The Royal Prerogative and the Office of Lieutenant Governor

by Hon. Ronald I. Cheffins

The primary role of the Lieutenant Governor is to represent the Queen of Canada within the context of the provincial political system. In the early days of Confederation, the Lieutenant Governor was seen more as a federal officer helping to protect federal interests within the provincial context than as a representative of the monarchy. This issue is now resolved, as the result of decisions by the courts and the flow of historical events. This article looks at the relevance of the royal prerogative to the office of Lieutenant Governor.

The preamble to the *British North America Act, 1867*, since renamed the *Constitution Act 1867* was remarkably brief. The essence of its philosophical and political thrust is contained in the first paragraph:

> Whereas the provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one dominion under the crown of the United Kingdom of Great Britain and Ireland with a constitution similar in principle to that of the United Kingdom...

The three conceptual ideas advanced here were federalism, the monarchy, and a constitution similar to that of the United Kingdom which involves the whole concept of responsible government.

The other particularly significant legal provision with respect to the Crown is contained in section 9 of the *Constitution Act 1867* which says "the executive government and authority of and over Canada is hereby declared to continue and be vested in the Queen." This statute, however, goes on to make it quite clear that the monarchy's major functions are largely to be exercised at the federal level by the Governor General and at the provincial level by the Lieutenant Governors.

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Office of Governor General

The office of Governor General is created not by statute but by virtue of the royal prerogative. In fact the powers of the office of Governor General derive from two sources: first, those powers defined in the *Constitution Act 1867*; and the prerogative powers of the Crown delegated to the Governor General by the monarch.

The classic definition of the royal prerogative was offered by one of Britain's greatest constitutional scholars, Professor A.V. Dicey, who defined it as "the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown."

In the *Letters Patent of 1947*, the then monarch King George VI, delegated to the Governor General the entire prerogative powers of the Crown at the federal level. These powers are of vital importance in the Canadian constitutional system, as they include such important matters as:

- the appointment of the prime minister and cabinet ministers;
- the appointment of ambassadors;
- the summoning, proroguing, and dissolution of parliament;

- the declaration of war; and
- the signing of treaties.

This gives some indication of the very significant legal powers still exercised within our constitutional system, which are based on the authority derived from the royal prerogative.

The remainder of the Governor General's powers come from the *Constitution Act 1867* and these include the power to appoint senators (as provided for in s. 24); the Speaker of the Senate (s. 34); and Superior, District and County Court judges (s. 96). This list is not intended to be exhaustive, but is merely illustrative of some of the statutory powers vested in the office of Governor General.

The major source of authority for first ministers at both the federal and provincial level rests with their capacity to advise the Governor General and the Lieutenant Governors in the exercise of their legal authority. It was Professor Dicey who developed the concept of the "conventions" of the constitution; that is to say that legal power is exercised by one authority, but that authority only uses its powers on the advice of the appropriate First Minister.

The most important convention which also illustrates the importance of the royal prerogative, is the fact that the Governor General, acting in the name of Her Majesty, asks to form a government a member of the House of Commons who can command the support of a majority of the members of that House, and who remains in office as long as he or she can command that legislative support. Most Canadians are probably unaware of the fact that the only rebellions staged in Canada prior to Confederation were in 1837 in the provinces of Upper and Lower Canada, pursuant to demands for the establishment of responsible government which is the cornerstone of our present political system.

The office of Governor General has been remarkably free of political controversy with there being only two examples of Governor Generals refusing to take the advice of the first minister. The first was when Lord Aberdeen refused to make appointments to the Senate and the courts recommended by Prime Minister Tupper, after the defeat of his Conservative government in the election of 1896. This refusal passed with very little debate as it was generally accepted there was very little political legitimacy in a defeated government advancing such important recommendations to the Governor General. The much more controversial incident was the refusal by Lord Byng to grant dissolution to Prime Minister Mackenzie King in 1926 which I will refer to later.[1]

Office of Lieutenant Governor

Let us now look at the office of Lieutenant Governor and in particular, the significance of the royal prerogative in relation to that office. It is important to underline the fact that Lieutenant Governors are regarded as so important in our constitutional system, that they are accorded a privilege of special significance in terms of amending the constitution of Canada. Section 41 of the *Constitution Act 1982* provides that the office of the Queen, the Governor General, and the Lieutenant Governor of a province can only be amended through a resolution of the Senate and House of Commons and of the legislative assembly of each province.

Only five matters in the constitution of Canada are given the protection of the unanimity requirement. This has the effect of making experimentation within the confines of our cabinet parliamentary system virtually impossible, as the courts have clearly indicated the term "office" not only includes those office holders, but also the powers vested in those various office holders.

> ***Historically the office of Lieutenant Governor was much less clearly defined than was the office of Governor General.***

The original debate really centred around the question of whether the Lieutenant Governor was primarily a representative of the Crown or whether the primary function of this office was to be a federal officer representing federal interests at the provincial level. It is my view that when Canada was created, central Canada largely viewed the embryonic nation as the replication of the colonial structure within the British empire, transferred to Canada. Ottawa saw itself in the same relationship to the provinces as London was in relationship to the far flung colonies of the empire.

Originally, Lieutenant Governors were seen to be representatives of federal interests and given extensive authority to represent those federal interests. For example, Lieutenant Governors were always given instructions as to what federal interests were to be protected. The authority to carry out these federal wishes was very substantial. It involved the power to assent to a bill, withhold assent, or reserve the bill for the signification of the Governor General's pleasure.

Ottawa vested in itself an equally important power, namely that of disallowance. Disallowance permitted Ottawa to in effect veto any provincial legislation that it did not think appropriate. When one puts together the power of reservation vested in Lieutenant Governors to

refuse assent to bills or reserve bills for Ottawa's consideration, and the even more crude exercise of authority by Ottawa being able to disallow provincial legislation of which it disapproved, one can understand my view that Canada in its original formation had a kind of neo-colonial quality to its governmental structure.

The power of disallowance has been exercised on 112 occasions, and the power of reservation by Lieutenant Governors has been used on 70 occasions. It is however imperative to note that these very significant powers have fallen into disuse with the last disallowance taking place in 1932 and the last reservation in 1961 in the province of Saskatchewan. The reservation of 1961 was viewed by many with very considerable surprise, as the last reservation prior to that date occurred in 1937.[2] Nevertheless, these very important powers still remain within our constitutional structure and in 1938, the Supreme Court of Canada held that even though a power has not been used for a very long time, it does not mean that it is no longer legal authority. The failure to use a power does not negate the potential of using that power in the future. The power of reservation illustrates the proposition that the Lieutenant Governors were looked upon as federal officers sent (particularly to the far flung provinces of the west) to promote the role of federal interests. No one today would argue that the Lieutenant Governor is in any way a federal officer whose role is to protect federal interests.

The legal role of the Lieutenant Governor began to be clarified with an 1892 decision of the Judicial Committee of the Privy Council in the case of *The Liquidators of the Maritime Bank of Canada* v. *The Receiver General of New Brunswick*. The government of New Brunswick had deposited a substantial sum of money in the Maritime Bank. The bank went into bankruptcy which invariably raised the question of debtor-creditor priorities, that is to say, out of a limited pool of funds, who can collect on their debt first. The government of New Brunswick argued that the Lieutenant Governor was the representative of the monarch and possessed all of the prerogative powers of the Crown. This meant that the government of New Brunswick could use Crown prerogative as a basis for claiming priority over other creditors seeking to recover funds from the liquidators of the Maritime Bank. The federal government in its arguments before the Judicial Committee of the Privy Council:

> maintained that the effect of the statute has been to sever all connection between the crown and the provinces to make the government of the Dominion the only government of Her Majesty in North America and to reduce the provinces to the rank of independent municipal institutions.[3]

The Judicial Committee totally rejected this idea and denied that the provinces were in any way in a subordinate position with respect to the federal government. Lord Watson said

> "it [the province] derives no authority from the government of Canada and its status is in no way analogous to that of a municipal institution..."

The effect of this judgment was to hold that the Lieutenant Governor was in all respects the representative of Her Majesty and had all the prerogative powers of the Crown. These include very important prerogatives such as: priority in the payment of debt in the case of liquidation or bankruptcy and the right to own all un-owned personal and real property. This means that all un-owned land belongs to the Crown in right of the province. For example, in British Columbia, approximately 90% of the province is owned by Her Majesty in right of the province, thus clearly indicating the significance of this decision. It often comes as a surprise to people that when crown land is transferred, the grant refers to Her Majesty Queen Elizabeth II.

The decision in *Maritime Bank* was also significant in that it elevated the provincial executive to the same rank as the Governor General at the federal level. It was one of a number of decisions of the Judicial Committee of the Privy Council which established that the provinces were in all respects autonomous within their jurisdiction. It formed an excellent parallel case to the decision of the Judicial Committee of the Privy Council in *Hodge* v. *The Queen* which held that the provincial legislatures were, within their legislative jurisdictions, supreme and in no sense subordinate to either the British parliament or the federal parliament. The *Maritime Bank* case thus meant that the Lieutenant Governor possessed all of the prerogative powers, such as: the appointment of a premier and cabinet ministers, and the summoning, proroguing, and dissolving of the provincial legislature. The decision was important therefore not only in terms of the power it vested in the office of Lieutenant Governor, but for the symbolic elevation of the provincial executive to an equal and coordinate position with that of the federal executive.

Another very significant decision relating to the office of Lieutenant Governor is *the Initiative and Referendum Act*. In this case the legislature of Manitoba enacted legislation which provided for the passage of legislation via referendum rather than enactment by the legislature of the province. The Judicial Committee in a very strong judgment held that this was unconstitutional on the ground that it did not require royal assent and accordingly was an amendment to the office of Lieutenant Governor and thus in conflict with s. 92(1) of the *Constitution*

Act 1867. This highlights another legal indication of the special position enjoyed by the office of Lieutenant Governor in our constitutional structure in that prior to 1982 the province could under s. 92(1) amend its own constitution with the exception of the office of Lieutenant Governor and after 1982 the office of Lieutenant Governor was protected from provincial change by s. 45 of the *Constitution Act 1982*. Thus not only is the office of Lieutenant Governor protected from change, other than change unanimously agreed to by all governments, it is also protected from provincial constitutional initiatives.

In previous writings, I have emphasized the extent to which this protection freezes the existing cabinet model of government and this view has been supported in a relatively recent decision of the Supreme Court of Canada, *OPSEU* v. *Ontario*[4]. In other words, since the powers of the office of Lieutenant Governor are so tightly interwoven with our whole cabinet and parliamentary model, it makes any change in this model very difficult without changing the office of Lieutenant Governor. As defined in the Initiative and Referendum case, the phrase "office" not only includes the literal office, but also all of the powers connected with that office.

Dismissal of Prime Minister

Though the office of Governor General has been relatively free from controversy, historically the same cannot be said for the office of Lieutenant Governor. The provincial scenes were often more embryonic and less developed than Ottawa which quickly developed the flavour of the parliament at Westminster. While no federal prime minister in Canada has ever been dismissed by a Governor General, the same is not true at the provincial level. Five premiers have been dismissed by Lieutenant Governors. Again it must be noted, that like the power of reservation, many of the exercises of this power are rooted much more firmly in the past than in the present. The last three dismissals took place in British Columbia between 1898 and 1903, and after the second of these dismissals, the then Lieutenant Governor McInnes was dismissed by federal order in council for failing to observe the principles of responsible government.

The power of dismissal of a first minister however is one that still remains an important weapon in the arsenal of the provincial Lieutenant Governor. This is particularly dramatically illustrated in connection with the regime of Premier van der Zalm and the Lieutenant Governor in British Columbia, David Lam. Upon investigation by the Conflict Commissioner in British Columbia, Mr. van der Zalm was found to have had a conflict of interest between his public duties and his private interests. As a result of the release of the commissioner's report, Mr. van der Zalm immediately resigned.

Mr. Lam later revealed in an interview with the *South China News*, an English language Asian newspaper, that if Mr. van der Zalm had not resigned, he would have used the prerogative power of dismissal. It is apparent to me that Mr. Lam was only citing this situation as an illustration of the potential powers of the Lieutenant Governor. The thrust of the interview was mainly what a Lieutenant Governor does within the context of the Canadian political system. It is quite clear to me that never for a moment did Mr. Lam think that this illustration of potential vice-regal power would ever be reported in Canada but, I am sure much to his discomfort, this interview was picked up by the *Vancouver Sun* and given a considerable degree of prominence.

It is my view however, that Mr. Lam would have been not only within his legal powers, but within the conventional traditions of the office of Lieutenant Governor if upon refusal of Mr. van der Zalm to resign, Mr. Lam had exercised the prerogative power of dismissal. (The Lieutenant Governor of Manitoba in the early 1900s threatened then Premier Roblin with dismissal if he did not appoint an independent and fair minded commissioner to investigate the allegations of scandal with respect to the Roblin administration. As a result of this threat, an investigator was appointed, who found a taint of scandal connected with the awarding of public contracts, which ultimately lead to the premier's resignation.)

None of the above should be taken as an invitation to vice-regal representatives to dismiss first ministers, but it does remain not only a clear legal power of a Lieutenant Governor or Governor General, but also in extraordinary circumstances, in accordance with constitutional practice.

Refusal of Dissolution

There has only been one refusal of dissolution at the federal level, namely the very controversial refusal of dissolution to Prime Minister King by Lord Byng. This of course lead to the now famous King-Byng crisis of 1926 and though Dr. Forsey felt that Lord Byng was completely within the purview of constitutional correctness, nevertheless Prime Minister King probably won the public relations war in connection with this incident. Dr. Forsey's defence of Lord Byng really centres on the following propositions, namely that:

- there had been a recent election in Canada, in October of 1925 and the refusal of dissolution came in June 1926; and
- there was an alternative government capable of carrying on the governance of Canada and obtaining

the support of a majority of the members of parliament.

Following the 1925 election, the Liberals had 101 MPs and the Conservatives 116, but Prime Minister King was able to remain in office because he had the support of the Progressive Party. Prior to refusing dissolution, Lord Byng was assured by the Progressives that they were prepared to support a Conservative government led by Arthur Meighen through the period of supply. It is quite clear that without an alternative government capable of carrying on, a refusal of dissolution would be unthinkable.

At the provincial level, there have been three refusals of dissolution, but all took place in the 19th century. Lord Atlee, the Prime Minister of Great Britain from 1945 to 1951, felt that there were only two occasions when the monarch or the monarch's representatives could act on their own initiative. These were respectively in certain *special circumstances*, a refusal of dissolution or upon the sudden death or resignation of a first minister, the selection of a successor.

Appointment of Prime Minister

Undoubtedly the first and most important task of any vice-regal representative is the appointment of a Prime Minister or Premier, and following from that, on the advice of the First Minister, the appointment of cabinet ministers. The traditional constitutional position has been that upon the sudden death or resignation of a First Minister, there is no one who can give advice to a Governor General or Lieutenant Governor and thus that office holder is left on his or her own. It should be explained that the word "advice" means advice coming solely from the first minister and except in the most extraordinary circumstances, this advice must be followed. When there is no First Minister there is no one who can give "advice" that must be followed.

The traditional view is that the monarch or the monarch's representative can consult as widely as he or she wishes, both inside and outside parliament as to whom should be appointed as the new First Minister. The most dramatic illustration of this in Great Britain was upon the sudden resignation of Prime Minister Eden in 1956, Her Majesty had to choose between R.A.B. Butler and Harold Macmillan and after considerable consultation, selected Mr. Macmillan to be the Prime Minister of Great Britain. This circumstance happened four times in Canada between the period of 1892 and 1896. The first two selections were made by Lord Stanley in the personages of Abbott and Thompson and the later two appointments were made by Lord Aberdeen who selected Bowell and Tupper. Each of these choices was very difficult and the Governor Generals spent a week or two in each case consulting widely before finally making a vice-regal choice. Since 1896, there have been no sudden deaths or resignations of a federal first minister, allowing prime ministers to hold off resignation pending the selection of a new leader at a party convention.

The provincial scene in this respect has been especially interesting and a new practice has developed and is slowly becoming a convention with respect to the selection of a new premier upon the sudden death or resignation of the incumbent. Starting with the death of Premier Duplessis in late 1959, the Union Nationale caucus sent a unanimous petition to the Lieutenant Governor asking him to call upon Mr. Paul Sauvé to form a government. The Lieutenant Governor appointed Mr. Sauvé who suddenly and tragically died very shortly after his appointment, in January 1960. The caucus had had very little difficulty in selecting Mr. Sauvé because he was a person of outstanding ability and political legitimacy, but upon his death, the caucus after a good deal of tension and conflict, finally sent forward a unanimous petition with the name of Antonio Barette to the Lieutenant Governor. Following the practice in the case of Premier Sauvé, the Lieutenant Governor appointed Mr. Barette as the new premier of Quebec. His regime was short-lived because in the provincial election of 1960, the electorate returned to power, Premier Jean Lesage, the leader of the Liberal Party.

In 1966 the Liberal Party was defeated and Premier Daniel Johnson lead the Union Nationale Party to a surprise victory in one of those interesting Canadian situations where the party that won received less votes than the party it defeated. In 1968, Premier Johnson was suddenly struck ill and died and following the practice noted earlier, the Union Nationale caucus sent to the Lieutenant Governor, the name of Jean Jacques Bertrand, who was duly appointed the First Minister of Quebec.

As the foregoing examples indicate, the practice of the caucus forwarding a name to the Lieutenant Governor had occurred primarily in Quebec. This was suddenly to change however when in April of 1991, Premier van der Zalm suddenly resigned. The decision was taken by the caucus of the Social Credit Party that it would conduct a formal election and would send the name of the winner to the Lieutenant Governor for appointment as First Minister. The final ballot was a contest between Rita Johnston and Russ Fraser, with Mrs. Johnston being the winner. It is interesting to note that the caucus actually reported to the press, the result of the final vote. The caucus chair then took Mrs. Johnston's name to the Lieutenant Governor, and she was duly appointed as First Minister by him, in the exercise of the traditional pre-

rogative power of the Queen's representative in British Columbia.

It was accordingly intriguing for me to read a three or four line story in the *Globe and Mail* indicating that upon the sudden resignation of Premier McKenna in 1997, the caucus had indicated to the Lieutenant Governor of New Brunswick, that they would be pleased if he would call upon Mr. Frenette to form a government and be appointed Premier of that province. The press report was as indicated very brief and it is unclear exactly how the wishes of the caucus were conveyed to the Lieutenant Governor. The only other information of note is that Mr. Frenette indicated to the caucus that he did not wish to stand as the long term leader of the Liberal Party, but would be prepared to serve as Premier until such time as the Liberal Party had selected a successor to Mr. McKenna.

The final precedent sees the political spot light return to the province of British Columbia. After it was revealed by the Attorney General of British Columbia that the Premier, Glen Clark, was under police investigation, he immediately resigned in August of 1999. Very shortly after this announcement, the caucus of the New Democratic Party revealed to the press that they would be forwarding to the Lieutenant Governor, the name of Dan Miller, to serve as Premier of the province. Mr. Miller like Mr. Frenette had indicated to his caucus that he would only serve as Premier of British Columbia until such time as the New Democratic Party of British Columbia had selected a new leader at their convention. Mr. Miller was appointed by the Lieutenant Governor of British Columbia as Premier, and he has indicated he will continue in this post until the New Democratic Party selects a new leader who will then be called upon by the Lieutenant Governor to form a government.

Since there has not been a sudden death or resignation of a First Minister in Ottawa since 1896, it is of course impossible to determine whether this newly emerging provincial practice of selection of a name and its submission to the Lieutenant Governor, would be followed by the governing party in Ottawa. It should be emphasized however that the submission of a name by a caucus is not the same thing as a First Minister giving "advice" to a vice-regal representative. In the case of advice from a First Minister, except in the most unusual circumstances, this is a recommendation which must be accepted and acted upon. It is only a First Minister who can give advice in this technical sense. The recommendation of the caucus is merely a point of view and Canadian constitutional practice would still allow a vice-regal representative the option of not appointing the person recommended by the caucus. This is probably hair-splitting, because it would be very difficult for a Lieutenant Governor to decline to act upon the governing party's recommendation, but nevertheless, it is imperative to recognize that "advice" in its traditional, technical sense, means only advice coming from the Queen's first minister, either federally or provincially.

Conclusion

The legal powers of the Governor General and the Lieutenant Governors of Canada and the provinces, respectively, are very substantial. They are in fact the essence of how a First Minister controls the operation of government in Canada at both the federal and provincial levels. The system has generally worked well because the vast powers of the crown have been exercised upon the advice of the leader of the governing party in parliament and the legislatures. Nevertheless, it must never be forgotten that an occasion might arise when a vice-regal representative might feel, under very special circumstances, that the advice tendered was inappropriate and the time had come for an independent exercise of vice-regal authority. The question is never one of legal capacity, but instead, whether it is an appropriate occasion for the breach of the convention that the crown or its representative acts only upon the advice of its first minister.

Notes

1. There is not time in this very brief presentation to go into the details of this, but the full chronicle of this event was very ably described by the late Senator Eugene Forsey in his classic work, *The Royal Power of Dissolution of Parliament in the British Commonwealth.*
2. It is important to note that the Lieutenant Governor used the power on his own initiative and not on instructions from Ottawa. In support of this point, Prime Minister Diefenbaker, when informing the House of Commons that royal assent has been given to the reserves bill by federal order-in-council,states that in future no bill should be reserved without prior consultation with the federal government.
3. Lord Watson in his reasons for judgment in the case: (1892) AC 437.
4. [1987] 2 SCR 2. Mr. Justice Beetz suggested that s. 92(1) of the *Constitution Act 1867* would not allow "a profound constitutional upheaval by the introduction of political institutions foreign to and incompatible with the Canadian system," citing as authority for this statement, the *Initiative and Referendum Act* case.