

The Crown and Prime Ministerial Power



This article elaborates on the relationship between the Crown and prime ministerial power through the lenses of the confidence convention and royal prerogatives. The article highlights how the prime minister's status as the Crown's first councilor complicates the operation of the confidence convention, the means which the House ultimately determines who heads the governing ministry. The article then outlines how the prime minister's discretionary authority to exercise key royal prerogatives serves as the foundation of the centralization of government around the first minister. Rather than seeing the centralization of power in the prime minister as a form of 'presidentialisation', the article argues that it is more accurately understood as a form of 'regalisation', owing to its source in royal authority.

Philippe Lagassé

Queen Elizabeth II surpassed Queen Victoria's time on the throne on September 9, 2015. The Canadian government marked the occasion with a commemorative bank note, stamp, and coin. Monarchists celebrated the event and politicians made statements. But most Canadians probably shrugged. Polls indicate that Canadians are ambivalent toward the monarchy.¹ If we were to rewrite the Canadian constitution from scratch, it's unlikely that Canada would have a sovereign. There is no longer a deep affection for the Crown as an institution or unifying symbol of the nation. A notable number of Canadians hold these feelings, of course, but no honest monarchist can think that most people share these sentiments. The Queen herself is admired, and Will and Kate draw crowds and sell magazines, but the Crown is not revered.

Given lukewarm Canadian sentiments toward the monarchy, it is tempting to assume that the Crown itself is unimportant and that this apathy toward the monarchy captures the reality of the Crown in Canada. Such assumptions are incorrect. The Crown matters a great deal.² This point can be shown in a variety of ways. One can emphasize how the Crown equalizes relations between the federal state and the provinces.³ Or one can discuss how treaties shape government obligations toward certain First Nations.⁴ These are important topics. Yet if one wants to convince Canadians that the

Crown really matters, that it merits far more attention and study, we might be better off focusing on an issue that stirs passions – at least amongst those interested in politics: the power of the prime minister.

The executive's dominance in Parliament, the pre-eminence of the prime minister in Cabinet, and the ability of prime ministers to centralize control of the government in their office are grounded in his or her authority to exercise the Crown's power. Indeed, as David E. Smith has shown, when the power that this office draws from the Crown is appreciated, it is evident that the primacy of the prime minister in government and the executive's command of the House of Commons are not accidental; to a significant extent, they reflect the Crown's continuing importance in the Canadian Constitution.⁵

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The Crown, the Prime Minister and the Confidence Convention

Canada is a parliamentary democracy. The lower house of Parliament, the House of Commons, is composed of popularly elected members. As the elected house, the Commons plays unique roles. Chief among these is the constitutional convention that most members of Cabinet - the group of ministers headed by the prime minister who run the executive - must be drawn from the lower, elected house. Equally important, Cabinet is expected to command, or potentially have, the confidence of the Commons when exercising executive power. The 'confidence convention' ensures that the elected house ultimately controls who governs. By electing those who sit in the Commons, Canadians therefore have an indirect say in who forms the executive.⁶

Based on this description of the relationship between the Commons and Cabinet, it stands to reason that the former is the master of the latter. The democratic legitimacy of the government rests with the confidence of the Commons, and the House decides who governs. When Canada is said to have a system of responsible government, we can take this to mean that the Cabinet is responsible to the Commons for the affairs of government, and that the House is the central actor in government formation. Certainly, if we want to get to the crux of the matter, this is how we would describe responsible government and executive-legislative relations in Canada.

Unfortunately, relying on this rendering alone sows confusion, particularly when we observe that the prime minister and Cabinet control the Commons much of the time. To address this confusion we must take political parties into account. Canada's strong party discipline means that a Cabinet is assured the confidence of the Commons if its party members are a majority. Because political parties elect their leader in conventions, party caucuses are loath to force prime ministers from office by ousting them as their party leader, as has happened in Australia lately. Party dynamics are necessarily part of the reason for the executive's dominance of the Commons.⁷ Parties are not a sufficient explanation, however.

To complete our understanding of the executive's dominance of the Commons, the Crown's powers within and over the legislature must be appreciated. Parliament consists of the Queen, the Senate, and the House of Commons, making the Crown and the Houses of Parliament coequal and codependent parts

of the legislature. In many ways, however, the Crown is the strongest part of Parliament. The Crown retains the power to summon, prorogue, and dissolve Parliament. Bills involving the spending of money require a 'royal recommendation' (i.e. the approval of the Crown) to be passed. Legislation initiated by the Crown's ministers is deemed more important than private members' bills. Senators are appointed by the Crown, and the Queen can name additional senators to the upper house to end a legislative stalemate. No bill becomes law unless and until royal assent has been granted. In nearly all cases, the Crown acts on and in accordance with the advice of the prime minister and/or Cabinet when performing these functions. This means, in effect, that the prime minister and Cabinet benefit from the Crown's coequality and codependence within the Commons.

To balance this point, we must return to the confidence convention: ministers only get to advise the Crown when they hold the confidence of the Commons. As the Privy Council Office (PCO) states: "In Canada's Westminster form of government, convention requires that the Government command the confidence of the House of Commons at all times."⁸ Yet there are a number of caveats attached to this rule that weaken it. Above all, the rule does not fully apply when a ministry loses a vote of confidence and secures a dissolution of Parliament from the Governor General. In such cases, the prime minister remains the head of government and ministers retain their offices. According to the caretaker convention, ministers are supposed to exercise restraint in these instances, but the scope of this convention and duration of the caretaker period are a matter of interpretation; a number of precedents suggest that the principle of restraint is looser than the PCO suggests in its official caretaker guidelines.⁹ And as with many constitutional conventions, prime ministers are uniquely placed to shape how to these rules apply. As Patrick Weller has recently argued: "prime ministers are the principal authorities that determine what the conventions mean, whether and how they should be applied, and when even normal procedures can be relaxed or ignored because it is convenient to do so."¹⁰

Ministers, furthermore, hold executive office in law, while the confidence convention is a political rule. The prime minister is appointed by the Crown and advises the appointment of the remainder of the ministry. Ministerial offices are legally independent of Parliament and of the fact that ministers are usually parliamentarians. Indeed, in law, neither the prime minister nor other ministers need to be parliamentarians

when they are appointed. This arrangement allows the executive to function when Parliament is not sitting or is dissolved. It further means that the authority of ministers to govern is not *legally* affected by what happens in Parliament. Ministers remain in office until they resign or the prime minister advises their dismissal. Prime ministers remain in office until they resign or are dismissed by the Crown.

In strictly legal terms, the Commons does not decide who governs. When the House expresses non-confidence in a ministry, this is a signal to the prime minister that he or she should resign or advise a dissolution. If a prime minister refuses to resign or request a dissolution, it can also prompt the governor general to dismiss him or her. But the House does not automatically determine which prime minister can form a government or how long a ministry stays in place. The prime minister and governor general are as important in the process of government formation as the Commons, owing to their respective responsibilities as the Crown's first minister and vice-regal representative.

These realities further highlight the privileges prime ministers enjoy as the Crown's primary councillor. Government formation revolves around the prime minister.¹¹ It is the prime minister who is commissioned to form a government, the duration of a ministry depends on the prime minister's resignation or dismissal, and it is the prime minister who selects other ministers and decides how long they will serve. In fact, the prime minister's authority over the Crown's power of ministerial appointments is one of the levers used to buttress party discipline. One means of keeping



the governing party loyal in the Commons is to dangle the prospect of a ministerial appointment in front of backbench MPs.¹² Since it is the prime minister who picks which MPs become ministers, it is he or she that often commands the loyalty of backbenchers, not the party or Cabinet per se.

The prime minister advises the Crown to summon, prorogue, or dismiss Parliament. A first minister's ability to use prorogation and dissolution to his or her advantage is well-known and far from uncommon. As the Crown's first minister, he or she also retains the right to meet the House of Commons following an election, regardless of the results. This is not a matter of convention or a courtesy extended by the House, but merely a reflection of the fact that the prime minister still holds the office of prime minister. When these two privileges are combined, they allow an incumbent prime minister to remain in power without recalling Parliament for some time after an election, even if his or her party has fewer seats than

others. Although the caretaker convention may apply during this period, Canada's current guidelines are vague. According to PCO, when the incumbent prime minister opts to stay in office, the caretaker period ends "when an election result returning an incumbent government is clear."¹³ What constitutes a clear election result is anybody's guess, though as per Weller, the prime minister would have the loudest say.

A prime minister who is asked to form a government immediately after an election, moreover, can also govern for a good deal of time before recalling Parliament, and the PCO guidelines indicate that the caretaker period comes to an end as soon as a new prime minister is named following an election. When an incumbent prime minister resigns and a new prime minister is appointed, the caretaker period "ends when a new government is sworn in."¹⁴ Hence, the caretaker period does not end when the new government has demonstrated that it can hold the confidence of the House; the caretaker convention ceases to apply as soon as a new government is sworn in, even if it only meets the House months later.

Underlying the prime minister's unique powers over Parliament is the foundational principle of responsible government: that a ministry headed by the first minister is accountable for all acts of the Crown because it is responsible for the exercise of nearly all the Crown's powers.¹⁵ It is only when the centrality of this facet of responsible government is recognized that the reality of Canadian government and executive-legislative relations comes to the fore. Prime ministers are the dominant actors in Parliament because they control the powers of the strongest part of the legislature, the Crown. A prime minister's right to direct the Crown rests with the executive office that they hold. The confidence convention ensures that prime ministers have the democratic legitimacy to hold this office, but a confidence vote does not begin a prime minister's tenure, nor does a vote of non-confidence necessarily end it. Rather than granting the Commons a direct role in choosing and removing governments, the confidence convention is better understood as a form of confirmation or endorsement. This leaves the Crown's first minister with an ability to exploit the tensions surrounding the confidence convention to his or her own ends.

Prime ministerial 'regalisation'

The prime minister is said to be 'first amongst equals' in Cabinet. In recent decades, however, the prime minister's importance has been elevated.

Coupled with the centrality of party leaders in election campaigns, this elevation of the prime minister has arguably 'presidentialised' the office.¹⁶ The presidentialisation thesis aptly reflects the electoral and party leadership components of the prime minister's growing stature.¹⁷ Few would question the increasing tendency of treating leadership races as quasi-presidential nominations and Canadian parliamentary elections as presidential campaigns. But the presidentialisation thesis explains less when accounting for the prime minister's dominance within the executive. If Canadian prime ministers look increasingly presidential within government, it is because they are more monarchical. (The American presidency, after all, was modelled on the role of the monarch in the 18th Century British constitution.)¹⁸ This point has been noted by observers such as the authors of *Democratizing the Constitution*,¹⁹ F.H. Buckley in *The Once and Future King: The Rise of Crown Government in America*,²⁰ and Donald Savoie, who describes the increased centralization of governmental authority within the Prime Minister's Office (PMO) as 'court government'.²¹

This claim may appear overwrought. Stating that prime ministers are king-like is often offered up as a lazy form of critique or an attempt to be clever. Yet stating that prime ministers have a monarchical role need not be pejorative or a facile way of lamenting the state of Canadian democracy. It can simply reflect the reality that the prime minister's ascendance within the executive is attributable to their control of key royal prerogatives – legal authorities vested in the Crown as recognized by common law.

No Crown authority has given prime ministers more control over the executive than the appointment prerogative.²² As detailed in Smith's work, the power of appointment grants the prime minister command of Cabinet and government departments.²³ Ministers can be removed, shuffled, and demoted at the pleasure of the prime minister. This alone belies the notion that the prime minister is first among equals within Cabinet. Prime ministers stand above other ministers in that they are, for all intents and purposes, their superiors within the hierarchy of the executive. Since they hold their offices at the behest of the prime minister, ministers are expected to follow prime ministerial directives. The mandate letters that new ministers receive from the prime minister make this clear. These letters inform ministers of the policies and priorities the prime minister expects them to pursue.²⁴ While ministers head their departments, they manage their portfolios in accordance with the instructions of the prime minister.



Queen Elizabeth II and Prince Phillip at the opening of parliament, October 14, 1952.

Deputy ministers are appointed by the prime minister as well. Control of their appointments further cements the prime minister's ability to set departmental policies and priorities.²⁵ Indeed, if ever a minister should stray from their mandate letter instructions, their deputies will remind them of the prime minister's priorities. Should a minister decide to go his or her own way regardless, their deputy will inform the equivalent of the prime minister's deputy minister, the Clerk of the Privy Council. Measures can then be taken to bring the minister and department back into line, including the naming of a new minister by the prime minister.

The centralization of policy decisions and communications within the PMO and PCO was built upon the authority the prime minister wields through appointment prerogative. The appointment prerogative ensures that ministers are responsible and accountable to the prime minister for the policies and performance of their departments. This grants the prime minister ultimate responsibility for, and final accountability to the Crown and Parliament, for all departments and the affairs of his or her government as a whole.²⁶ With this responsibility and accountability comes the final say on policy and communications. Over the past four decades or so,

prime ministers have relied on their political staff in PMO and civil servants in their *de facto* department, PCO, to help manage and coordinate their absolute responsibility and accountability for government. We should not take this to imply that the resulting control of policy and communications in these two bodies is not pre-ordained or irreversible. Prime Minister Justin Trudeau, for instance, has promised to give his or her ministers greater leeway and autonomy.²⁷ But the fact that this is the prime minister's choice reflects the institutional structures that facilitated the centralization: the first minister's monopoly over the Crown's power of appointment.

The appointment prerogative grants prime ministers effective control of the Crown's other prerogative powers as well. Crown prerogatives allow ministers to grant various forms of clemency for criminal offences in exceptional cases, to deploy the armed forces overseas and within Canada (including to assist law enforcement), and to negotiate, sign, and ratify treaties. As noted by then Major Alexander Bolt of the Office of the Judge Advocate General, the prime minister has particular privileges regarding the exercise of these prerogatives. As stated by Bolt: "the Prime Minister has a two-pronged legal basis for the use of the Crown prerogative. First, the legal authority that is derived from his or her position as head of government, and, second, the authority derived from the right to define the consensus of Cabinet."²⁸ In practical terms, therefore, the prime minister can individually decide on exceptional grants of clemency, military deployments, and Canada's signature and ratification of treaties. As PCO further notes: "the Prime Minister has special responsibilities for national security, federal-provincial- territorial relations and the conduct of international affairs."²⁹ The prime minister, furthermore, is free to consult with whomever he or she chooses when making these decisions, be it PMO staff and PCO secretariats and advisors in the Langevin Block (effectively a contemporary *Curia Regis*) or Cabinet ministers and their departmental officials.

The idea of cabinet government in the Westminster tradition holds that the executive shall be directed by a collective body. In many ways, this remains the case. Cabinet committees still make significant decisions and the machinery of government operates according to the principles of individual and collective ministerial responsibility. Notwithstanding

the centralization of power in the PMO and PCO, ministers remain the heads of their departments and essential actors in government. However, it is equally true that prime ministers are more than the head of Cabinet. Their control of the Crown's prerogatives has given a stature within the executive not dissimilar to that of a seventeenth or eighteenth century monarch. While they are surrounded by powerful ministers, prime ministers determine the overarching policies and of their governments, and they can exercise individual discretion over matters of state. Although this description could support the notion that prime ministers have become presidential, this ignores the underlying source of the prime minister's heightened status: his or her control over the Crown's powers. Accordingly, the dominance of the prime minister is less a question of 'presidentialisation' than 'regalisation'.

Conclusion

The Crown may matter less and less to Canadians if it is merely understood as Queen Elizabeth II, her successors, and her vice-regal representatives. When the Crown is seen as the vehicle by which the executive commands Parliament and the prime minister dominates government, however, it should garner greater attention. The relationship between the governor general, the prime minister, and the House of Commons in matters of government formation complicates simplistic renderings of responsible government and the confidence convention. While the House ultimately decides who leads the government, the prime minister's ability to advise the governor general regarding the life of a Parliament, and the fact that the first minister's office is legally independent of the legislature, ensure that the Commons' role is more akin to a confirmation of democratic legitimacy than a delegation of governing authority. Within the executive, moreover, the prime minister's control of the Crown's prerogatives, notably over appointments, places the first minister above other members of Cabinet and gives him or her the ability to centralize policy and communications within the Langevin Block. Rather than seeing this as a form of presidentialisation, the royal source of the prime minister's dominance of the executive indicates a realisation of the office. Whatever Canadians think about their monarchy, these realities suggest that they should pay greater attention to their Crown.

Notes

- 1 Forum Research, "4-in-10 favour abolishing monarchy," 18 May 2015, available at <http://poll.forumresearch.com/post/289/majority-dont-want-prince-charles-as-head-of-state/> ; Angus Reid, "Canadians Lukewarm on Monarchy, Would pick William as Next King," 30 April 2013, available at http://angusreidglobal.com/wp-content/uploads/2013/04/2013.04.30_Monarchy_CAN.pdf
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- 3 D. Michael Jackson, *The Crown and Canadian Federalism*. Dundurn, Toronto, 2013.
- 4 Nathan Tidridge, *The Queen at the Council Fire: The Treaty of Niagara, Reconciliation, and the Dignified Crown in Canada*. Dundurn, Toronto, 2015.
- 5 David E. Smith, *The Invisible Crown: The First Principle of Canadian Government*, 2nd edition. University of Toronto Press, Toronto, 2013, pp. 60-61.
- 6 Peter Aucoin, Mark D. Jarvis et Lori Turnbull, *Democratizing the Constitution: Reforming Responsible Government*. Edmond Montgomery Publications, Toronto, 2011, chapter 3.
- 7 For a broader discussion of the role of parties in weakening Parliament, see Alison Loat and Michael MacMillan, *Tragedy in the Commons: Former Members of Parliament Speak out about Canada's Failing Democracy*. Penguin Random House, Toronto, 2014.
- 8 Privy Council Office, *Guideline on the Conduct of Ministers, Ministers of State, Exempt Staff and Public Servants During an Election*, August 2015.
- 9 Ibid.
- 10 Patrick Weller, "Cabinet government," in Brian Galligan and Scott Brenton, eds. *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges*. Cambridge University Press, Cambridge: 2015, p. 74.
- 11 Audrey O'Brien and Marc Bosc, eds. "Duration of a Parliament and a Ministry," *House of Common Procedure and Practice*, 2nd edition. Éditions Yvon Blais, Montréal, 2009.
- 12 C.E.S Franks, *The Parliament of Canada*. University of Toronto Press, Toronto, 1987, p. 32.
- 13 Privy Council Office, *Guideline on the Conduct of Ministers, Ministers of State, Exempt Staff and Public Servants During an Election*.
- 14 Ibid.
- 15 Eugene A. Forsey and G.C. Eglington, "The Question of Confidence in Responsible Government," study prepared for the Special Committee on the Reform of the House of Commons, 1985, part 2.
- 16 John C. Courtney, "Has the Canadian Prime Minister become 'Presidentialized'?" *Presidential Studies Quarterly*, 14 (2), 1984, pp. 238-241; Herman Bakvis and Steven B. Wolinetz, in Thomas Poguntke and Paul Webb, eds. *The Presidentialization of Politics: A Comparative Study of Modern Democracies* (Oxford: Oxford University Press, 2005); David Schneiderman, *Red, White, and Kind of Blue? The Conservatives and the Americanization of Canadian Constitutional Culture*. University of Toronto Press, Toronto: 2015, chapter 2.
- 17 Jamie Gillies, "The Presidentialization of Executive Leadership in Canada," in Alex Marland and Thierry Glasson, eds. *Canadian Election Analysis 2015: Communication, Strategy, and Democracy*. University of British Columbia Press, Vancouver, 2015; available at <http://www.ubcpres.ca/CanadianElectionAnalysis2015/>
- 18 Eric Nelson, *The Royalist Revolution: Monarchy and the American Founding*. Harvard University Press, Cambridge, MA, 2014.
- 19 Aucoin, Jarvis and Turnbull, *Democratizing the Constitution*, 16.
- 20 F.H. Buckley, *The Once and Future King: The Rise of Crown Government in America*. Encounter Books, New York, 2014.
- 21 Donald Savoie, *Court Government and the Collapse of Accountability in Canada and the United Kingdom*. University of Toronto Press, Toronto, 2008.
- 22 The prime minister also exercises discretion over Governor-in-Council appointments and the appointment of Senators, Lieutenant Governors, and the Governor General.
- 23 Smith, *Invisible Crown*, chapter 5.
- 24 Canada, Prime Minister's Office, Ministerial Mandate Letters (November 2015), available at <http://pm.gc.ca/eng/ministerial-mandate-letters>
- 25 James Ross Hurley, "Responsibility, accountability and the role of deputy ministers in the government of Canada." Study prepared for Commission of Inquiry into the Sponsorship Program and Advertising Activities, 2006.
- 26 Privy Council Office, *Open and Accountable Government*, 2015, Annex F.2, "The Prime Minister's Functions and Powers."
- 27 Lisa Van Dusen, "'Government by cabinet is back': Trudeau, ministers sworn in at Rideau Hall," iPolitics.ca, 4 November 2015.
- 28 Major Alexander Bolt, "The Crown Prerogative as Applied to Military Operations," Office fo the Judge Advocate General, Strategic Legal Paper Series, Issue 2 (2008): 3.6.4; available at <http://www.forces.gc.ca/en/about-reports-pubs-military-law-strategic-legal-paper/crown-prerogative-power.page>
- 29 PCO, *Open and Accountable Government*, Annex F.2