority."[54] Since the government was likely to be re-elected, many voters may have felt that their vote would not make a difference and stayed away from the polls as a result. If true, this would confirm Simpson's claim that the competitiveness of the election can influence on voter turnout.[55]

In Ontario, fixed dates were brought in as part of an attempt to address the decreasing rates of voter participation. Concern about the level of voter turnout was due to the declining percentage of electorate showing up on polling day. Since 1990 voter turnout had dwindled from 64.4% to 56.8% in 2003.[56] Although participation appears to be decreasing, due to increases in the number of eligible voters registered, the number of voters showing up has increased in every election. In the first fixed date election in 2007 voter turnout fell to 52.1% and approximately 70,000 fewer ballots were cast than in 2003.[57] The decreased participation in the 2007 election should come as somewhat of a surprise since the general election was coupled with a referendum on the provincial electoral system. Switching from a first-past-the-post system to a Mixed Member Plurality system is a significant issue, but one that did not appear to mobilize Ontario voters in 2007.

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54 Ibid., 14.

55 Simpson. *The Friendly Dictatorship*, 140.

56 Elections Ontario. "2007 Election Summary," 4. Available at http://www.elections.on.ca/NR/rdonlyres/686AD8BE-2042-4316-8A64-89B6DB8F47FF/0/StatisticalSummary.pdf (accessed on June 11th, 2011).

57 Elections Ontario. '2007 Election Summary'. Pg 4. http://www.elections.on.ca/NR/rdonlyres/686AD8BE-2042-4316-8A64-89B6DB8F47FF/0/StatisticalSummary.pdf

A post election survey conducted on behalf of Elections Ontario did not find any significant issue that caused voters to stay away from the polls in 2007. The survey included both voters and non-voters. Over 91% of respondents reported that they were registered to vote and had not experienced any problems getting on the voters list.[58] Also, 97% of voters and 90% of non-voters "recalled seeing, reading, or hearing non-political election advertising"[59] which indicates that the advanced knowledge of the day of the election did not provide a positive influence on voting numbers. The survey found that the primary reason for not voting was due to a perceived lack of time or availability on behalf of the non-voter.[60] Other common reasons for not voting included a dislike of the candidates and parties on offer and a sense of disaffection, a feeling that one's participation and the election itself does not matter.[61]

New Brunswick is the province to have the most recent election held on a fixed date. New Brunswick has been able to maintain a relatively high level of voter participation. Between 1967 and 1999 voter turnout ranged from 82% to 75%, dipping just below the 75% mark in 1995.[62] However, since 1999 both the overall voter turnout rates and the total number of votes cast has been declining. In 2003 voting rates dropped to 68.67% with 386,657 votes cast, and in 2006 they slumped further to 67.52% with 377,247 votes cast.[63] On September 27th, 2010 New Brunswick held its first election on a

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58 Elections Ontario. "Placing the Elector at the Centre of the Process: Election Ontario's Report on the 39th General Election in the Province of Ontario," 35. Available at http://www.elections.on.ca/en-CA/Publications.htm (accessed on June 11th, 2011).

59 Ibid.

60 Ibid., 36.

61 Ibid.

62 Elections New Brunswick. "Report of the Chief Electoral Officer: Thirty-Sixth General Election September 18, 2006," 25.

63 Ibid.

fixed date. Elections NB reported that 71.5% of eligible voters participated in the election, thus declaring an end to the declining streak that had been in place since 1999, however, this increase in voting percentage was due to the fact that approximately 40,000 fewer names were on provincial voting lists than was the case in the previous election.[64] The total number of votes cast in New Brunswick provincial elections continues to decline, and the 374,902[65] votes cast in the 2010 election was less than in every election since 1978. This result casts doubt on the potential that fixed dates have to improve levels of participation during elections.

In terms of percentage of eligible electorate showing up to vote, fixed date elections in Canada have seen increases in two elections but decreases in three. The first fixed date election in BC saw a 3% increase in voting numbers from the previous election. Similar results can be observed in New Brunswick, where there was a 4% increase in the first fixed date election. However, these results do not signal a victory in the battle against decreasing voter turnout. The 3% increase in BC was followed by an 8% drop in the second election to be held on a fixed date. The first election on a fixed date in Ontario resulted in a 4% decrease for overall voting numbers, while Newfoundland was subject to a 12% drop in voting for the first fixed date election in that province. With results such as these it is understandable why some observers of fixed date elections have commented "it is difficult to conclude that this reform succeeded in any measurable way."[66]

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64 CBC News. "N.B. Voter turnout lowest since 1978" October 1st, 2010 Available at http://www.cbc.ca/canada/nbvotes2010/story/2010/10/01/nb-voter-turnout-616.html (accessed on June 11th, 2011).

65 Elections New Brunswick. "Report of the Chief Electoral Officer: Thirty-Seventh General Election September 27, 2010," 27.

66 Andrea M L Perrella. et al. "The 2007 Provincial Election and Electoral System Referendum in

There is no simple explanation for the decreases in voter turnout for the fixed date elections mentioned above. While Milner claims that fixed dates would help "optimize participation"[67] the evidence from these elections suggests otherwise. Even with the potential for voters to plan their participation well in advance of election day, and the increased ability of political parties and election administrators to make the upcoming election public knowledge and encourage participation, the overall numbers of people voting declined in four out of the five elections held on fixed dates. The only fixed date election to see increases in the number of people voting was the 2005 BC election, which saw the incumbent government lose over thirty seats but manage to maintain their majority position. The results from the elections in Newfoundland, Ontario, and New Brunswick saw incumbent governments re-elected with very large majorities. Although these elections may have not been particularly close, majority governments were formed in every case, it is not likely that this had a significant impact on the number of people voting. Simpson recognizes that although competitive elections contribute to higher levels of participation,[68] the decline in voter turnout runs deeper than the absence of competitive electoral politics.[69] Others argue that while a relationship may exist between the closeness of an election and voter turnout, the link is not very strong[70] and the closeness of the race has only a marginal impact on whether or not people vote.[71]

The downward spiral of voter turnout in Canada is not a new phenomenon, but

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Ontario" *Canadian Political Science Review.* Vol. 2 No. 1 (2008): 78.

67 Milner. "Fixing Canada's Unfixed Election Dates," 22.

68 Simpson. *The Friendly Dictatorship*, 140.

69 Ibid., 142

70 Andre Blais and Agnieszka Dobrzynska. "Turnout in electoral democracies," *European Journal of Political Research*, Vol. 33 (1998): 239-61.

71 Andre Blais, et al. *Anatomy of a Liberal victory: Making sens of the 2000 Canadian election*. (Ontario: Broadview Press, 2002), 57.

rather the current situation is the result of an on-going, long-term trend. It is a trend that cannot be adequately addressed by a quick-fix solution like implementing a fixed date electoral cycle. This trend is based on more than the issues regarding one specific election. A referendum on electoral reform is the type of issue that should galvanize the public, one way or the other, and result in higher levels of participation. Both the 2005 BC and 2007 Ontario elections included referendums on significant reforms to provincial electoral systems. The 2005 BC election saw a short lived 3% increase in voter turnout from the previous election, while the 2007 Ontario election marked a continuation in the decline of voter turnout. In both cases "pessimism,"[72] "disaffection,"[73] or some form of disengagement were cited as primary reasons for non-voters to stay home. Fixed dates were promoted as one way of "reducing the prevailing cynicism towards elections"[74] and yet this sentiment remains present even during elections held on fixed dates. This indicates that fixed date elections are incapable of addressing cynicism and disengagement prevalent in the Canadian public because the root of cynicism goes much deeper than the specific date of elections. "[P]olitical disaffection is symptomatic of a deeper democratic malaise."[75] It is a response to larger problems inherent in the Canadian system. The only way that voter turnout will be improved is by addressing the broader systematic impediments to participation and making people want to engage in political processes, something which is beyond the scope of fixed date election legislation.

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72 Elections BC. "Report of the Chief Electoral Officer on the 39th Provincial Election and Referendum on Electoral Reform, May 12, 2009," 39.

73 Elections Ontario. "Placing the Elector at the Centre of the Process: Election Ontario's Report on the 39th General Election in the Province of Ontario," 36.

74 Milner. "Fixing Canada's Unfixed Election Dates," 22.

75 Gidengil. *Citizens*, 106.

Participation, Disengagement, and Cynicism

Claims that the Canadian public is becoming cynical in and disengaged from political processes and institutions are common in the discourse on the Canadian electoral system. "The extent of Canadians' disaffection with politics should not be underestimated."[76] The concern with the rising trend of political cynicism and apathy is that it results in a disengagement from established forms of political participation. "Something is breaking the social trust and ... threatening the foundations of democratic society."[77] Even elected representatives have become "painfully aware that the public is cynical."[78] This growing disengagement that threatens democratic institutions presents itself as a "voter's lack of interest in all forms of political participation."[79] The continuing decline of voter turnout is a problem that goes beyond any single political party or election and is a signal that Canadians are not satisfied with either the political system or their role within it. This disengagement is a criticism of a system where the average voter has little input in decision-making processes. Aversion to institutionalized politics is intentional non-participation in the political system as a whole and stems from perceived notions of inefficacy, a feeling that one's efforts will not make any difference.

Some claim that this problem is "generational" and the growing tendency of non-voting "appears to hold true for virtually all established democracies."[80] "Young

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76 Gidengil. *Citizens*, 106.

77 Emily-Anne Paul. "Why Youth Do Not Vote?" *Canadian Parliamentary Review.* Vol. 33 No. 2 (2010): 29.

78 Hansards: S. Owen. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 47. September 18th, 2006. Pg 2879.

79 Derek Lee and Ryan K Powell. "Voter Turnout: A Case Study of Scarborough-Rouge River" *Canadian Parliamentary Review.* Vol. 33 No. 1 (2010): 5.

80 Lee and Powell. "Voter Turnout," 3.

Canadians generally feel that they are not integrating into the political system" but are instead adopting attitudes of "voter apathy" and "political distrust."[81] As a general trend, youth "do not seem to be voting or engaging politically."[82] As Nevitte writes, "there is a sustained, and possibly generationally driven, public reaction against all hierarchical institutional arrangements that limit the opportunities for meaningful citizen participation."[83] LeDuc and Pammett argue the trend of declining voter participation is driven by powerful demographic factors that are "not easily offset by the types of shorter-term elements that may be associated with a particular set of electoral circumstances."[84]

Disengagement from politics, especially from the process of voting, is rightly viewed as a threat since "democracy depends upon the active participation of its citizens."[85] Voting is the "bedrock of informed democratic participation."[86] High levels of voter participation are important to ensure a healthy and vibrant democracy. Low and declining levels of voter turnout poses the problem "that people are depending on a government controlled by fewer and fewer people. That is not democratic."[87] The growing trend of non-voting is a very serious matter because this "generational shift represents a cultural change that could shake the very foundations of our democratic institutions."[88] With fewer people voting fewer voices are represented, and this presents a

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81 Jessica Nasarallah. "Voter Turnout in Canada and Denmark" *Canadian Parliamentary Review.* Vol. 32 No. 2 (2009), 33.

82 Paul. "Why Youth Do Not Vote?," 29.

83 Neil Nevitte. *The Decline of Deference*, (Peterborough: Broadview Press, 1996), 62.

84 Lawerence LeDuc and John H Pammett. "Voter Turnout in 2006: More than Just the Weather" *The Canadian Federal Election of 2006*. ed. John H. Pammett and Christopher Dornan. (Toronto: Dundurn Press, 2006), 320.

85 Mac Harb. "The Case for Mandatory Voting in Canada" *Canadian Parliamentary Review.* Vol. 28 No. 2 (2005): 4.

86 Milner. *The Internet Generation*, 117.

87 Paul. "Why Youth Do Not Vote?," 29.

88 Harb. "The Case for Mandatory Voting in Canada," 4.

serious problem for a representative democratic system such as Canada's.

Despite the grave implications of non-participation in a democratic system, many fail to grasp the severity of the problem. Turcotte claims "The problem seems to be one of disengagement rather than of active discontent."[89] This, however, is an error. People do not disengage from a system and processes with which they are content. Further, youth voting, the fastest falling segment of voter turnout, is not the result of laziness. Others quite rightly claim that low youth turnout should not be equated with "complacency" because "it is symptomatic of a broader disconnection from politics."[90] Turcotte claims that apathy may not be the source of dwindling voter participation, but that the cause lies in the actions of political parties and their inability to mobilize the masses. Increasing rates of non-voting "may not be simply the result of apathy, but a reaction to what political parties have been offering" in terms of issue discussions and campaign dynamics.[91] Where this position falls short is in assuming that if political parties were to speak to different issues then that would re-invigorate political participation. Political parties changing their tune to something more pleasant in the hopes of attracting more listeners is not likely to have the desired effect. Declining rates of voter turnout and rising rates of voter apathy is not a sign that the electorate does not like what they are hearing but rather an indication that some people have just stopped listening. The statement "simply the result of apathy"[92] negates the societal prevalence and effect that apathy has on political institutions. If the problem is as simple as an aversion to what political parties

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89 Andre Turcotte. "Different Strokes: Why Young Canadians Don't Vote" *Electoral Issues*. Vol. 7 No. 1 (2005): 13.

90 Elisabeth Gidengil. et al. "Missing the Message: Young Adults and Election Issues" *Electoral Issues*. Vol. 7 No. 1 (2005): 10.

91 Turcotte. "Different Strokes," 16.

92 Ibid.

are saying then the current situation would more resemble the abandonment of some political parties in support of others and a consistent number of voters participating in established institutions in other ways. What is happening is not only the abandonment of political parties but of institutionalized political processes as well.

Milner claims that political participation is directly related to "citizens' awareness of the consequences of their actions"[93] and those who are able to make connections between their actions, such as voting, and real world outcomes, such as the formation of governments and subsequent policy options taken, have demonstrably higher rates of political participation. Political literacy has a direct influence on rates of participation, meaning that low voter turnout "is better understood as a symptom of the problem that as the problem itself."[94] Milner is not alone in making such assertions. Many have observed a "recurring pattern" regarding levels of political participation, "the young, the less educated, and the poor are less likely to be involved." Also, "Better-educated and higher-income Canadians have a demonstrated tendency to vote."[95]A logical inference to draw from this observation is that if better educated Canadians are more likely to vote then this demonstrates "the need for increased political education" to improve voting rates.[96] One potential approach could be affecting children at a young age to believe that actively engaging in political institutions and the political process is something that is part of daily life. Implementing political participation as part of an elementary school curriculum could result in forming habits of participation at an early age that might continue into

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93 Henry Milner. *The Internet Generation: Engaged Citizens or Political Dropouts*. (Medford, Massachusetts: Tufts University Press, 2010), 165.
94 Milner. *The Internet Generation*, 26.
95 Gidengil, et al. *Citizens*, 142.
96 Nasarallah. "Voter Turnout in Canada and Denmark," 33.

adulthood. Another potential approach could be educating adult citizens on their political system, including an emphasis on the importance of voting. Milner argues that both of these approaches would receive benefit from a system of fixed dates for elections since "those initiating civics education courses" could make connections to electoral campaigns and events and "plan their programs well in advance."[97] In Milner's view, fixed dates serve as another small step in making the connection between action and out come more tangible, where, in his ideal world, political parties would be able to coordinate their campaigns at the federal, provincial, and municipal levels and would contest each election simultaneously.

The literature discussed above attempts to grapple with a crucial issue prevalent in the Canadian political system and highlights a connection between political participation, disengagement, and cynicism. On my interpretation, it seems that this connection is one of perceived inefficacy on the part of citizens. Those who doubt the intentions of politicians and elected representatives feel they have no power to change it, and those who feel that they have no power to effect change in our political system are the most likely to withdraw from it. To remedy notions of cynicism towards political institutions may not be an easy task. Perhaps some people are just cynical by nature and are inclined to think ill of others. However, the problem of disengagement may not be insurmountable. The most common prescription for this ailment is to increase the political knowledge of citizens through the process of education, specifically for those who are at the greatest risk of withdrawing from political institutions. Education programs aimed at improving rates of civic literacy, with the intention of bringing people

[97] Milner. "Fixing Canada's Unfixed Election Dates," 9.

back to political institutions, will provide citizens with the "knowledge required for effective political choice"[98] by enabling them to understand the impact their actions can have on the political system.

Do feelings of cynicism cause people not to vote? Are people cynical about election date manipulation and avoiding the ballot box because of it? To answer these questions it may be necessary to employ the tools of public opinion polling, but that is a primary research task that goes beyond the scope of this thesis. What this thesis has found is that it is certainly the opinion of many of the legislators who introduced fixed date legislation that cynicism, specifically with regard to election date manipulation, is deterring people from voting. However, there is little academic research to show that this specific issue is deterring potential voters from voting. Perhaps academic researchers and legislators are engaged in two separate but similar conversations that are talking past each other rather than in concert with one another.

In the House of Commons, members of the governing party stated that one of the causes of distrust of politicians, voter cynicism, and low voter turnout is due to the manipulation of election dates for partisan interest,[99] and "if we reduce cynicism, that should lead to greater voter turnout."[100] In Saskatchewan, Alberta, and British Columbia, members of the governing party in each province also declared that people become cynical about blatant "political opportunism"[101] when the premier is able to manipulate

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98 Henry Milner. *Civic Literacy: How Informed Citizens Make Democracy Work*. (Medford, Massachusetts: Tufts University Press, 2002), 55.

99 Hansards: C. Skelton. Parliament of Canada. 1st Session, 39th Parliament. No. 48. September 19th, 2006. Pg 2942.

100 Hansards: S. Owen. 1st Session, 39th Parliament of Canada. Vol. 141 No. 47. September 18th, 2006. Pg 2880.

101 Hansards: Hon. D. Morgan. Legislative Assembly of Saskatchewan. 1st Session, 26th Legislature. March 10th, 2008. Vol. 50 No. 9A. Pg 232.

the timing of elections to serve the "immediate, short-term interest of that government"[102] as part of their "political strategy."[103] It is assumed that the implementation of a fixed date election cycle would "take away a lot of speculation and scepticism from the political and electoral processes,"[104] as one member of the Legislative Assembly of New Brunswick stated.

It seems rather unlikely that preventing first ministers from manipulating election dates will have the dramatic effect on participation, disengagement, and cynicism that these legislators had hoped. Fixed dates are certainly not "the panacea of so-called democratic reform"[105] as one Alberta legislator exclaimed. Even if regular and certain dates for elections were of vital importance to restoring the public's trust then it seems highly counter-intuitive to provide legislation that can only be upheld by trusting first ministers to abide by the legislated date. Since fixed dates cannot be enforced, this has been argued in the previous chapters, the public must trust the incumbent first minister to not attempt to capitalize on a politically opportune moment and call an election on a date of his or her choosing. Since voter cynicism and apathy are typified by a distrust of politicians and political processes fixed dates seem a very odd solution indeed.

Going Forward

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[102] Hansards: Hon. F.L. Morton. Legislative Assembly of Alberta. 1st Session. 27th Legislature. April 28th, 2008. Pg 269.

[103] Hansards: Hon. G. Plant. Legislative Assembly of British Columbia. 2nd Session, 37th Parliament. Vol.2 No.22, August 21st , 2001. Pg 678.

[104] Hansard: Hon. S. Jamieson. Legislative Assembly of New Brunswick. 1st Session, 56th Assembly. May 29th, 2007. Pg 30.

[105] Hansards: N. Brown. Legislative Assembly of Alberta. 1st Session. 27th Legislature. April 28th, 2008. Pg 267.

The legislators who introduced fixed date legislation should be applauded for their efforts, however, it should be recognized that such legislation is not a sufficient approach. If the decline in voter turnout is caused by a mass withdrawal from political institutions then this trend can only be reversed by addressing the source of the problem. This is a task that requires significant effort and cannot be accomplished on a whim. There is no single fire solution to problems of disengagement in the Canadian political system. Courtney and Wilby claim the answer to "voter apathy, voter cynicism, and declining electoral participation" lies in "a variety of societal and political reforms."[106] This means that in order for there to be a real effect on the way in which people relate to their political institutions, significant changes will have to take place.

In order to reverse the trend of declining rates of engagement and participation something needs to be different, either the people or their institutions must change. Those who promote political education as a way to improve citizens' political knowledge are advocating a measure that is intended to change people, specifically the way in which they behave and relate to their political system. Another way in which the problems of disengagement and cynicism may be addressed is to look at structural factors, such as party and electoral systems, to understand how they may better improve patterns of participation. If other electoral systems, proportional representation for example, are capable of allowing citizens to be more effective when casting their votes, then perhaps it is time for Canada to consider transitioning to a new electoral system. Both approaches, increasing political education and adjusting the structural factors of participation, include

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[106] John C Courtney and Drew Wilby. "The Debate About Compulsory Voting." *Canadian Parliamentary Review.* Vol. 30 No. 4 (2007): 45.

strengthening the connection between potential voters and their political system as well as making it more relevant to their daily lives. The second approach, that of adjusting political institutions to adapt to the behaviour of citizens, was the path chosen by those who implemented fixed date elections.

To restate a point, legislating fixed dates seems an odd approach to attempt to increase voter turnout. Implementing fixed dates should be viewed as little more than a band-aid solution as it attempts to remedy the symptom, low voter turnout, without considering the source of the ailment, why people are withdrawing from their political system in the first place. Not only is this legislation incapable of improving the emotions that non-voting Canadians feel towards their political system but it is also an indirect path towards the intended goal. Fixed date legislation was intended to make the process of voting more convenient for potential voters. It would increase the number of ballots cast by enabling voters to plan their participation in advance and make use of advance polls whenever it fit their schedule, offering similar improvements as allowing for internet voting. However, as Courtney argues, "voting on the Internet could amount to little more than an additional way of casting a ballot for those who already vote and do little to address the more fundamental problem of how to increase the level of voter turnout".[107] A similar argument can be made for fixed dates. In short, both fixed dates and internet voting make the process of voting easier for those already intending to vote without having any impact on the remainder of society.

If the goal is to increase rates of voter turnout and reduce the impact of non-participation then why not pass legislation that would make voting mandatory and

[107] Courtney. *Elections,* 124.

effectively outlaw the practice of non-voting? A far more effective way to improve the number of voters showing up on polling day would be to make their attendance mandatory. Some argue that "Voting is a positive duty owed by citizens to the rest of our society" and requiring all citizens to vote is justified as "modifying behaviour for the common good".[108] Others object to "Parliament sanctioning any measure of coercion in electoral law" since voting is a case of "the voter's freedom of choice".[109] The basic argument underlying this debate is that Canadian citizens have the right to choose their representative which is exercised as a complete freedom of choice in their vote. The debate is centred around whether voting is a right or a freedom. If voting is a right then it is possible to make the case for mandatory voting, since some rights are only valuable if they are exercised. Numerous other countries have a system of mandatory voting that require the participation of voters by law, notably Australia which has voting rates that are routinely over the 90% mark.[110] Where the argument for mandatory voting runs into trouble is when voting is considered a freedom. In this sense, any attempt by government to ensure the freedom to select a representative is exercised by enforcing it as a law would actually diminish that freedom since "Parliament sanctioning any measure of coercion in electoral law"[111] would be infringing on the freedom of choice at the ballot box.

Mandatory voting encourages a practice of a normal pattern of voting, which was one of the intentions behind legislating fixed date elections. Not only is mandatory voting a direct path to increasing the number of voters casting a ballot on election day, it is also

[108] Harb. "The Case for Mandatory Voting in Canada," 5.
[109] Courtney and Wilby. "The Debate About Compulsory Voting," 45.
[110] Australian Electoral Commission. http://results.aec.gov.au/ (accessed on June 11th, 2011).
[111] Courtney and Wilby. "The Debate About Compulsory Voting," 45.

enforceable legislation; both of which are benefits that are beyond the reach of fixed date election legislation. While mandatory voting may solve the problem of dwindling voter turnout it is not be capable of fostering meaningful engagement by improving citizens' understanding of their political system. Common in academic discussions on disengagement is the need for increased political education and perhaps significant reforms to the electoral system. It seems that, when contemplating the problem of disengagement and low rates of voter participation, academics and legislators share the same concerns. Although they are talking about the same issues they do not appear to be having the same discussion. If any changes to our established political institutions are going to take place it will require action on the part of our elected representatives. Fixed dates represent a well intentioned attempt at such a change, however this legislation is completely insufficient to achieve the goals for which it was intended. Perhaps legislators do not have the political will to undertake serious alterations to our centuries old first-past-the-post system, at least for the time being. Until a serious movement takes place, which includes effort on the part of both legislators and academics, the changes necessary to inspire citizens to re-engage with our political system may still be some time off.

Conclusion

The general trend in Canadian elections has been for the number of votes cast to increase in every election. This should not come as a surprise since the overall population of Canada has been growing steadily. What is surprising is that, of the first five elections

held on fixed dates, four saw decreases in the total number of votes cast from the previous election in that jurisdiction. The reason this is so peculiar is because fixed date legislation was enacted, in part, in an attempt to improve rates of voter participation. By this measure, fixed date elections have been ineffective at preventing the continuing decline in voting rates.

As the overall population of Canada increases more people will be enumerated, added to voters lists, and showing up on polling day in every election. This has occurred along with a simultaneous decrease in the percentage of eligible voters casting ballots. This is concerning because it means that the number of eligible voters and the number of people not voting is growing faster than the number of people actually voting. As the general population of Canada increases and the percentage of participating voters continues to decline it seems that the number of non-voters is growing faster than the number of active voters.

If the goal behind fixed dates was to improve the number of voters showing up on polling day then surely instituting mandatory voting would be a more rational, direct, and effective approach. To address disengagement from political institutions requires creating a meaningful connection between citizens and their institutions, and if this is the goal then other initiatives must be considered. Fixed dates have not succeeded in the attempt to address voter apathy. One criticism of a fixed date election system is that it is portrayed as a solution for low voter turnout. It "keeps re-emerging, often as the panacea of so-called democratic reform"[112] and is intended to address "all of the ills that plague

[112] Hansards: N. Brown. Legislative Assembly of Alberta. 1st Session. 27th Legislature. April 28th, 2008. Pg 267.

our voting system today"[113] but it does not address the problem behind low voter turnout. In my view, the root cause of low and declining voter turnout is voter apathy, and fixed dates are incapable of addressing this issue. Numerous provinces and the federal government have all claimed that the application of fixed dates would remedy the cynicism, apathy, malaise, and disdain towards politics that is abundant in large portions of the Canadian population. This is completely impossible. The issue of voter apathy means that people are not planning to vote regardless of the date of the election. If people are not planning to vote anyway then the amount of time they have to spend not planning this activity prior to the election is entirely irrelevant.

Efforts to get people involved in political processes should be of the highest priorities for elected representatives. If more people can be compelled to vote then there will surely be more people informing themselves and making considered decisions about what is good for society. But in order to compel people to engage in meaningful participation within their political institutions they must have a sufficient level of "civic literacy".[114] Notions of voter apathy and cynicism manifest themselves as acts of disengagement from political institutions and disassociation from established political parties on the part of many potential voters because non-participants fail to understand the connection between politics and themselves. Many Canadians have convinced themselves that politics, legislation, and elections are not in any way relevant to their daily lives. Because of this misconception they become non-participants. Milner's extensive research has lead him to make some recommendations including compulsory

[113] Ibid.: Hon. R. Liepert. Pg 274.
[114] Milner. *Civic Literacy*, 55.

civic education courses, a "complimentary framework" of fixed date elections, a mixed member proportional system, and political parties operating at the national, federal, and provincial level, as well as a coordinated national academic research effort paying special attention to measures of political knowledge.[115] While this may not be the precise recipe to foster high rates of informed political participation, it is certainly an approach that merits serious consideration.

[115] Milner. *The Internet Generation*, 223.

Chapter 5 – Conclusion

In this thesis I have addressed the question of whether fixed date elections are an effective way to reverse the national trend of declining rates of voter participation and remove the capacity of first ministers to manipulate election dates. The preceding chapters have defended an answer of "No." Fixed date legislation represents an attempt by legislators to address significant issues in Canada's political system by taking one very small step. These issues, the declining rates of electoral participation and the use of government power to represent the public interest, are also being considered by academic researchers. What is missing from discussions about reforming Canada's political system is an open dialogue between academics and legislators. Although both groups are discussing broader impediments to effective political participation, they seem to be having their conversations separately rather than in concert.

The primary reason why Fixed dates represent an insufficient approach to reduce the power of first ministers is because this type of legislation is ultimately unenforceable. Since the Crown possesses "the legal power to dissolve the legislature at any moment"[1] it is not possible to mandate a four year cycle between elections, as this would be construed as infringing upon the powers of the Crown. Fixed date legislation was written in such a way as to not "alter the constitutional power of the Crown to prorogue or dissolve the Legislative Assembly"[2] at any point. Although the Crown retains the ability to "force or refuse dissolution" at any point,[3] such an action would not be used to enforce fixed date

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1 Forsey. "Extension of the Life of Legislatures," 609.

2 Hansards: Hon. D. Morgan. Legislative Assembly of Saskatchewan. 1st Session, 26th Legislature. March 10th, 2008. Vol. 50 No. 9A. Pg 232.

3 Forsey. *The Royal Power of Dissolution of Parliament in the British Commonwealth*, 259.

legislation. It is long standing constitutional convention that the Crown's representative only exercise the powers of the Crown upon ministerial advice. In this sense the Crown is considered an "automaton"[4] incapable of taking any independent action whatsoever. It is highly unlikely that the Crown would disregard ministerial advice to uphold fixed date legislation (see Chapter Two), and as such, there is no mechanism that would compel a first minister to adhere to fixed date legislation against when it is not in their interest. Fixed dates cannot be used to diminish the prerogative of first ministers to request an election at any point of their choosing, and this reform could not exist as legislation any other way.

The second most common reason for fixed dates to have been legislated was to increase rates of voter turnout. Many legislators argued that fixed date legislation would serve to remove "scepticism from the political and electoral processes"[5] and that this would help to "improve voter turnout."[6] The most common argument that linked fixed dates to improved rates of voter participation was related to the first ministers ability to control the timing of elections. It was claimed that "The most cited reason for this lack of participation is cynicism of the political process ... with manipulation of election dates increasing voter apathy."[7] However, fixed dates seem to be an insufficient approach in this regard. Based on rates of voter turnout in the first five fixed date elections held in

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4 R MacGregor Dawson. "The Constitutional Question" *Dalhousie Review*. Vol. 6 No. 3 (1945): 332-337 in *The King-Byng Affair, 1926: A Question of Responsible Government*. ed. by Roger Graham. (Toronto: The Copp Clark Publishing Company, 1967), 95.

5 Hansard: Hon. S. Jamieson. Legislative Assembly of New Brunswick. 1st Session, 56th Assembly. May 29th, 2007. Pg 30.

6 Hansards: Hon. R. Nicholson. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 77. November 6th, 2006. Pg 4729.

7 Hansards: C. Skelton. Parliament of Canada. 1st Session, 39th Parliament. Vol. 141 No. 48. September 19th, 2006. Pg 2942.

Canada, a regular schedule of election dates has not had the desired effect on voter participation.

The discussions regarding fixed date elections have left two questions that remain to be answered. First, does the ability to select the date of the next election constitute a significant power in the hands of first ministers? Many legislators, and a small group of academic researchers, certainly seem to think that it does (see Chapter Three). However, there is little more than anecdotal evidence to suggest that this is the case. Serious empirical research that demonstrates how first ministers derive concrete advantage from choosing the date on which an election will take place is required to support these claims. Perhaps first ministers do have an unfair advantage in being able to manipulate the date of elections. If so, then fixed dates may serve as a positive reform, if a regular cycle of election dates can be maintained. If not, it may explain why so many first ministers were willing to give up this power.

The second question which remains to be answered relates to why more people are choosing to not vote. Are potential voters staying away from the polls because they are cynical about the Canadian political system? If so, does the manipulation of election dates serve to exacerbate this cynicism? Many legislators seem to believe that there is a connection between declining participation and election date manipulation (see Chapter Four). However, there is little empirical research to support these claims. To answer these questions will require some form of public opinion research. In short, to answer these questions we need to ask the public.

It is worth noting that, while this thesis has claimed more that interactive

conversation needs to take place between legislators and academic researchers in order to adequately address the problems of our political system, I have not been advocating the inclusion of a third group within the conversation. Excluding the views of the public was not intentional. While this thesis focused on the statements and opinions of legislators and related academic research, this approach was taken to ensure that sufficient attention could be given to these views. Public opinion research can make significant contributions to efforts related to improving our political system, it can only further add to the discussion which is the focus of this thesis. This type of research, as well as academic research similar to that covered in this thesis, needs to be combined with legislative efforts to reform and improve our political system. In my view, real changes to our political system will only come at the hands of either legislative assemblies or the public en mass.

The issue of this thesis has been reforming Canadian political institutions. This will require significant effort and research by academics and legislators to understand the problems of our system, their root causes, and the best ways in which to solve them. On my interpretation, what may be required is to begin a comprehensive program of political education to strengthen the connection between citizen and system. This will invariably improve government accountability as more people with improved political knowledge will be willing and able to scrutinize the actions of government and their elected representatives. A population will a high level of political knowledge is not only more likely to participate in their political system, they are also more capable understanding the connection between politics and themselves.

My choice to write this thesis in particular was motivated partly by my wonder at how a seemingly innocuous reform spread across the majority of Canada so rapidly, and also in part by my frustration with the claims justifying the adoption of this legislation that became more numerous and divergent in every legislature in which it was introduced. Although the discussions surrounding this reform have vastly overstated the effects, the content of these discussions holds immense importance. The approach that I've taken will contribute to shifting the discourse on Canadian government away from a focus on reducing governmental power towards an emphasis on a more open democratic system that encourages accountability and participation on a massive scale. The timeless question of who should be involved in the act of governing can be answered simply: in a democracy, everyone must be involved. The specific day on which an election is held really does not matter, and formal schedules do not significantly contribute to positive democratic norms. What the attempt to legislate fixed dates in Canada hints at is the desire to revive our democratic system and expand the electoral franchise to include those who feel that their voice goes unheard. As long as this effort is sincere and maintained, Canadian democracy will survive and continue to grow.

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