

Democracy in the 21st Century: Canada Needs a War Powers Act

In Canada the declaration of war, or its functional equivalent, is still a prerogative power. It should not be.

A.V. Dicey, in his *Law of the Constitution* described the prerogative power as the residue of discretionary authority which at any given time is left in the hands of the Crown. This means in effect that whatever ancient power the monarch once uniquely possessed, and was not taken away by Parliament, is still intact.

As a government power, the prerogative is both substantial and inconsequential. The large and sprawling field of foreign policy, which involves matters like making treaties, declaring war, deploying the armed services in international conflicts, appointing ambassadors, recognizing states, accrediting diplomats and so forth, is largely governed by the prerogative power. Then there are more mundane areas like issuing passports, granting honours, appointing Queen's Counsel, and clemency.

There are discretionary prerogative powers which rest with the monarch, such as appointing the Prime Minister and his or her ministers, royal assent, dissolution of Parliament, and the emergency power – and then there are those which have devolved from the monarch to ministers of the Crown, who act in the name of the Crown – such as those foreign policy powers described above. Ministers enjoy the exercise of the power without necessarily having to involve Parliament. In fact, throughout history, Parliament was bypassed in the decisions to allocate this ministerial prerogative power.

It is the latter use of the prerogative – that devolved one – that Canadians must watch, especially as concerns commitment of our armed services. Parliament has been consulted but it has never expressly claimed the right to declare war (or its equivalent), or to say when it has ended, or how it shall be conducted. It should.

Canada has not declared war for close to seventy years. However, war has clear functional equivalents. Involvement in armed conflicts, collective police actions, and actions undertaken under instruments for collective defence: all of these have placed the Canadian Forces on active service and in harm's way.

For the most part Canada has entered international wars and conflicts on the basis of the domestic prerogative power. One exception in the 20th century was World War I. Canada was at war on August 4, 1914 because the Imperial Government had declared war and, as such, according to the practice of the day, "the Dominions, Colonies and Dependencies of the Empire" were automatically at war. However, there were a number of Canadian Orders in Council that implemented Canada's going to war.

In 1939 Britain declared war on September 3, but Canada waited, to emphasize its autonomy. Parliamentary debate (September 9) preceded the order in council declaring war (September 10). A similar procedure was followed when Canada declared war on Italy in 1940. The point is that only an order in council made the declaration of war formal. This was brought into stark relief in 1942 when war was declared on Japan, Romania, Hungary and Finland by simple proclamation, and no parliamentary debate or approval of an Address.

At the beginning of the Korean conflict, Parliament did not issue a resolution authorizing the sending of troops to Korea. A newly amended *National Defence Act* provided that Parliament be recalled within 10 days after a proclamation placing the forces on active service, but Prime Minister St. Laurent on September 8, 1950 noted that: "My understanding of the constitutional position is that there is no specific action required by parliament in the form of an affirmative decision."



And so it continued with NATO and UN missions (Suez, 1956, Congo, 1960, Cyprus, 1964, Namibia, 1989, Persian Gulf, 1990): Parliament had to convene within 10 days, but what it had to do was unspecified. Parliament simply reviewed the Government's decision. Canada's recent mission in Afghanistan has seen similar procedures, with the exception that the involvement of Parliament has been styled a take notice debate. Take notice of what the executive is up to, that is.

So what is the issue? Has not the executive acquitted itself appropriately and judiciously to date? Arguably. But the past is not a reliable guide for the future. Are there alternatives?

The prerogative has interesting characteristics. The most important for our purposes is that the prerogative power can be displaced by statute. Not only can statute law abolish or limit the prerogative, but the Crown can no longer act under the prerogative in areas where a statute has spoken. There is no going back.

This does not mean senseless obliteration, however. Statute can also safeguard prerogatives, or partially and selectively affect prerogative, leaving some areas still in the hands of the executive while others fall under Parliament's purview.

However, the legislature has been relatively quiescent about its potential power. This is especially the case regarding war and conflicts. It does not have to be this way.

Consider the United States Constitution. Congress in Article I, Section 8 expressly claims the power to declare war. The President is the Commander in Chief (Article II, Section 2). When the President continued to ignore the role of Congress decades ago, Congress bolstered it with the War Powers Resolution of 1973. Major foreign conflicts or police actions involving American troops since then – Lebanon (1983), Operation Desert Storm (1991), Somalia (1993-4), Bosnia (1995), Afghanistan (2001), Iraq (2002) have involved the Resolution.

Failing Congressional approval for military action, US troops must be withdrawn within 60 days (after the 48 hour window the President has to report the commitment of US forces), or withdrawn at any time in the face of concurrent resolutions in the two Chambers. The limit can also be extended. Of course Presidents have tried to sidestep these requirements in other contexts, or challenge their constitutionality, but that is another story. There are other, supplemental Congressional tools as well, but these are not necessary to discuss here.

Canada should have its own *War Powers Act*. All Parliament has to do is pass legislation and the democratic deficit in deciding war and involvement in armed conflict is history. The participation of the military in armed conflict should be subject to Parliamentary consent, either before commitment of troops, or within a specified time. Common sense limits like the country's right of self-defence or dealing with emergencies could be built in.

The need for limits on the executive has never been clearer. Consider the involvement of Canadian troops in Afghanistan. Before the discussion of the February 2009 deadline, we were told that it was until the end of 2006; then for two years; and then the government hinted at other scenarios. This is not good enough.

What kind of limits do we need? The Democratic Audit unit of the Human Rights Centre at the University of Essex has suggested some. Parliament can set meaningful and not open-ended mandates for the armed services regarding conflicts. It can specify the need to honour international agreements and international law. It can require the executive to report on a regular and meaningful basis. It can require that military actions previously hidden be made public. It can build up its overview, analytic and legal instruments to monitor conflict situations. It can specify thresholds above and below which legislative approval is and is not necessary. It could exercise the power to recall Parliament in a war emergency, and the exercise of plenary power by specialized or joint committees in similar circumstances. It could change its mandates to mirror a new configuration of public opinion.

Parliament had an opportunity to move in the direction of a *War Powers Act* in June 2007 when Prime Minister Harper announced that he was looking for an all-party agreement among the Commons parties in order to extend the Afghanistan mission beyond its February 2009 deadline. While there appears to be no such consensus, the parties could be demanding more including a role for Parliament in the declaration of war by any future government.

The prerogative power is a power whose time is plainly marked. When lives are at stake, take notice debates and mere advisory commentaries pale as alternatives in this most profound of decisions. A *War Powers Act* would eliminate the future possibility of Parliament sleepwalking to war.

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