Comment

Re: The Royal Prerogative and the Office of Lieutenant Governor

In an article (Vol 23, Spring 2000) by Professor Ronald Cheffins on "The Royal Prerogative and the Office of Lieutenant Governor" the author maintains that "the primary role of the Lieutenant Governor is to represent the Queen of Canada within the context of the provincial political system."

The significance of that assertion lies in the contrast drawn between the lieutenant governor's role currently and "in the early days of Confederation, [when he] was seen more as a federal officer helping to protect federal interests within the provincial context...."

Professor Cheffins concludes with the statement that "the issue [of roles] is now resolved, as the result of decisions by the courts and the flow of historical events."

These statements could leave readers with two erroneous impressions – (1) that there is both a federal Crown and provincial Crowns with nothing much to bind them together except the person of the absent monarch and (2) that the Lieutenant Governor no longer has a role as a federal officer.

In one respect there is nothing particularly new in what Professor Cheffins has written. Canada, he says, began as a highly centralized, hierarchical, quasi-federal arrangement of power which rapidly evolved in the last quarter of the nineteenth century into a more classically balanced system of coordinate and independent jurisdictions. Much of the credit if credit there be for this development-and that is an assumption whose validation depends upon the premise that the Fathers of Confederation got things inexcusably wrong at the outset-lies with the Crown. He cites the *Liquidators of the Maritime Bank v. the Receiver General of New Brunswick (1892) and In Re Initiative and Referendum (1919)* as proof that in the hands of the courts the prerogatives of the Crown were revealed and then woven into the fabric of federalism. In light of that depiction of events, it could hardly be maintained that lieutenant governors still function as federal officers. Nor does Professor Cheffins offer any surprises on this score. On the contrary, he says that "no one today" would make this argument. Although he does not cite the *Labour Conventions Case* (another venture into the realm of the prerogative), Professor Cheffins' conclusion evokes the nautical metaphor used in that opinion to describe Canadian federalism-a "ship of state [that] retains water-tight compartments."

The contention that there are two solitudes, federal and provincial, in the matter of the Crown lacks foundation in fact and theory. While it is true that the Crown played an important part in the development of provincial status after Confederation, it would be less than accurate to say that its contribution today is solely as a preserver of divided jurisdiction. Similarly, although reservation has not been used since 1961 and disallowance since 1943, failure to exercise these powers in no way circumscribes the authority to use them. This is a point Professor Cheffins acknowledges but whose import he devalues and this is my basic but essential point of disagreement with his logic.

At no time does he offer evidence to support the claim that lieutenant governors have ceased to be responsible for defending federal interests. The counter (and literal) constitutional position is quite different: certain jurisdiction is exclusively conferred on Parliament, and the *Constitution Act* specifically empowers the federal government, at its discretion, to instruct lieutenant governors to use their reserve power. The mountain of precedents that would counsel caution in pursuing this course of action; the convention that encourages resolution of federal-provincial disputes by other means; the adverse political consequences that would arise if the federal government issued such instructions and were accused of interfering in provincial matters-none of these considerations override black letter law to the contrary. Regardless of how often the claim is made, the federal Crown is not a vestigial Crown in the provinces.

A provision is obsolete only if all sides agree it is. True in regard to s.26 of the *Constitution Act*, which provides for the appointment of extra senators and which until Mr. Mulroney invoked it had rested dormant for over a century, so the

same might be said of the lieutenant governor's role as a federal officer. Strong historical grounds exist to support this latter claim: as late as 1982, when the *Constitution Act* underwent major reform, neither the federal nor provincial governments were willing to see the position of the lieutenant governors altered. On the contrary, they agreed to make change to Canada's tripartite Crown (Queen, Governor General and Lieutenant Governor of a province) more difficult by requiring the unanimous consent of the two houses of Parliament and each provincial legislative assembly.

If the proposition that the lieutenant governor is no longer a federal officer is flawed in fact, it is problematic in theory too. As already noted, Canada's Crown has three aspects: the monarch, who links the political system to the past and infuses it with a sense of history, is the ultimate source of sovereign power necessary to government; the Governor General represents both the authority of the Crown and the people of Canada as a whole; and the Lieutenant Governors represent the diversity of Canada's many local and provincial communities.

But these are not self-excluding functions any more than the jurisdictional classes of subjects specified in ss. 91 and 92 of the Constitution Act, 1867 were self-excluding. On the contrary, as the Judicial Committee of the Privy Council found long ago in *Hodge v. the Queen (1883)*: "Subjects which in one aspect and for one purpose fall within section 92, may, in another aspect and for another purpose, fall within section 91." For example, where there is a national public interest and where proposed provincial legislation threatens the integrity of national policies that embody that interest, or where they limit the sovereignty of other provinces, then the lieutenant governor is obliged to leave the question of assent for the government in Ottawa to determine.

Justification for this position cannot be found in Professor Cheffins's concept of Crown solitudes. Still the Crown has obligations toward citizens collectively, as the people of Canada and not only as residents of a province. For that reason the federal government is, legally and constitutionally within its rights to instruct lieutenant governors if, in an extraordinary situation, it deems that course necessary. Necessity might very well be a question of timing, where delay is unacceptable and an immediate decision required to resolve uncertainty. The last time reservation was used (in Saskatchewan), the premier of the affected province, T.C. Douglas, observed that "at first glance it seems to me that if [the lieutenant governor] had doubts as to the validity of the legislation this fact should have been made known to the Government of Canada who could have disallowed the legislation in question if they saw fit to do so."

It is significant that while Douglas also recognized a second, judicial, route to redress grievances arising under the proposed legislation, he ruled out neither consultation by the lieutenant-governor with Ottawa nor use of the disallowance power.

Contrary to the claim by Professor Cheffins, every premier and most academics, the issue of reservation and disallowance is not "resolved." Nor, in light of the constitutional amendments of 1982, is there any prospect of its being resolved, if by that term is meant the removal of federal power over the provinces.

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