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# Part II Institutions and Constitutional Change, A The Crown and the Executive, Ch.6 The Crown in Canada

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## (p. 129) Chapter 6  The Crown in Canada

## 1.  Introduction

Students of Canadian government are convinced that the monarch is merely a figurehead in the Canadian system of government. One can hardly blame them for this point of view, as it is after all the prevailing one. As a result, constitutional commentators must return to first principles, or at least to 1 July 1867, the date of Confederation, to explain the logical consequences that flow from the fact that Canada is a constitutional monarchy.

Her Majesty Queen Elizabeth II is the Queen of *Canada*[1] thus bearing the *Canadian* Crown. She is the head of state and all executive authority is vested in her; all those seeking to acquire Canadian citizenship, in fact, swear an oath to her.[2] She is not just a figurehead. Rather, she is *also* a figurehead—the symbol and the physical representation of the Crown.

The Crown has three functions. The first is *institutional* (or constitutional) being the 'principle' around which governing in Canada is organized.[3] The second is the *symbolic* representation of Canadian unity. The third is the *ceremonial* role fulfilled by the Queen and her representatives in Canada, namely, the Governor General and the Lieutenant-Governors. In the eyes of the public, the institutional function is often obscured by the (p. 130) symbolic and ceremonial functions, the result being confusion. Some think the Crown is constitutionally powerless and merely a relic of tradition, while others overestimate the power it retains to influence the conduct of political life. Only in distinguishing the institutional function from the symbolic and ceremonial ones is it possible to appreciate the role of the Crown in the Canadian system of government.

In the next section of the chapter there is a brief account of the symbolic and ceremonial functions of the Crown. The following and longest section deals with the institutional functions. It begins with a historical account of the institutional development of the Crown in Canada, in particular, the changes that coincide with the country's progress from colony to nation. There follows an assessment of the statutory and prerogative powers of the Crown. In the conclusion, we address the issues facing the Crown in Canada today.

## 2. Symbolic and Ceremonial Functions

At Confederation the Crown and federal Parliament were to serve as symbols of Canadian unity[4] and identity[5] respectively. The Fathers of Confederation sought to rally a very diverse population *not* under a cultural umbrella, but under a political and institutional one.[6] They foresaw, or at least hoped for, a time when Canadians would share a *political identity* based on salient *political values* expressed through Parliament.[7] Meanwhile the constitutional monarch, a politically neutral figure staying above the fray of day-to-day politicking, was to remain a symbol of the country itself, in essence, a symbol of national unity. Arguably, today these unifying and nationalizing functions are served more by the Canadian Charter of Rights and Freedoms[8] than the Crown. Still, (p. 131) affection for the current monarch remains strong despite declining sympathy for the institution of monarchy itself,[9] and she continues to fulfill the symbolic function.

As for the ceremonial functions, these are quite numerous: honours are granted in the name of the Crown in recognition of service to the country and other significant literary, academic, and artistic accomplishments and contributions to its well-being.[10] Some notable examples include the Order of Canada[11] and the Victoria Cross.[12] Finally, the Crown is an inescapable part of traditional political ceremonies, like the Speech from the Throne that is read by the Governor General at the opening of a new Parliament.

## 3. Institutional Function

Although the symbolic and ceremonial roles of the Crown are deeply significant, there can be no doubt that the institutional function of the Crown is the most important—albeit the least visible—and it affects every aspect of governing in Canada. In fact, the executive power is composed of the Crown (formal Executive), the Prime Minister and Cabinet (the political Executive), and the bureaucracy (the permanent Executive). In the words of David E. Smith, the Crown is the 'organizing principle of Canadian government'.[13] Its presence touches every other governmental institution. Importantly, it remains a (contested) bulwark against abuses of power—a function that becomes all the more important in an era in which notions of the concentration of power in the hands of prime ministers and their cabinets are widespread. So how did it get here?

### A. The Crown(s) in Canada

#### *(i) European Crowns Vie for Control of North America*

England's King Henry VII, by way of the Italian navigator John Cabot, was the first European to claim land on Canada's east coast in 1497 even though no significant, (p. 132) long-lasting settlements or colonies were established at that time. The presence of the French Crown in Canada can be traced back to 1534 when Jacques Cartier erected a Christian cross on the Gaspé for King François I. Here, too, initial attempts to create a colony failed miserably, but in the 1600s, France claimed and settled a vast tract of land, naming it—perhaps unimaginatively—New France. By 1670, England had also established a solid presence on an immense swathe of territory to the north and west of New France, naming it Rupert's Land.

In the end, the Seven Years' War (1756–1763) resolved this European rivalry over empire. Engulfing almost all of Europe as well, the war ended with Great Britain's victory over France. King Louis XV was the last French king to rule over, and in, Canada, bringing to an end the 229-year presence of the French Crown (1534–1763). From a British perspective, the *Royal Proclamation* signed in 1763, among other things, placed Indigenous nations under the protection of the British Crown, in particular from land speculators and their dubious dealings. This protection was secured by stipulating that Indigenous lands could only be 'alienated' to the Crown, which would then proceed to negotiate sales in the best interest of the Indigenous nations. These provisions created a fiduciary responsibility of the Crown for Indigenous nations which continues today. The *Royal Proclamation* is, in fact, the seminal document which influenced—and continues to influence—Crown-Indigenous relationships. References to Indigenous peoples in founding (and foundational) documents of Canada highlight the significance of their enduring and distinctive bond with the Canadian Crown (as state and as symbol). In legal terms, it is a sui generis relationship which predates Confederation.[14]

Following the American War of Independence (1775–1783) those who remained loyal to the British Crown were dubbed 'United Empire Loyalists' and they relocated to Canada, settling in central Canada, New Brunswick, and Nova Scotia. This English-speaking group and the pre-established French-speaking populations in those areas soon found themselves at odds with each other, and the attempt to alleviate tensions led to the *Constitutional Act* of 1791 which created Upper and Lower Canada (currently portions of the provinces of Ontario and Québec respectively). This institutional remedy did not produce the desired effects; eventually, the strained relationship devolved into full-on rebellion (1837–1838). The British government sent Lord Durham to the Canadas to inquire into the causes of the uprisings. His observations are famously (or infamously) detailed in the *Report on the Affairs of British North America*. One of Durham's recommendations, the reunion of the Canadas, was accomplished in the *Act of Union,* 1840, which established the *Province of Canada.* Another was the adoption of responsible government in the colonies, which took longer to establish. Responsible government is the constitutional convention whereby, in modern terms, the Executive, meaning the (p. 133) Prime Minister and Cabinet, must have the confidence—the support—of the House of Commons in order to retain the right to govern. This convention remains the cornerstone of Westminster-style parliamentary democracy.

It is worth noting that in recommending responsible government, Durham was rather ahead of his time, as the practice of it in the British system was barely underway. Responsible government is a system that evolved in a country famous for its evolutionary institutional developments. The key was the slow if inexorable transition from a government model that featured the monarch governing with the advice of individual ministers, and getting support from Parliament when required, to a government model that featured a cabinet of ministers headed by a first or prime minister that governs in the name of the monarch, but with the support of Parliament.

In the British colonies, Nova Scotia was the first to achieve responsible government (1848) followed in relatively short order by the other Maritime colonies, and then the Province of Canada. By the time of Confederation in 1867, the colonies had had several years' experience with the system. 1 July 1867 marks the birth of modern Canada—one very large colony of the British Empire. It also marks the Canadian journey from colony to independent country—from 1867 to the Imperial Conference of 1926 and the *Statute of Westminster* of 1931, and finally, full independence achieved by the repatriation of the constitution in 1982.

## B. British Crown: From Colony to Independence

In the *British North America Act, 1867* (now called the *Constitution Act, 1867*), the Fathers of Confederation established a constitution 'similar in principle' to that of the United Kingdom. However, use of the term 'similar' should not lead readers to believe that the founding document is little more than a written compendium of British principles. For one thing, in fact crucially, the Fathers adopted the federal principle while retaining the monarchy. This untested experiment, novel at the time[15], effectively combined two contradictory principles: the first—monarchy—concentrates power, whereas the second—federalism—disperses it.[16] The Crown was further adapted to fit the exigencies of federalism via the creation of a 'compound monarchy'[17], that is, the establishment of Lieutenant-Governors to represent the Crown in the provinces. On this model, the Crown remained indivisible as its federal and provincial representatives, the Governor General and Lieutenant-Governors, operate concomitantly.

Despite Confederation, the stubborn persistence of a colonial ethos was evidenced by some provisions in the Constitution which strongly contradicted the federal principle of divided legislative jurisdiction and the valued ideals of unity in diversity and local self-government. In fact, Canada's colonial status at Confederation was marked in a number (p. 134) of ways that bore on the office of the Governor General who, importantly, was regarded not only as the Queen's representative in Canada, but the representative of the British government as well. In the latter capacity, he was the recipient of instructions from that government on various and sundry matters.

The clauses in the *Constitution Act, 1867* that bear on the role of the Governor General in the law-making process illustrate the colonial point. For example, sections 55–57 on the powers of reservation and disallowance specify that the Governor General, acting in the Queen's name, either assents to a bill passed by both houses of Parliament, withholds assent, or reserves the bill for the Queen's consideration. If he assents to the bill, the Queen on the advice of her British counsellors can *disallow* it within two years of its passage. She has the same period of time to decide upon bills that the Governor General *reserves*[18] for her consideration. Section 90 applies the same template in relation to the Lieutenant-Governors, except that they must refer provincial bills to the Governor General for decision, not the British monarch, and the time line for decision is shortened to one year. The use of the power to veto bills or reserve them for consideration by a higher authority, rather robust in the early years of Confederation, diminished sharply as the years passed.[19] Today these are considered constitutional anachronisms and have long since fallen into disuse. Nonetheless, their inclusion in the Constitution illustrates the colonial status of Canada at Confederation.

This status was reflected as well in *constitutional conventions* bearing on the Governor General. One example is the appointment of the Governor General, a subject not mentioned in the *Constitution Act, 1867*. According to practice followed at that time, and consistent with the office's role as representative of the British government, the Governor General was appointed by the Queen on the advice of the British Colonial Secretary, which carried with it the approval of the British Prime Minister. This was how Governors were appointed to the colonies before Confederation, and the practice was simply carried over to Canada when it was established. With the passage of time, the ongoing changes made in the appointment of the Governor General tracked Canada's progress toward autonomous status within the Commonwealth.

By the latter part of the nineteenth century, the British system of appointment by the sovereign on the advice of the British government was modified by the practice of consulting with the Canadian government before the appointment was made. However, after the Imperial Conference of 1926 had severed the connection between the British government and the Governor General, the old method was no longer an appropriate one.

Instead, the appointment is made by the sovereign on the advice of the Canadian (p. 135) Prime Minister.[20] Initially the Prime Minister made his recommendation from a list of British candidates. However, since 1952, which saw the appointment of Vincent Massey to the post, only Canadians have been recommended to the sovereign for the position.

Yet another mark of colonialism involved the relationship between the Governor General and the British government in relation to the governance of Canada. On the domestic front, and from the beginning, the Canadian Cabinet was wary of efforts by the British government to continue issuing instructions to Governors General, the execution of which would influence the course of the country's internal affairs. In 1878 Edward Blake, Minister of Justice in the Liberal government of Prime Minister Alexander Mackenzie, successfully resisted the British proposal to authorize the Governor General to preside at Cabinet meetings (this had not happened for years), and on occasion not only to override Cabinet decisions but to act without consulting the Cabinet (presumably when Imperial interests were at stake). Although part of the British Empire, Canada, said Blake, should not be treated like a small, young colony but a large, self-governing country.[21] In his review of these matters, R. MacGregor Dawson concluded that by 1914 Canada was to all intents and purposes autonomous in relation to its own internal affairs and the Governor General was no longer an active political figure in domestic political life.[22]

Canadian autonomy in relation to external affairs was much slower to develop. From the standpoint of the Governor General, again the key point in the shift to autonomy in this field was the status of the office as representative of the British government as well as the Crown. So long as the British government retained control of Imperial policies that implicated and affected the colonies—such as trade, treaty-making, and the declaration of war—the office was understood to combine both functions. Once the country effectively became an autonomous actor in the world, the achievement was reflected in the status of the Governor General as representative of the Crown only, not the British government. These developments emerged at the Imperial Conference of 1926, which issued a formal statement of the equality of the United Kingdom and the Dominions (including Canada) within the British Commonwealth. Moreover, the conference declared that as a consequence of this equal status, the Governors General of the Dominions were representatives of the Crown and held essentially the same position vis-à-vis their governments as the King to the British government. They were no longer the representative or agent of the British government. These declarations along with additional provisos bearing on the autonomy of the Dominions took formal shape later in the terms of the *Statute of Westminster* which was enacted by the British Parliament in 1931.[23]

(p. 136) Finally, there is the history of the Letters Patent,[24] which also reflects Canada's track from colony to independent nation. Under British colonial practice, Governors of colonies routinely were issued Commissions appointing them to the office, Letters Patent that defined the office and Royal Instructions that regulated specified matters such as oaths of office or the quorum needed for meetings of the Cabinet. As amended over the years, the Letters Patent broadened the space within which the Governor General could act as the sovereign's personal representative and, importantly, exercise the royal prerogative on his own. For example, in 1905 the Letters Patent were amended to vest in the Governor General the position of commander-in-chief for Canada, one previously held by the senior officer commanding British military forces in the country.

In 1931 the Letters Patent, following the spirit of the Imperial Conference of 1926 mentioned above, executed the transformation of the office of Governor General from agent of the British government and personal representative of the sovereign to the latter role alone. Notably, the Letters Patent 1947 authorized the Governor General to exercise on advice of the Canadian Cabinet all of the sovereign's powers and authority for Canada. But this did not include the royal prerogatives then exercised by the sovereign, who received submissions for approval from Canada for the authorization of declarations of war, the

signing of treaties, the appointment of Canadian ambassadors and ministers to foreign countries, and the granting of honours and the appointment of the Governor General, to name a few. These and other prerogatives were delegated to the Governor General in later years. Significantly, in 1977 the delegations covered important matters of foreign affairs, such as the authorization of the declaration of war and treaties of peace, the signing of treaties and of letters of credence, and recall of Canadian ambassadors abroad. It should be stressed that the sovereign retains the prerogative to appoint the Governor General.

Readers will notice that in tracing the country's evolution from colony to independence from the standpoint of the office of Governor General, we make mention of several powers which are formally in the hands of the Crown. A detailed explanation of them is now in order.

## 4. The Powers of the Crown: Statutory, Prerogative, and Reserve

The *Constitution Act, 1867* suggests that the constitutional reach of the Crown is extensive and substantial. The powers at its disposition are *statutory, prerogative*, and *reserve* powers. In keeping with Canada's standing as a parliamentary democracy, however, constitutional conventions require that these powers be exercised *almost* exclusively on the advice of the Prime Minister and Cabinet (the active Executive). The operative word here is 'almost'. As explained below, some powers remain in the hands of the Governor General.

### (p. 137) A. Statutory Powers

Let us begin with the statutory powers of the Governor General found in the written constitution. The strongest note is struck in section 9 of the *Constitution Act, 1867* which states: 'The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen'. This means that the authority of the Executive to govern and carry out its activities flows exclusively from the Crown. In addition, a formidable array of specific powers is assigned to the Governor General throughout the Constitution, such as section 24, the power to appoint persons to the senate of Canada, or section 96, the power to appoint judges to federal courts. By convention, of course, the Governor General exercises these powers only on the advice of the Prime Minister and Cabinet, the obvious political beneficiaries of the arrangement. Noteworthy as well is section 15, which states that the commander-in-chief of the armed forces is the Queen. This is why Canadians see the Governor General, who represents her in this capacity, in military uniform on such occasions as the Remembrance Day service in Ottawa.

### B. Prerogative Powers

In addition to statutory powers, the Crown also has prerogative powers which derive from common law and are largely undefined in scope, remain unwritten, and are exercised on advice of the Prime Minister. Among them are the appointment and dismissal of prime (first) ministers and summoning, proroguing, and dissolving Parliament (or provincial legislatures in the case of the Lieutenant-Governors). Again, according to convention, the prerogative powers of the Governor General, like the statutory powers, are exercised by him on the advice of the Prime Minister. Clearly, the conventions that govern the actions of the Governor General are an extremely important part of the Canadian parliamentary system. It is worth pausing here to expand on what has been said before and to consider the provenance of constitutional conventions.

In defining the phrase 'constitutional convention,' scholars often refer to an established practice that is considered binding upon the relevant political actors. However, it is not a practice that is enforced by the courts; instead, if it is enforced at all, it is through political pressure, and, ultimately by the people through public opinion or in an election. Sir Ivor Jennings added the idea that there must be a reason for the conventional rule. Thus, the

reason for the conventions that circumscribe the powers of the Governor General is usually the democratic principle. Andrew Heard captures this point in his definition of the concept, which is cited here in full:

> Conventions, at heart, are obligation upon political actors to act in a way other than what the formal law prescribes or allows. These obligations rise directly from the constitutional principles that underlie the political system, and they give final form to the constitution as a living expression of a society's dominant values. The job of judges is to define and enforce the legal rules at stake in disputes that come before (p. 138) them. But some of those laws are incomplete and utterly archaic. As a result, political actors must obey other rules of the constitution in order for our political system to function in ways that are considered legitimate by the attentive public.[25]

The conventions that circumscribe the legal powers of the formal Executive accomplish the task by requiring that the holders of the office exercise these powers only on the advice of the Prime Minister or in some instances the Prime Minister and Cabinet. Generally speaking, they ensure procedural smooth sailing. Year after year, decade after decade, government proceeds apace with no need for the Governor General and the Lieutenant-Governors of the provinces to exercise any of the legal powers available to them on their own initiative. For example, although the first duty of these officers is to see that there is a Prime Minister and Cabinet in place, the voters almost always make the decision a foregone conclusion. Again, because Prime Ministers and Premiers who cannot command majority support in the elected legislature generally follow convention and advise that an election be held or resign to make way for a rival team to try to gain a viable majority, whichever course of action is appropriate in the circumstances, the Governors and Lieutenant-Governors need not exercise the undoubted legal power of their offices to dismiss their first ministers. Or again, long gone are the days in which they exercised their legal power to refuse royal assent to bills duly passed by the legislature. And until recently at least, they evinced no hesitation in following the advice of the Prime Minister and Premiers to prorogue the legislature. As a result, Canadians, including the students mentioned in our introduction, can be forgiven for imagining that the representatives of the Crown retain no legal powers at all, and that the functions discharged are symbolic ones only. Mostly they see these personages at important ceremonies or reading the Speech from the Throne—a document that is drafted by the government and outlines its legislative intentions for the upcoming parliamentary session.

## C. Reserve Powers

And yet, there are the (exceedingly) rare occasions when circumstances combine to produce a constitutional crisis, or near crisis, in the parliamentary system. Naturally, these are the ones of most interest to students of government because they reveal the stark reality that the parliamentary system is not always on auto-pilot from the procedural standpoint. Instead, in times of constitutional crises there is controversy about the basic rules of the system itself. In the end, a decision must be made, and it falls to the Governor General or the Lieutenant-Governor to make it. The power to make such decisions is referred to as the reserve power.

The prerogative powers include the reserve power which, as the word implies, is exercisable by the Crown at its own discretion. In other words, the reserve power is the (p. 139) right of the Crown's representative to reject the advice of the government. The rationale for the maintenance of the reserve power in the hands of the Governors General (and Lieutenant-Governors) is their role in protecting the practice of responsible government from the predations of political actors who would not scruple to bend the system to their own advantage. Of course, the scrutiny of Her Majesty's Loyal Opposition,

other political parties, the media, and public opinion, to name a few, make their intervention in this respect unnecessary—almost.

### *(i) Reserve Power Controversies*

At the federal level of government, there have been only two occasions of serious controversy about the reserve powers of the Governor General, one about dissolution and the other prorogation. It is instructive to take a close look at both for the following reasons. First, they demonstrate the complexity of the political context out of which such controversies emerge. There is no basis for easy judgments, except those of the partisan variety. Secondly, they demonstrate the depth and passion of the partisan divide between the political actors who confront one another over the issues. Each side is utterly convinced of the rightness of its position and prepared to act on that basis. Thirdly, they show that such crises are zero-sum games. There are winners and there are losers. There is no brokered or in-between position of the sort that might be reached, say, in a trade agreement. In these fights over who governs, the Governor General is in an awkward position indeed. It is too facile to suggest that the office is like an umpire or referee of constitutional crises because the crises are not occasions of rule-following. On the contrary, the rules themselves are at issue among opponents whose partisanship ensures that they will take anything but an objective approach to the problem.

Let us begin with the so-called King-Byng affair, the roots of which were nourished in the general election of 1921, which produced the first real third party in Canadian politics, namely, the largely Western-based Progressive Party comprised of former Liberals determined to press a low-tariff agenda on the government and a more radical Albertan group intent on replacing altogether the system of political parties in the House of Commons with representatives of group interests who would openly bargain with one another on public policy choices. Out of a total of 235 seats, the Progressives claimed 64, or roughly 27 percent, nearly depriving Prime Minister Mackenzie King of a Liberal majority government. In the next general election in October 1925, the combination of a resurgent Conservative Party and a much weaker, but still significant Progressive presence did the trick. The Liberals were reduced to 99 of 245 seats. King even lost his own seat in Ontario.

Arrayed against the Liberals were 116 Conservatives, more than double their 50 seats in the 1921 outing; 24 Progressives; 4 Independents; and 2 Labour.[26] The Conservatives were led by Arthur Meighen, who had taken over leadership of the party in 1920—a year after King won the leadership of the Liberal Party. It is worth noting that the two rivals, (p. 140) as unalike as could be imagined, detested one another. Following accepted constitutional convention, King decided to stay on in office and let the House of Commons determine his fate, as was his undoubted right to do so. He spent the weeks before the House opened shoring up support from the Progressives by incorporating some of their demands in the government’s legislative programme and on occasion by including them in Cabinet committee meetings. The protectionist Meighen could hardly win at this game. And for several months he was unable to topple King’s government on a vote of no confidence.

King might have managed to stay in office for a good amount of time if it had not been for a scandal in the Customs Department under investigation by a special committee of the House. When the committee reported the malodorous evidence back to the House, the Conservatives moved to censure the entire Cabinet. King got an adjournment of the House before it could vote on the censure motion, and then asked Governor General Byng to dissolve Parliament in preparation for a general election. Eight months had passed since the election the previous October. Byng refused his request, and King promptly resigned. Byng then asked Meighen to form a government, which he attempted to do—unsuccessfully. It lasted three days. As a result, Meighen sought and received a dissolution from Byng, and the general election was set for September. The election was a triumph for King, for whom

the constitutional issue was the key talking point. Indeed, some say it was the main reason for the win.[27]

Was Byng wrong to refuse King's request for dissolution? As might be imagined, some say no and some say yes. The constitutional expert Eugene Forsey, warning against the prospect of a 'diet of dissolutions,' said that a Governor could refuse a dissolution requested too soon after the election, or before the legislature could meet to determine the government's fate, or in the event of the government's defeat as soon as the legislature has met.[28] But this case does not fall nicely within such parameters. They never do. King had met the House and had not been defeated for several months—in fact, his government was never defeated—and eight months is not a short time. The problem, of course, was an unforeseen one, namely, King's decision to resign office forthwith once his request for dissolution was turned down. By resigning office to avoid the censure vote, he left Byng in the lurch, that is, without a Prime Minister and Cabinet in place. Byng had no choice but to ask Meighen to form a government.

What was King's alternative course of action to resigning forthwith? Obviously, it was to offer his resignation to Byng, who might have refused that too, thereby putting pressure on King to carry on towards the dreaded vote of censure. If King had flounced off at that point, determined to escape the vote, the optics of the decision would have looked terrible. On the other hand, if Byng had accepted an offer of resignation from King, the resulting scenario involving Meighen likely would have played out as before, with this difference—Byng would have appeared in a stronger light. Why? Because an offer of resignation from King would have implied some responsibility for the messy state of his (p. 141) government. The resignation forthwith sent off quite a different message by suggesting instead that it was Byng who was following the wrong course of action.

What was Byng's alternative course of action to the refusal of the dissolution request? Obviously it was to accede to it, thereby triggering a fresh election. Certainly that would have been the easier option. Moreover, from a political standpoint, it would have deprived King of the constitutional issue that he used to good effect in the campaign. And it would have ensured the prominence of the hanging censure vote instead. In other words, there might have been a different election result. A zero-sum game indeed.

Despite the development of Canada's multi-party system, which really got underway in the election of 1935, and the ensuing occasions of minority government since then, nothing approaching the Byng-King affair has ever recurred. But it could. Meanwhile, seemingly out of nowhere there erupted the prorogation imbroglio of 2008. Prorogation is a procedure under which the current session of the legislature is suspended, with no carry over to the next session. In other words, the next session begins afresh. By contrast, under adjournment, the legislative session is halted for a specified period, after which it is simply resumed.

In the wake of the general election in January 2006, the Conservative Party under the leadership of Stephen Harper formed a minority government, winning 127 out of a total of 308 seats. Some two-and-a-half years later, Harper sought and received from Governor General Michaëlle Jean dissolution of Parliament, and set an election date for October 14. He urged Canadian voters to give him a stronger mandate to govern the country during a period now referred to as the 'global economic crisis'. They declined. The Conservatives won 143 seats, still short of a majority; the Liberals under their new leader, Stephane Dion, sank to 77 seats from the 103 held going into the election; the New Democratic Party (NDP) under leader Jack Layton moved from 29 to 37; and the Bloc Québécois under Gilles Duceppe slipped slightly from 51 to 49. Shortly after the election, Dion confirmed his lame-

duck leadership status by announcing that the Liberals would choose a new leader to succeed him the following May.

In light of the worsening economic situation, the government talked about the need of parliamentarians to set aside the bitter partisan differences on display during the campaign and work together to secure the stability of the economy. In the Speech from the Throne it incorporated some of the ideas of the opposition parties set out in the campaign. As a result of these blandishments, the Liberals (although not the NDP or the Bloc) decided to support the Speech from the Throne, thereby enabling the government to meet this critical test of the confidence of the House of Commons. Fresh from the triumph, the government then turned roundly on its opponents in the upcoming 'economic and fiscal update' to be delivered in November.

Such documents are like a mid-term economic report card. This one contained several provocative proposals to draw the ire of the opposition, among them the elimination of the subsidies awarded to the political parties for each vote received in the election.[29] (p. 142) Elimination of the subsidies—unpopular with the public—was a real blow to the opposition parties, none of which could match the Conservatives' prowess at fundraising from supporters. They were bound to feel the pinch in the next election. In the event, at the beginning of December the three opposition parties reached a formal agreement to establish a Liberal-led coalition government, supported by the Bloc, that would govern until June 2011. They notified the Governor General that they had no confidence in the Conservative government and were prepared to govern in its place.[30]

For its part, the government signaled its intention to pursue a prorogation gambit by convincing the Governor General to prorogue Parliament until January, thereby putting off the need to face a confidence vote that it would almost certainly lose.[31] The public war of words that ensued are instructive in demonstrating how partisans interpret the conventions of the Constitution to suit their purposes. On behalf of the coalition, Dion explained that under Canada's parliamentary system the government needs to be sustained by majority support in the House of Commons, without which it simply cannot govern. The Harper government could not claim such support. As the last election was hardly two months ago, and the coalition was prepared to govern, the Governor General should have refused any prorogation request, and called on the coalition to establish a new government. Dion's was the classic understanding of the conventions of the Westminster-style parliamentary system.

The Prime Minister essayed a different, indeed novel, understanding of the system by removing from it the centrality of the House of Commons in choosing to support—or not support—a government. He did so first by questioning the legitimacy of the very idea of a coalition government, and especially one supported by the Bloc, a party devoted to the cause of Quebec sovereignty. Second, and more important, he made the claim that Canadians needed to vote on whether they wanted a coalition government. In his interpretation, the opposition parties were foisting a coalition government on Canadians rather than offering to establish a viable government supported by a majority of elected members of the House.[32]

Whether Harper used these same arguments in his conversation with Governor General Jean cannot be known, as such meetings are private affairs. In the event, he advised prorogation and she accepted his advice. As a result, and from the standpoint of the zero-sum game, the Harper Conservatives were spectacular winners. By contrast, the prorogation crisis was a debacle for Dion. Michael Ignatieff, a Liberal leadership aspirant with the support of most of the party's MPs, demanded that the caucus be allowed to elect him interim leader, which decision would be reviewed at the convention in May. The party executive agreed, and Dion's leadership was finished immediately. When Parliament reopened in late January, the Liberals under Ignatieff supported the government's Speech from the Throne, while only the NDP and Bloc voted against it. (p. 143) The government

remained in office, eventually calling an election for May 2011, at which outing it finally won the majority that had eluded it in 2006 and 2008.

## 5. The Crown and Canadian Federalism: Lieutenant-Governors

In the section on Canada's development from colony to independent nation as viewed from the standpoint of the Crown, reference was made to the notion of a 'compound monarchy'[33] that bridges the seeming inconsistency between the unity represented by the monarchical principle and the diversity represented by the federal principle. It has to be said that this notion is a rationalization after the fact. Why? Because the terms of the *Constitution Act, 1867* reveal a system of government, the key feature of which is a dominant central government. Put another way, the bare words of the Constitution are a little light on the federal principle.

The dominance of the federal government is mirrored in the way in which the Lieutenant-Governor is appointed, that is, by the Governor General on the advice of the Prime Minister. The Fathers of Confederation used this model to designate an executive hierarchy in which the Governor General was dominant over the Lieutenant-Governors just as the federal government was dominant over the provincial governments. Indeed, some have argued that the Lieutenant-Governors were intended to be agents of the federal government tasked with the duty to ensure that provincial legislative actions aligned with federal interests. As long as this scheme prevailed, there was no need for the notion of a compound monarchy. But would it prevail?

The answer is no. Instead, Canada evolved towards a robust federal system in which the provinces could pursue their own constitutionally-designated areas of jurisdiction, independent of Ottawa. Among the reasons, one of the most interesting is the effect of judicial rulings on the status of the Lieutenant-Governors, and through them the status of the provinces, rulings that were bound up with conceptions about the role of the Crown and the nature of prerogative power. In these rulings, the judiciary adapted the Crown, a unitary institution if ever there was one, to the binary nature of the federal system.

The view of the provincial governments as inferior to the central government was not only articulated by many in the Confederation debates. It was also the view of the Canadian and British governments in the years following Confederation. The central government, it was understood, commanded the broad, important areas of legislative jurisdiction whereas the provincial governments were local entities with jurisdiction over merely local matters. This same hierarchy was thought to be reflected on the executive side in the relationship between the Governor General and the Lieutenant-Governors. Under the Constitution, the Governor General rather than the Queen (p. 144) appoints the Lieutenant-Governors; the Queen is expressly declared to be part of the central government but not the provincial governments, and although the Governor General assents to legislation in the Queen's name, the Lieutenant-Governors were expected to do so in the name of the Governor General. Essentially they were held to be officers of the central government who could be expected to exert influence on the latter's behalf in provincial circles rather than being direct representatives of the Queen, and independent of such orders.

On the other hand, as Saywell points out, there were contrary indicators of a different status. Lieutenant-Governors made appointments in the Queen's name, and they were also empowered to exercise the prerogative powers to summon, prorogue, and dissolve the legislature.[34] The inconsistency between the architecture of the Constitution and the practice in the provinces sparked a legal battle that lasted 25 years between the provincial governments on the one hand, and Ottawa and the British authorities on the other. It covered contested incidents of prerogative power in the hands (or not) of the Lieutenant-Governors, such as the appointment of Queen's Counsel, the use of the pardoning power for provincial offenses, and the prerogative right of escheats and forfeitures. Led by Oliver

Mowat, Liberal Premier of Ontario, the provincial governments fought in the courts to secure these prerogative rights and powers for the Lieutenant-Governor.

However arcane such matters might sound to modern ears, it must be understood that they were a proxy for much larger issues. A successful result in the courts would directly benefit the Premier and the Cabinet, the chief advisers of the Lieutenant-Governor. More important, it would enhance the status of the provinces as well, thereby affecting which interpretation of the governmental system established at Confederation would prevail: the centralist version according to which the provinces are subordinate to the central government, or the federal version (often referred to as the provincial-rights version) according to which the provinces are the equals of the central government in the sense of being independent actors within their own established spheres of jurisdiction. Mowat himself was an advocate of provincial rights who often tilted against his chief adversary, the centralist-leaning John A. Macdonald, Conservative Prime Minister of Canada. Theirs was a political rivalry that dominated the early years of Confederation. In the event, it was Mowat's view of the role of the provinces that triumphed in the famous *Maritime Bank* decision handed down in 1892 by the Judicial Committee of the Privy Council (JCPC).

At issue in the case was whether Maritime Bank's debt to New Brunswick was a debt of the Crown. If it was, then the province could claim payment before any other creditors. Writing for the JCPC, Lord Watson said that it was a debt of the Crown because the Lieutenant-Governor is the representative of the Queen for the purposes of the provincial government. The fact that the Governor General rather than the Queen appoints the Lieutenant-Governor does not, he said, undermine the point. 'The act of the Governor (p. 145) general and his Council in making the appointment is', he reasoned, 'within the meaning of the statute [then the British North America Act, 1867], the act of the Crown; and a lieutenant governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the governor general himself is for all purposes of Dominion government'.[35]

Lord Watson clearly spelled out the inferences to be drawn from the idea that the Lieutenant-Governor represents the Crown for the purposes of the provincial government. The provincial legislature of New Brunswick, he wrote, derives no authority from Ottawa; it is not subordinate to Ottawa in the way that municipalities are subordinate to the provinces because they are the creatures of the provinces under the terms of the Constitution. Instead, he explained, New Brunswick 'possesses powers, not of administration merely, but of legislation, in the strictest sense of that word; and, within the limits assigned by sect. 92 of the Act of 1867, these powers are exclusive and supreme'.[36] In other words, so long as they remain within the spheres of jurisdiction assigned to them in the Constitution, the provinces are independent, autonomous actors. In conceiving of the Lieutenant-Governor as representative of the Crown for provincial purposes, the JCPC in effect placed the judicial seal of approval on Mowat's theory of provincial rights. The governmental system established at Confederation could no longer be viewed in hierarchical terms. Instead, it was a real federation.

On the whole, the Lieutenant-Governors have demonstrated a more lively appreciation of their constitutional powers than the Governor General. For example, no Governor General has ever dismissed a Prime Minister; by contrast, Lieutenant-Governors have dismissed provincial Premiers five times, the last in 1903.[37] And apparently discussions have materialised since then. In 1991, British Columbia Premier Bill Vander Zalm (in office from 1986 to 1991) resigned immediately following an investigation that found him in a 'conflict of interest between his public duties and his private interests'.[38] The Lieutenant-Governor at the time, David Lam, told a newspaper reporter for the *South China News* that he contemplated using his powers to dismiss the Premier had he not resigned of his own accord.[39] If nothing else, events such as these serve as a reminder that the role of the Crown is not merely symbolic. It is an institutional safeguard of the country's parliamentary

democracy. It is worth restating that the Crown is the ‘organizing principle of Canadian government’.[40]

## (p. 146) 6. Conclusion

Thomas Paine opined that ‘[a]ll hereditary government is in its nature tyranny’.[41] Few Canadians are as captivated by the kind of revolutionary ardor that animated him. Nevertheless, it is legitimate to ask whether monarchies in the twenty-first century are anachronistic, and whether republicanism in Canada is conceivable. We conclude our chapter with a cursory discussion about possible obstacles to establishing a republic should Canadians ever consider that route. By ‘republicanism’, we simply mean a form of government without a monarch. We do not engage in lengthy analyses of republican *theoretical* paradigms.

### A. A Republican Future for Canada?

Debates about the relevance of monarchy wax and wane in Canada but, in the wake of Queen Elizabeth II’s ninetieth birthday, the institution’s fate is suddenly pertinent once again. A recent Angus Reid Institute survey shows that Canadians maintain a strong sense of respect for the current monarch (close to 70 percent), but Prince Charles, her direct heir, does not enjoy that same level of esteem (a little over 20 percent), and neither does his son Prince William (close to 50 percent); the survey also shows that only 42 percent of Canadians are in favour of retaining the monarchy in the future.[42]

Monarchy has proven to be astonishingly resilient not necessarily thanks to Burkean attachments to tradition but because, once entrenched, replacing the monarch proves to be an arduous task. Why is this so? The transformation from constitutional monarchy to republic is not simply a matter of substituting a president for a Governor General, elected or appointed. Rather, when the prospect of a republic is considered, a flurry of frequent and recurring questions begins to emerge: What role would a Canadian president have? How would a president be elevated to office—election or appointment? How will other parliamentary institutions be affected by the transition? What would become of constitutional conventions? Would they have to be codified under a republic? And what of the reserve powers currently in the hands of the Crown? If these questions are not enough, in addition there are three dreaded words in Canadian politics: ‘opening the constitution’. Memories of the repatriation struggles (1982), the failed *Meech Lake Accord* (1987), and the equally unsuccessful *Charlottetown Accord* (1992) live indelibly in the minds of Canadians, to say nothing of the politicians. Constitutional changes of great magnitude—such as abolishing the monarchy—would require the application of (p. 147) the most stringent amending formula available: unanimous consent of Parliament and the provincial legislatures. Moreover, once the Constitution is ‘opened’, there is always the possibility of political opportunism in the form of the provinces, say, looking for concessions in return for their agreement. Speaking of the provinces, they themselves would have to contend with the disappearance of Lieutenant-Governors and the associated ramifications. This is particularly important because Canadian provinces do not even have upper chambers of ‘sober second thought’. So, even with the protections granted by the Charter of Rights and Freedoms, powers to ‘check’ the Executive, in absence of the Crown, must be pondered carefully.

Consider also Indigenous peoples who might be justifiably circumspect about any changes to the role of the monarch. A constitutional change of this nature might arguably trigger a duty to consult, so Indigenous peoples would have to be part of the conversation. Treaties were signed with the Crown; thus Indigenous peoples will want to safeguard their relationship with it until they are satisfied with the new arrangements. None of this is to

suggest that the transition from constitutional monarchy to republic is impossible—only that it is much more difficult than many suspect. Australia offers a cautionary tale.

The Honourable Justice Michael Kirby (High Court of Australia) isolated ‘ten possible reasons’ that the referendum held there to decide whether the country should move to a republican system failed the test of popular opinion.[43] Of particular interest is the following:

> The opinion polls indicate that 70% of Australians insist that if Australia is to move to a republic, the President should be directly elected. This is said to be in harmony with Australia’s basic democratic traditions. Yet if such a change to the Constitution were made, the office would be fundamentally different from any in our present system.[44]

These are matters of great concern in a Canadian context as well. The (Australian) Republican Advisory Committee explored four possible avenues for replacing the Crown with a new head of state: one option was direct election by the people; three additional options examined methods for the head of state’s *appointment*—prime ministerial, parliamentary, and by an electoral college.[45] With these options in mind, Canadians might call for the direct election of a head of state. Appointments could proceed as they do currently, but it is specious to suggest that, once the Constitution is ‘opened’, Canadians would settle for yet another appointed office.

So, if we set aside the need to determine term duration, and qualification and removal criteria, what would be the implications of directly-elected presidents in terms of (p. 148) their status and powers vis-à-vis an already powerful head of government, the Prime Minister?[46] One logical suggestion is to codify presidential powers. This presents more problems because codification would impact the prerogative and reserve powers that are now the Crown’s right. The whole point of *discretionary* power is to offer flexible means of preventing a strong executive from running roughshod over the Constitution and responsible government. If these powers are codified, even with the *Charter of Rights and Freedoms* in place, will their scope be broad enough to ensure that a Prime Minister bent on defiance can be restrained?

The monarchy, in many ways, is the only remaining trace of Canada’s colonial attachments, and when the time is right, Canadians may well contemplate taking the last remaining step toward *true* independence. Let us recall the Fathers of Confederation had two reasons to keep monarchical ties: national identity and the assurance of a permanent (non-partisan) caretaker of responsible government. The first task has been largely accomplished by the passage of time and the establishment of the *Charter of Rights and Freedoms*. The second presents problems akin to wading through formidable labyrinths in the dark. But difficulty should not indicate impossibility.

The last time changes to the office of the Governor General were discussed seriously was in 1978. Pierre Elliott Trudeau’s government proposed Bill C-60 which contained reforms to the Senate, the Supreme Court, and the role of Governors General. These proposals were heavily criticized and led to charges of Trudeau’s supposed anti-monarchical sentiments. He stated: ‘If I were an anti-monarchist, I should leave the post alone and let it become obsolescent, let the Governor-General do nothing but attend Boy Scout rallies’.[47] When the Crown comes to appear ‘obsolescent’ to a significant majority of Canadians, they can only hope that diligent students of Canadian government have found the answers to the questions about the transition to republicanism that we have posed.

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## Footnotes:

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**1** The Canadian Crown is distinct and independent from the British Crown since the passing of the *Statute of Westminster* (1931) which will be discussed later in this chapter. Queen Elizabeth II officially became *Queen of Canada* with the *Royal Style and Titles Act, 1953*.

**2** Philippe Lagassé. ‘Citizenship and the Hollowed Canadian Crown’. *Policy Options*, accessed 1 May 2016. http://policyoptions.irpp.org/2015/03/02/citizenship-and-the-hollowed-canadian-crown/ (para 4–5). Retrieved 11 January 2017.

**3** David E. Smith. *The Invisible Crown: The First Principle of Canadian Government* (University of Toronto Press, 1995: 5 & 11.

**4** ‘Here sit the representatives of the British population claiming justice—only justice; and here sit the representatives of the French population, discussing in the French tongue whether we shall have it. One hundred years have passed away since the conquest of Quebec, but here sit the children of the victor and of the vanquished, all avowing hearty attachment to the British crown—all earnestly debating how we shall best extend the blessings of British institutions—how a great people may be established on this continent in close and hearty connection with Great Britain’. George Brown, Legislative Assembly, 8 February 1865 (in J. Ajzenstat, P. Romney, I. Gentles & W.D. Gardner, *Canada’s Founding Debates* (Stoddard, 1999: 15).

**5** ‘We thereby strengthen the central parliament and make the Confederation one people and one government, instead of five peoples and five governments, with merely a point of authority connecting us to a limited and insufficient extent’. Sir John A. Macdonald, Legislative Assembly, 6 February 1865 (in Ajzenstat, ibid, 284).

**6** Janet Ajzenstat. *The Canadian Founding: John Locke and Parliament* (McGill-Queen’s University Press, 2007), 11 & 81.

**7** Ibid, 81.

**8** Benjamin Shingler. ‘Charter and Universal Health Care Top Canadian Unity Poll’. *Global News*. http://globalnews.ca/news/1424367/charter-universal-health-care-top-canadian-unity-poll/. Retrieved 16 February 2016.

**9** Karen Pauls. ‘Royal Family Support by Canadians Waning’. *Canadian Broadcasting Corporation (CBC).* http://www.cbc.ca/news/canada/manitoba/royal-family-support-by-canadians-waning-poll-indicates-1.3072469. Retrieved 16 February 2016.

**10** A full list can be found at https://www.gg.ca/document.aspx?id=5&lan=eng. Retrieved 2 January 2017.

**11** One can become Companion of the Order (for national or international service and accomplishments), Officer of the Order (for national service and accomplishments), and Member of the Order (for local, regional, or field-specific service and accomplishments). Full descriptions can be found at https://www.gg.ca/document.aspx?id=14940&lan=eng. Retrieved 2 January 2017.

**12** The Victoria Cross honours qualities of bravery and duty. See C. McCreery, ‘The Crown and Honours: Getting It Right’ in Jennifer Smith & D. Michael Jackson (eds.) *The Evolving Canadian Crown* (McGill-Queen’s University Press, 2012), pp. 139–154.

**13** Smith, above (n 3) 5 & 11.

**14** The *Constitution Act, 1867* in section 91 (24) assigns jurisdiction to the federal government for ‘Indians and lands reserved for Indians’. Jurisdiction over ‘status Indians’ and protection of their reserve lands continues under the *Indian Act* (1876) while section 35 of the *Constitution Act, 1982* reaffirms Indigenous rights. The *Charter of Rights and Freedoms* (section 25) guarantees that Aboriginal rights will not be diminished by its enforcement and, significantly, makes mention of the *Royal Proclamation 1763.*

**15** Smith, above (n 3) 156.

**16** Ibid, 8.

**17** Ibid, 11 & 156–173.

**18** Disallowance has been used a total of 112 times; the last time was in 1943 to disallow a statute in Alberta prohibiting the sale of land to Hutterites. The powers of reservation were exercised 70 times with the last time being in Saskatchewan in 1961 in relation to mining contracts. The bill in question ultimately received Royal Assent.

**19** Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law & Politics*, 2nd ed. (Oxford University Press (Canada), 2014), 71.

**20** Robert MacGregor Dawson, *The Government of Canada,* 3rd ed. revised (University of Toronto Press, 1954), 174.

**21** Ibid, 53.

**22** Ibid, 58.

**23** Ibid, 60, 166–173.

**24** McCreery, above (n 12) 34–37.

**25** Heard, above (n 18), 5–6.

**26** J. Murray Beck, *Pendulum of Power* (Prentice-Hall, 1968), 174–175.

**27** Ibid, 177–189.

**28** Eugene A. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (Oxford University Press, 1943), 262.

**29** Michael Valpy, ‘The “Crisis”: A Narrative’ in Peter H. Russell and Lorne Sossin (eds.) *Parliamentary Democracy in Crisis* (University of Toronto Press, 2009), 9–10.

**30** Ibid, 11–13.

**31** Ibid, 13–16.

**32** Jennifer Smith, ‘Parliamentary Democracy versus Faux Populist Democracy’ in Russell and Sossin, above (n 28) 175–188.

**33** Smith, above (n 3) 11 & 156–173.

**34** John T. Saywell, *The Office of Lieutenant-Governor* (University of Toronto Press, 1957), 8–11.

**35** J.M. Beck, ed., *The Shaping of Canadian Federalism: Central Authority or Provincial Right* (Copp Clark Publishing Company, 1971), 96.

**36** Ibid, 95.

**37** Ronald I. Cheffins. “The Royal Prerogative and the Office of Lieutenant Governor’ (2000) 23 *Canadian Parliamentary Review* 17.

**38** Ibid.

**39** Ibid. Notably, Cheffins maintains that during this interview, Lam was simply explaining the powers at the Lieutenant-Governor’s disposition and that using them would have been theoretically legitimate.

**40** Smith, above (n 3) 11.

**41** Thomas Paine. *Common Sense and Selected Works of Thomas Paine*. (Canterbury Classics/Baker & Taylor Publishing Group, 2014), 191.

**42** Nicole Thompson. ‘Canadians Like the Queen but Her Heir Not So Much Survey Says’. *The Globe and Mail*, http://www.theglobeandmail.com/news/national/canadians-like-the-queen-but-her-heir-not-so-much-surveysays/article29658118/, accessed 25 April 2016.

**43** Michael Kirby, ‘The Australian Republican Referendum 1999—Ten Lessons’. Law and Justice Foundation, para 49, http://www.lawfoundation.net.au/ljf/app/&id=DF4206863AE3C52DCA2571A30082B3D5, accessed 26 April, 2016.

**44** Ibid, para 79.

**45** Ibid, para 28.

**46** This particular conundrum appears consistently throughout the literature—both Canadian and Australian—when discussing the possible transition from constitutional monarchy to republicanism. It surfaced during the Australian experience as evidenced in Kirby’s work (Ibid, para 78).

**47** Sarah Schmidt. ‘Monarchists Get a Rival in New Republican Movement’, *The National Post*, 11 April 2002, http://www.canadian-republic.ca/national_post_4_11_02.html, para 16.