

## **Philippe Lagassé, Carleton University – written evidence (FPA0012)**

This submission analyses how the *Fixed-term Parliaments Act 2011* (FTPA) has affected the Prime Minister's ability to seek an early election, how the confidence convention has been reinterpreted by the executive in light of the Act, how the statute risks exposing the Queen to political controversy, and what amendments might be considered to improve the legislation. In addition, the analysis addresses the question of whether the Queen's prerogative to dissolve Parliament would be revived if the Act were repealed.

### **Summary of Key Points**

- The FTPA has displaced the Queen's prerogative to dissolve Parliament and thus removed the Prime Minister's ability request a dissolution of Parliament from the Queen.
- Prime Ministers may resort to creative means of triggering an early election under FTPA, though these require the cooperation of the Commons.
- A determined Prime Minister can arguably refuse to resign following an FTPA no confidence motion, despite the presence of a viable alternative government, in hopes of triggering a general election.
- Traditional confidence matters remain alongside the explicit motion set out in section 2(4) of the FTPA; however, the Act has led the executive to consider that these traditional matters of confidence are no longer binding.
- Interpreting section 2(4) of FTPA as the only binding vote of no confidence offers Prime Ministers the options they enjoyed prior to FTPA: the ability to stay in office and attempt to regain confidence, either through a general election or with a new motion, as the Act now provides.
- This interpretation of confidence under the FTPA has given the Commons greater liberty to block Government initiatives without facing a general election as a possible consequence.
- As a result of this narrowed interpretation of confidence under FTPA, the number and duration of impasses between the Government and Commons may increase.
- The Queen retains the prerogative to dismiss a Prime Minister who refuses to resign when there is a viable alternative government, though this power should be a measure of last resort as it could drag the Sovereign into the political fray.
- It is unlikely that the Queen's prerogative to dissolve Parliament would be revived by a repeal of the FTPA.

## Recommendations

- The FTPA should be amended to clarify the purpose and intent of section 2(4).
- The Act should be amended to differentiate between motions of no confidence that lead to a general election if the existing Government cannot regain confidence within 14 days, and motions of no confidence requiring the Government's resignation to allow alternative governments to be formed within a single Parliament.

### **1) To what extent has the Fixed-term Parliaments Act 2011 led to a meaningful transfer of power from the Prime Minister to the House of Commons, removing the right of Prime Minister to seek the dissolution of Parliament whenever he or she chose to?**

1.1 The FTPA has displaced the Queen's prerogative authority to dissolve Parliament. In so doing, the Act has removed the Prime Minister's right to request a dissolution from the Queen, as per constitutional convention. Having displaced the Queen's prerogative and the Prime Minister's ability to request its exercise, the FTPA provides two statutory mechanisms for an early dissolution. The first of these is a motion, as per section 2(2), 'That there shall be an early parliamentary general election' passed by 'a number equal to or greater than two thirds of the number of seats in the House (including vacant seats)'. The second mechanism involves an explicit motion of no confidence provided by the Act: if the House of Commons passes a motion, as per section 2(4), 'That this House has no confidence in Her Majesty's Government,' then a general election will take place unless a second motion 'That this House has confidence in Her Majesty's Government' passes within 14 days, as per section 2(5). Although it was perhaps not intended, this second mechanism could provide the Prime Minister with a degree of control over an early dissolution, particularly if they can command a majority of the Commons, rather than the two thirds required by section 2(2).

1.2 The Prime Minister can only seek an early election through the FTPA. As Prime Minister Johnson has shown, they may present a section 2(2) motion to the House of Commons, but there is no guarantee that the two thirds threshold will be met. This leaves section 2(4). In theory, there is nothing to prevent a Prime Minister from presenting a motion of no confidence in their own Government. A governing party backbencher could also be enlisted to table the motion. Alternatively, the Government could pursue policies or other actions that would provoke the opposition or backbenchers to present such a motion. Should such a motion pass, which only requires a simple majority, the Prime Minister could then refuse to resign or seek to regain the confidence of the House of Commons within 14 days. In effect, the Prime Minister could "run out the clock" to trigger a dissolution.

1.3 Orchestrating a motion of no confidence to force an early election would face two hurdles: it would either be embarrassing for the Government to present such a motion or the opposition would be aware of what the Government was seeking to achieve and refuse to cooperate. Yet such manipulations of sections 2(4)-2(5) are not beyond the realm of the possible or the

plausible. In light of their narrowed discretion, Prime Ministers may resort to these means of seeking an early election.

1.4 An argument exists such that the Prime Minister must resign if the House of Commons passes a section 2(4) motion. According to this reading of the Act, a Prime Minister should not be able to stay in office and allow 14 days to elapse in order to force a general election. This argument is supported by two contentions. First, the explanatory notes to the Act state that:

Where the House of Commons passes a motion of no confidence in the Government, an election must be held, unless within the period of 14 days, the House passes a motion expressing confidence in a Government. The intention is to provide an opportunity for an alternative Government to be formed without an election.

1.5 The explanation that this provision is meant to ‘provide an opportunity for an alternative Government to be formed without an election’ can be taken to mean that the intent was that the Government would be expected to resign, and a new Government formed, if a motion of no confidence passed. Under this reading, the purpose of section 2(4) is to facilitate changes of government within a single Parliament. Section 2(5), in turn, is meant to ensure that a new Government is able to demonstrate confidence within 14 days, and if not, that a general election can take place to allow the electorate to express themselves.

1.6 This reading of the Act, however, is open to contestation. While section 2(4) does provide an opportunity for a new Government to be formed, the explanatory notes do not suggest that this is a necessary consequence of a section 2(4) motion. As the notes indicate, the House of Commons can express confidence in ‘a Government’ within the 14-day window, not only an alternative government. This suggests that the existing Government is not required to resign following the passage of a section 2(4) motion; the Government can seek to regain the confidence of the House of Commons with a section 2(5) motion. Indeed, when no viable alternative government can be formed, the existing Government must stay in office to ensure that there is a Prime Minister, whether they are able to regain confidence or not.

1.7 When a section 2(4) motion has passed and a viable alternative government is present, the second contention holds the Prime Minister faces a normative obligation to resign and allow the Queen to appoint a new head of government. This obligation is backed by paragraph 2.19 of the Cabinet Manual, which states: ‘The Prime Minister is expected to resign where it is clear that he or she does not have the confidence of the House of Commons and that an alternative government does have the confidence.’

1.8 The Prime Minister, however, must accept that they are bound by this duty in particular cases. In a contentious or uncertain political environment, there may be disagreement between actors about what obligations bind the Prime Minister and whether an alternative government would in fact be able to maintain the confidence of the House of Commons. It may be expecting too much of a partisan actor to give up the premiership when they have another option available: refusing to resign to trigger a general election.

1.9 The argument that the Prime Minister has a duty to resign following a successful section 2(4) motion is further complicated by the relevant conventions that existed prior to the FTPA. Before the Act, a Prime Minister who lost a vote of no confidence would have the option of resigning, attempting to regain confidence, or requesting a dissolution. Requesting a dissolution was the preferred course, since it would allow the Prime Minister to remain in office and attempt to regain confidence in a new Parliament.<sup>1</sup>

1.10 When grafted upon the new reality of the FTPA, the previous option of seeking a dissolution could be used to justify a refusal to resign and a decision to wait out the 14-day period following a successful section 2(4) motion. The argument could be made as follows: As a statute that replaced the Queen's dissolution prerogative with statutory mechanisms for an early election, the FTPA has not extinguished the Prime Minister's option of seeking an election following a vote of no confidence. What the Act has done instead is change the manner in which a dissolution is sought, not the Prime Minister's option of seeking one. Seen from the perspective of how convention operated prior to FTPA, a Prime Minister who allowed the 14 days to elapse could argue that they are following past practice within the new parameters set out in FTPA.

1.11 It should further be noted that the Prime Minister has other means of seeking a dissolution: an act of Parliament that amends the FTPA or an act of Parliament that provides a new date for a general election, one that would be earlier than the date set out in FTPA. Using new legislation to secure a dissolution of Parliament would require a simple majority in both houses. In that sense, it avoids the two-thirds majority required under section 2(2). Yet such a bill would need to follow the standard legislative process, which would allow for careful scrutiny of the Government's motives in either amending or circumventing FTPA.

## **2) What impact has the Act had on the notion of the House of Commons having "confidence" in a Government? Is it still possible for the Government to make a vote in the House of Commons on a matter of policy a "confidence" issue?**

2.1 The FTPA has modified the confidence convention in two ways, the first directly, the second indirectly. First, the Act has established a statutory provision whereby a motion of no confidence can lead to a general election, as per sections 2(4) and 2(5). This replaces how a general election would have resulted from a vote of no confidence prior to FTPA. Specifically, prior to the Act, the withdrawal of confidence in the Government would typically have led the Prime Minister to work to regain confidence or request a dissolution of Parliament. Since the FTPA has displaced the Queen's prerogative to dissolve Parliament, the Prime Minister can no longer request a dissolution from the Queen. Accordingly, the Act introduced a mechanism that leads to the dissolution of Parliament if no Government can secure confidence following the passage of a section 2(4) motion of no confidence. Thus, the Act has removed the Prime Minister's conventional power to request a dissolution following a vote of no confidence by displacing the Queen's legal power to dissolve Parliament and replacing it with a statutory mechanism tied to a motion of no confidence.

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<sup>1</sup> The dissolution option, in fact, remains the norm in other Westminster-style states, such as Canada. Canadian first ministers will tend to resign only after their request for a dissolution has been refused by the Crown.

2.2 The second impact of the FTPA on confidence is indirect. Although the Act outlines how a motion of no confidence can lead to a general election, it is silent on the other aspects of the confidence. Of note, the FTPA does not prevent the Government from declaring that a vote or signature piece of legislature is a matter of confidence. Nor does the Act negate the notion that the reply to the Queen's Speech and money bills should be considered matters of confidence. Likewise, the Act does not prevent the Commons from effectively withdrawing its confidence in the Government in other ways, such as finding it in contempt or preventing the executive from moving ahead with its legislative agenda. In principle, these other means of losing or withdrawing confidence remain, alongside the explicit motion set out in section 2(4). Indirectly, however, the Act has led the executive to no longer consider these losses of confidence as binding. Indeed, it appears that, from the executive's perspective, section 2(4) of the Act has become the only binding vote of confidence. The Government may consider these other matters confidence questions, yet they have arguably lost the binding authority of constitutional convention. Instead, they may now have been reduced to non-binding, 'customary' matters of confidence, rather than binding, conventional ones.<sup>2</sup>

2.3 To understand how the Act has had this effect, it is necessary to return to the displacement of the dissolution prerogative. The Prime Minister's previous authority to request a dissolution acted as a counterweight to the Commons' ability to withdraw confidence or block the Government's agenda. More precisely, members would need to consider the possibility of a general election, and thus a risk to their own positions in Parliament, when deciding whether to withdraw confidence or prevent signature Government legislation from being passed. The Prime Minister was thus able to link a variety of confidence matters to the Commons' own fate. The Commons could withdraw confidence or act as a bulwark against the Government, but there was a consequence to that action. The Prime Minister, moreover, could decide to appeal directly to the electorate if their ministry lost the confidence of the Commons or was prevented from passing signature legislation. The essential point here is that the Prime Minister's ability to request a dissolution gave them a degree of leverage in a stand-off with the Commons and an opportunity to rebalance the composition of the elected house in their favour.

2.4 The FTPA's displacement of the dissolution prerogative has narrowed the Prime Minister's room for manoeuvre in confrontations with the Commons. When the Prime Minister loses a vote on a traditional matters of confidence that is not a section 2(4) motion, they now only have two choices: resign or stay on. Rather than give up power, Prime Ministers have so far decided to stay on. Since they no longer have the option of requesting a dissolution on traditional matters of confidence, Prime Ministers have responded by adjusting their interpretation of when a vote of no confidence is binding. Since only section 2(4) of FTPA mirrors the past options of resignation or dissolution, only motions of no confidence outlines in that part of the Act are interpreted as binding confidence votes. In effect, it appears that, from the executive's perspective, veritable matters of no confidence should still be tied to the possibility of a general election, which under FTPA is linked to section 2(4) motions alone. Treating section 2(4) as the sole means of losing confidence offers Prime Ministers the path they would have had prior to FTPA, namely the ability to stay in office and attempt to regain confidence, either through a general election would have traditionally been done, or with a new motion, as the Act now provides.

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<sup>2</sup> For a discussion of non-binding custom versus binding convention, see Philippe Lagassé, "The Crown and Government Formation: Conventions, Practices, Customs, and Norms," *Constitutional Forum* vol. 28, no. 3 (2019).

2.5 For its part, this interpretation of confidence under the FTPA has given the Commons greater liberty to block Government initiatives without facing a general election as a possible consequence. But this has come with a need to be more explicit when members no longer have confidence in the Government, namely with a section 2(4) motion. On the one hand, this has increased the Commons' ability to serve as a check and veto on the executive. In that sense, this interpretation of the FTPA has augmented parliamentary control of the Government. On the other hand, it has arguably made the Commons partially responsible for the resolution of intractable executive-legislative disputes. Members of Parliament must now take the lead in determining when an impasse between the Government and legislature merits a general election, either through a section 2(2) motion or a section 2(4) motion with no Government securing confidence within 14 days. In the past, the Prime Minister would have been expected to resolve such disputes by resigning or requesting dissolution. Since Prime Ministers are now unlikely to resign unless the Commons passes a section 2(4), a viable alternative government is clearly present, and there is significant pressure within their own party, this responsibility has been partially transferred to MPs. As a collective, partisan body, however, the Commons will not always act resolutely here. Consequently, the number and duration of impasses between the Government and Commons may increase.

**3) Is there a risk of the monarch being drawn into the political debate during 14-day period following the passing of a motion of no confidence in the Government and, if so, how should this be mitigated?**

3.1 There is a risk that the Sovereign will be drawn into politics by the 14-day period following the passage of a section 2(4). This could occur in cases where a section 2(4) motion of no confidence has passed, a viable alternative government is present, yet the Prime Minister refuses to resign, preferring to wait out the 14-day period to trigger a general election. In this situation, there would likely be calls for the Queen to dismiss the Prime Minister and appoint the leader of the viable alternative government as first minister. Such calls would place the Queen in a difficult position.

3.2 The prerogative of the Queen to dismiss the Prime Minister remains. This reserve power ensures that the Queen can remove a Prime Minister who is incapacitated or involved in criminality or flagrant unconstitutional behaviour. Yet this is not a power that the Queen would normally be expected to exercise. It remains in place to address exceptional circumstances and situations where other actors, such as the Cabinet, the Commons, or the courts, cannot provide a remedy, and the Prime Minister is either unwilling or unable to act honourably or according to the requirements of the constitution. To the extent possible, the Queen should not be expected to exercise this power if at all avoidable.

3.3 As noted above, a Prime Minister could leverage the ambiguity of the FTPA to stay in office following a section 2(4) motion. The Prime Minister could argue that they should be permitted to face the electorate rather than resign, as they would have had prior to FTPA. Were the Queen to determine that the Prime Minister does not have that right, she would not only be shaping the evolution of the post-FTPA constitution, her decision would invariably be called into question by the dismissed first minister and his or her supporters. Conversely, if the Queen acquiesced to the Prime Minister's decision to wait out the 14-day period, or if she simply chose not to get

involved by dismissing her first minister on an ambiguous constitutional question, the members of the alternative governing party and their supporters would likely call her judgement into question. Hence, although the Prime Minister's decision not to resign would be what would risk dragging the Queen into politics in this scenario, the fact remains that the Sovereign could be exposed to political controversy and a constitutional quagmire.

3.4 To mitigate against this risk, the FTPA should be amended to clarify the purpose and intent of section 2(4). If Parliament does not wish to give the Prime Minister an ability to wait out the 14-day period and trigger a general election, then the Act should provide language to that effect. For instance, the Act could differentiate between different types of motions of no confidence. The first of these would be a motion that would allow the Government to regain confidence within 14 days or face a general election. The second would specify that the Government must resign, allowing for an alternative government to be formed, as required by constitutional convention. It would not be necessary to include a provision for a general election as part of this second motion, since the first of these motions (or the current section 2(2)) could be used to provoke a dissolution in the unlikely event that the alternative government failed to secure the confidence of the Commons. One disadvantage to this approach would be that it would be easier for the Government to secure an early dissolution through a vote of no confidence than with a section 2(2) motion. However, this is arguably already the case, and it is perhaps appropriate that an early election should be simpler to trigger when the Commons has expressly lost confidence in the Government.

3.5 In light of the Supreme Court's ruling in *Cherry/Miller 2*, there is reason to believe that the courts could address this question by finding that Prime Minister who chooses to remain in office following a section 2(4) motion and the presence of an alternative government is violating a constitutional principle of confidence. Ideally, however, this is a matter that should not require a judicial remedy. Clarifying the FTPA to include both a motion requiring the resignation of the Prime Minister would deal with this question and avoid involving the courts.

#### **4) If the Act was repealed, would the prerogative power for the Prime Minister to dissolve Parliament and call a general election be revived in the event of repeal?**

4.1 Statute can have two effects on the royal prerogative: acts of Parliament can either abolish prerogative powers outright or they can displace prerogative, placing them in abeyance.

4.2 When an act of Parliament abolishes a royal prerogative, the prerogative ceases to exist altogether as a source of legal authority. In the event that the statute that abolished the prerogative is repealed, the prerogative remains a nullity. If the abolishing act replaces the prerogative with a statutory authority, a new act will be required to fill the legal gap that the combined prerogative abolishment and statutory repeal creates. If Parliament wishes to replicate or recreate the authority of an abolished prerogative, it will need to do so on a statutory basis. An example of a statute abolishing a prerogative is the *Bill of Rights 1689*, which expressly declared that the Sovereign dispensing power was henceforth illegal.

4.3 When an act displaces a prerogative, either expressly or by necessary implication, the executive can only exercise the authority granted by statute. Since statute is not always precise or

wide-ranging, however, prerogative may still provide the executive with authority where the act is silent. In effect, the prerogative can be used to address gaps that statute failed to address. When statute clearly occupies the same ground as the prerogative, but does not expressly abolish it, the prerogative authority remains but is placed in abeyance. Put differently, the prerogative authority continues to exist at common law, yet it is inaccessible to the executive as long as the government can act through statute. In the event that the displacing statute is repealed, the prerogative authority would, in theory, be revived and exercisable by the executive.

4.4 To determine whether a prerogative has been abolished by statute, or merely displaced and placed in abeyance, two factors should be considered. First, the language employed by the statute should be taken into account. If the statute expressly abolishes the prerogative, as *the Bill of Rights 1689* did regarding many such authorities, then the prerogative evidently ceases to exist. If, on the other hand, the statute neither expressly binds Her Majesty, nor makes any allusion to the previous prerogative authority, the argument that the prerogative is in abeyance is stronger. Second, the necessity of providing the executive with an authority should be examined. Were the security, peace, and well-being of the United Kingdom jeopardized if the executive was left without a specific authority, then a prerogative that provides this authority should be held to be in abeyance if statute occupies the same ground, unless it has expressly been abolished. For instance, the executive requires emergency powers to respond to crises, and if the statutes that provide these powers are repealed, the Government would be justified in calling upon a revived prerogative power to act. If it is not absolutely necessary for the executive to have an authority, however, then the importance of reviving the prerogative would be less evident, meaning that the power would be in a permanent state of abeyance, which would tantamount to abolishment.

4.5 In applying these criteria to the Queen's prerogative to dissolve Parliament, the case that the FTPA has abolished this royal authority is stronger, though not definitive.

4.6 Section 3(3) of the Act states that 'Parliament cannot otherwise be dissolved'. While this language does not expressly abolish the Queen's prerogative, it does constitute an allusion to that authority. In addition, other relevant acts of Parliament, such as the *Succession to the Crown Act 1707*, have been stripped of their references to the Sovereign's power to dissolve Parliament. This weighs in favour of abolition. The explanatory notes to section 3, however, are murkier. They state that 'the Queen will not be able to dissolve Parliament in exercise of the prerogative'. Had abolition been the intent of Parliament, the notes might have used language such that the Queen 'can no longer' use the prerogative to dissolve. The wording of the FTPA, therefore, is not clear on the question of abolition or abeyance.

4.7 Applying the necessity test, however, suggests that the dissolution prerogative is in a state of permanent abeyance, and hence effectively abolished. In the event that the FTPA were repealed, there would be no mechanism to dissolve Parliament to hold a general election. While this might suggest that the prerogative of dissolution would be revived to compensate and ensure democratic representation, Parliament would retain the option of dissolving itself with new legislation. Indeed, even if this new legislation only dealt with the dissolution of the existing Parliament, it would still mitigate against the necessity of reviving the prerogative. Accordingly, the availability of other means to dissolve Parliament weighs in favour of permanent abeyance, and thus abolishment for all intents and purposes.



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