

The Crown and the Constitution: Sustaining Democracy?

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By

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As one of the members of the planning committee that helped organize this conference, and especially one who had a hand in designating the topics of the panels that make up the program, it would be presumptuous, if not irrational, to quarrel with the title assigned to me. Nor do I intend to do that. I do, however, want to say a few words about the topic of ‘The Crown and the Constitution: Sustaining Democracy?’

Let me say at the outset what, to my mind, this topic is not about. It is not about the comparative merits of monarchy and republicanism. Until there is some agreement, or even understanding, about the meaning of the Canadian monarchy, it is premature, and a recipe for failure were it tried, to balance its strengths and weaknesses against those of a republican constitution. (As an aside, the ingredients of a republican constitution are themselves not self-evident, but that is for another conference.) One indication of the uncertainty and unease that accompany the subject of the Canadian monarchy is the infrequency with which that phrase appears. The reason for this deserves examination, although whatever the explanation it will embrace a rationale articulated more than sixty years ago by Gordon Robertson, then a member of the Cabinet Secretariat: ‘I don’t think Canadians will like the term “King of Canada,” no matter how logical it may be. Whatever the legal facts are, most Canadians... have not thought of themselves as citizens of either a republic or a monarchy’ (LAC. Reid Papers, Gordon Robertson comment, 27 July 1949). There is still much truth to that comment, and it goes far in explaining the ambivalence Canadians display when talking about the Crown and the constitution (and the lassitude they exhibit when discussing a republican alternative). Nor should this attitude be surprising. Canada, like Australia and New Zealand, and a handful of much smaller states, possesses a unique constitutional status, of which the surrogate representative of the Sovereign as local Crown is a fundamental element. In itself, that constitutional arrangement does not explain the ambivalence, but combined with historical and geographic features (proximity to the United States, for example), it reinforces the sentiment.

Another topic omitted from this paper is Walter Bagehot’s trinity of rights due the sovereign or her representative, that is: to be consulted, to encourage, and to warn. (As one scholar has recently commented, that historic formulation has been altered to read ‘to advise, encourage and warn.’ The substitution of the right to advise for the original right ‘to be consulted’ is a large change indeed, and yet another topic that requires examination [Hicks 2009, 69]). Silence on this matter is not because these rights are unimportant. On the contrary, they are essential to legitimizing the relationship that continues to exist, as it did in Bagehot’s time, between the dignified and efficient parts of Parliament. In this context it should be noted that the chapters in *The English Constitution* deal only with the

three parts of Parliament, while the meaning of the word constitution, as used in the title of this paper, extends well beyond Parliament. This enhanced meaning deserves attention in any discussion of the Crown in Canada.

One reason for the elision of the familiar trinity is because it is familiar: no one in this room is unacquainted with the content of Bagehot's book or the argument it presents. Where there may be room for debate and re-evaluation is the reputation its author holds as master interpreter of the constitutional position of the Crown. The attributions associated with this by now classic interpretation are increasingly subject to review. For instance, in Australia it has been said that 'the law is coming to reflect the political reality that executive power does not descend from the Crown, but flows up from the electorate...' (Curtis 1983, 6-7). In Canada, a similar, electoral democratic political culture appears to be emerging. At the time of the imminent legislative defeat of the Harper government and its replacement by a coalition of opposition parties, Professor Tom Flanagan argued that 'only voters have the right to decide on the coalition' and, by inference, the transition of power (Flanagan 2009, A13). Dissent from this view on the grounds that sovereignty rests not with the people but with the Crown-in-Parliament, as demonstrated by the convention that political authority is monopolized by those who command the support of the House of Commons, has been strongly voiced (Russell and Sossin 2009). In turn, this orthodox interpretation has generated its own unorthodox response (See Potter 2009).

Like the English, the Canadian constitutional formula links the public to the executive power through Parliament. It is for this reason that Parliament, specifically the House of Commons, has the indisputable authority to make and unmake governments. That many members of the public and representatives of the media in 2008 seemed to be confused about this bedrock foundation of parliamentary government was treated by scholars as a matter both perplexing and disturbing. Perhaps, but it should not have been viewed as surprising: in the midst of what quickly was labelled a 'constitutional crisis,' Ipsos-Reid reported that 'half of Canadians (51%) believe the prime minister is directly elected by voters.' (Ipsos Reid 2008). How this view can be held in a country that for more than 150 years has had responsible government under a constitutional monarchy is a puzzle.

When it is said, as the Friends of the Canadian Crown have said, that the public and the media need to be better informed about the Crown, that sentiment scarcely scratches the surface of the much more complex topic at issue here--the Crown and the constitution. A number of examples might be offered to support that generalization. Prorogation is one of them. Much has been said in the last eighteen months about the governor general's acceding (twice) to the prime minister's advice to prorogue Parliament. It is not the intent here to discuss the details of those actions or to assess their constitutional correctness from the perspective of either party to that discussion. Among the topics that do deserve attention, however, are the remedies critics of the prime minister's actions have proposed.

Take, for example, the suggestion made by Professor Andrew Heard that in future the House of Commons be dissolved or prorogued only after a vote by the *chamber* (Heard

2010, A11). That vote, and not the prime minister's personal advice, would then inform the governor general's decision whether to accept or reject the request. This suggestion requires close examination, for we know—after the Harper government's experiment with legislation in 2007 to establish fixed election dates-- that uncertainty may arise when statute law is offered as a substitute for exercise of the prerogative. In September 2008, the prime minister advised the governor general to dissolve Parliament and set a polling day for 14 October 2008. The following year that advice was challenged in the Federal Court by Duff Conacher and Democracy Watch as in contravention of the fixed election date legislation (more precisely, the Canada Elections Act, as amended in 2007). In its decision the Court found that 'the Governor General has discretion to dissolve Parliament pursuant to Crown prerogative...Any tampering with this discretion may not be done via an ordinary statute, but requires a constitutional amendment under Section 41 of the *Constitution Act, 1982* (Federal Court 2009, para.53; and Stoltz 2010). Moreover, Professor Heard's proposal is not as modest as it may at first appear. It would give to one chamber of the legislative branch a power that has historically rested with the executive. Still, the proposal has the advantage, in light of the Federal Court's decision, that it would reduce but not remove the Crown's discretion, since the governor general would grant or deny dissolution or prorogation according to his or her interpretation of the vote of the House.

Here is a proposal whose constitutional consequences would take some time to examine. Nonetheless, in its barest outline it reveals the contradictions that reside in the constitution but which are normally disguised by the operation of its conventions. How to reconcile prerogative with accountability? In this context it deserves mention that following the governor general's acceptance of prime ministerial advice to prorogue Parliament in December 2009, some critics of the decision argued that the governor general should provide 'a written decision,' which would 'force the governor to examine whether the reasons are appropriate for modern Canada' (Hicks 2009, 69; see too Martin 2008). Behind that recommendation lies a whole philosophy of mind at odds with the assumptions that support constitutional monarchy. Whether stated reasons would clarify the constitutional issues and relationships at play in this set of facts is open to doubt, or at least speculation. Here again is one more subject that deserves careful analysis.

Section 9 of the *Constitution Act 1867* states that 'the Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.' It is difficult to overemphasize the significance of that provision. Of its manifold and important features none is greater than this: under the Canadian constitution the executive is not a creature of legislation but independent of it. The implications of that status or placement are profound in an era, such as the early twenty-first century, concerned with enforcing executive accountability. Yet, like so much else about the Crown and the constitution, this central feature of government is inadequately understood. As an aside, it should be said that it is the absence of 'constitutionally rooted executive authority' that makes Nunavut, the Northwest Territories and Yukon 'in effect federal protectorates' (Sossin 2006, 53).

In the Canadian constitutional arrangement, the government of the day is no mere executive. As a monarchy where there is a ‘real’ executive and a ‘formal’ executive, where the real executive is made up of members of the legislature, where that real executive exercises prerogative power inherent in the formal executive, where the formal executive in a province (the lieutenant-governor) is constitutionally empowered (S.90) to reserve provincial legislation for the ‘Signification of Pleasure,’ that is, approval, by the federal real executive (cabinet), where the same body (the federal cabinet) may direct Parliament to make remedial laws in the matter of denominational education in a province—in such an arrangement of responsibilities the easy distinction presumed to exist between legislative and executive powers in the Canadian constitution is not immediately apparent. Arguably, this imprecision is a source of great power—usually to the executive. The unconvinced might reply that, the prerogative aside, these are archaic, moribund powers, relics of the quasi-federal system the Fathers created.

In addition to the obvious retort that there have been a number of opportunities to remove these provisions yet they remain in the Constitution (in the case of S.90 entrenched after 1982 by a unanimity amendment provision), there is Eugene Forsey’s oft-repeated pronouncement that provisions in respect of Lieutenant-Governors give to the central government power to preserve, in each province, the system of responsible cabinet government (Forsey 1960). He repeated this view in 1979 following appearance of a Canadian Bar Association recommendation that the lieutenant—governor should be renamed ‘The Chief Executive Officer of the province [and] should not be subject to federal control.’ That recommendation he termed ‘objectionable,’ because it would ‘remove one of the few safeguards against a province playing ducks and drakes with the Constitution’ (LAC. Forsey Papers 1979).

The legal basis of responsibility of ministers lies in the Privy Council oath all cabinet ministers take on becoming members of the Council. It is the Privy Council which, according to section 11 of the *Constitution Act 1867*, ‘aid[s] and advise[s] in the Government of Canada.’ At any particular time, the current cabinet is the active part of the Privy Council, although it speaks and acts in the name of the entire Council. ‘[T]he Governor General acting by and with the advice of Cabinet [is] the first emanation of executive power.’ (*Angus v. Canada* (1990), cited in Tardi 1992, 83). Ministerial authority for a portfolio established by departmental statute originates in a second oath ministers swear on appointment to cabinet, an Instrument of Advice and Commission under the Great Seal being a necessary formality.

Ministers are chosen by the prime minister, their appointment recommended to the governor general, and their tenure in a portfolio at the discretion of the prime minister. Ministerial dismissal or ministerial resignation occurs only on the agreement of the prime minister. Similarly, the life of a government is tied to the decision of the prime minister, since he or she is the sole adviser to the governor general. More than this, deputy ministers are appointed, and may be dismissed, by the prime minister as one of his or her ‘special prerogatives.’ That power is regularized by order-in-council going back to Sir Wilfrid Laurier’s time.

What has the foregoing discussion to do with the subject of this paper—the Crown and the constitution? A one-word reply is: everything. Support for that claim may be found in the proliferation of literature on the Crown and its prerogatives. See for instance, M. Sunkin and S. Payne, *The Nature of the Crown: A Legal and Political Analysis* (1999); Philippe Lagassè, *Accountability for National Defence: Ministerial Responsibility, Military Command and Parliamentary Oversight* (2010); Paul Craig and Adam Tomkins, *The Executive and Public Law* (2006). A common theme in this literature is the contribution the Crown makes to concentrating power in the political executive in British-styled parliamentary systems. The obverse of concentrated power is what Canadian critics call the democratic deficit. In fact, it is the Crown's powers exercised on the advice of the prime minister, as in prorogation or dissolution of Parliament, or myriad appointments--to the judiciary and the Senate, for example-- that have begun to focus public attention on the Crown.

This attention is neither sustained nor the criticism accompanying it always well-informed. Nonetheless, and in marked contrast to the past, the focus of comment is constitutional in nature: no longer the conventional (and limited) talk of the Crown as a unifying national symbol, although it may still play that role in different dress—honours, for instance; no longer agitation over its imperial-colonial dimension, although this was never a prominent feature of debate about the Crown in Canada. British personalities—the Queen and Prince Charles, for instance-- continue to cast a shadow over discussion of the Crown in Canada, but less than formerly. Equally significant is the prominence of the individuals who have occupied the office of governor general over the last decade and a half and the fragmentation of the party system in the same period, thus denying to any one party the opportunity to form a majority government and thereby linking in the public mind, to a degree rarely seen before, the governor general with the political forum. In the language Bagehot made familiar, the Crown in Canada, as represented by the office of governor general, is ceasing to be the indisputably dignified institution political science textbooks made it out to be and is emerging, for some observers at least, possibly as an efficient institution.

Can the opinion in that last sentence really have any substance? Is it too extreme to defend? The answer to the first question is 'yes, and to the second 'no.' For almost two years a continual controversy has enveloped the relationship between the governor general and the prime minister or between the governor general and the leaders of the opposition parties, whether the subject was the proposed coalition, or prorogation of Parliament or dissolution of the House of Commons. In the discussion surrounding these issues the constitutional crisis of 1926 has invariably been cited, as has the exhaustive analysis of that event written by Eugene Forsey (Evatt and Forsey 1990). Again, there is no need to explore in detail what happened eighty years ago, except to say that the Byng-King affair and its resolution—and unlike the events of 2007 through 2010, the 1926 controversy actually did have a conclusion—has only peripheral relevance to the current situation. While the controversy of the last two years may have been confined to the period of Michaëlle Jean as governor general, the autobiography written by her predecessor, Adrienne Clarkson, speaks to similar concerns on her part about Paul

Martin, who led a minority government after the 2004 election, seeking an early dissolution to the 38th Parliament (Clarkson 2006, 192).

Compared to Canadian-born governors general since 1952, or to Viscount Byng in 1926 for that matter, the most recent governors general have been very much centre-stage in matters that are by any definition constitutional. The discussion that has taken place has been as national in character as it has been partisan, in the sense that while the leaders of the opposition parties have disagreed with the advice the prime minister has offered the governor general, public and media opposition have been rooted in concern for preserving democratic values and limiting prime ministerial power (Editorial, *Globe and Mail* 2010, A18). A petition signed by 170 academics accusing the prime minister of ‘undermining our system of democratic government’ may not be conclusive evidence of popular unrest, but in the words of *Globe and Mail* columnist Lawrence Martin, it ‘shows democracy matters to Canadians’ (‘The Professors’ Letter,’ 15 January 2010; Martin 2010; see too Dickerson 2010). Is this a pale, Canadian parallel to the Tea Party movement in the United States, at whose core, says American legal academic Sanford Levinson, lies ‘the lawyerhood of all citizens’? (Liptak 2010, *New York Times*, WR 1/5).

What exactly are these constitutional matters? There are three meanings associated with the adjective. First, there is constitution as law (and convention). As already noted, the Crown provides the legal foundation for the structure of government and the doctrine of ministerial accountability. How adequately that doctrine is realized in practice is a different matter. Second, there is constitution as composition or aggregation. Essentially, this is about federalism, and really beyond the boundaries of this paper, except that federalism in Canada is very much about the Crown. Elsewhere, I have described the Canadian federation as one of compound monarchies. From being perceived as an institution amenable to enforcing Sir John A. Macdonald’s highly centralized federal ambitions, the Crown came to underwrite the autonomy of the provinces and thus lay the foundation for the federative principle in Canada. This is the explanation for the strength of executive federalism in Canada and why Canada differs so markedly from its neighbour, the United States, the first modern federation. There, federalism is about representation; indeed, that is all that it is about. Here, it is about jurisdiction. In this contrast lies the source of frustration would-be reformers of Canada’s Senate experience, since the Canadian body is unrepresentative in any popular sense of the term.

The third meaning of constitution is health or condition, in other words the subject alluded to in sub-title of this paper. Does the Crown strengthen or weaken the constitution? Somewhere in his voluminous writings, Harold Innis remarks that ‘lack of unity preserves Canadian unity.’ Anyone familiar with Canadian history and politics will understand the logic of that aphorism. The potential for the country to fly apart—although it never does—seems not too exaggerated, whether the threat comes from annexationist sentiment, secession movements, or continental integration. Does the Crown make that potential real, or does it limit it? At Confederation, the Crown was expected to strengthen the centre, yet over time executive power in the provinces was found to be co-equal with legislative power. As a consequence, the concept of the province as an administrative unit and the lieutenant-governor as its executive officer

disappeared. In its place, as the JCPC said in *Liquidators of the Maritime Bank v. the Receiver General of New Brunswick (1892)* '[T]he Dominion government should be vested with such ... powers, property and revenues as were necessary for the due performance of its constitutional functions, and ... *the remainder should be retained by the provinces for the purposes of the provincial government.*' (itals. add.).

In his review of *The Invisible Crown: The First Principle of Canadian Government*, J.L. Granatstein wrote that, whatever the author's intent, 'his complex argument [about compound monarchies] is sure to bolster the case put forward by Canadian monarchists, though there seems no reason whatsoever that the same system could not exist even in the absence of a Canadian monarch' (Granatstein [1996]). One response to that comment-- aside from noting its imprecise language-- is that while perhaps the same 'system' might exist (or be perpetuated) in the absence of monarchy, it would not have developed as it has without the monarchically- based constitution given Canada in 1867 and without subsequent judicial determination that the Crown (along with its prerogatives) was divisible in conformity with federal and provincial spheres of jurisdiction. Irrespective of one's sympathies as to what may be thought the right constitution for the country, there is no question that in the evolution of Canadian federalism the Crown and its interpretation by the courts is the turning point.

Sustaining federalism is not the same thing as sustaining democracy. For that matter, the division of powers embedded in federalism presents its own challenge to democracy's goal of communicating the popular will regardless of divided jurisdictions. The juxtaposition of monarchy and democracy is stark because two millennia ago Aristotle saw them as incompatible forms of government. In modern-day Canada neither exists in pure form. Constitutional monarchy in Canada is different from its counterpart in the United Kingdom just as is the relationship of each to its own Parliament. At no time and in respect to no subject has this contrast been more sharply defined than it has during the last year on the topic of prorogation. It is not necessary to undertake a comparative study of prorogation or other practices associated with the prerogative in the two countries to make the point. The principle that informs the relationship between Crown and prime minister in each is now fundamentally different. The contrast between what has occurred in the last eighteen months in Canada and decades-long practice in the U.K. is eminently set down in the following letter (dealing with the dissolution of Parliament) written to *The Times* a quarter of a century ago:

[I]t is often argued in Britain that because there are no precedents for a royal refusal of a request to dissolve Parliament, the power to refuse is moribund. Surely... the fact that acute controversy concerning the role of the Crown has been consistently avoided in the United Kingdom for more than a century is evidence, not that the Sovereign has been bound by convention invariably to follow advice of a government to dissolve Parliament, instead of seeking an alternative ministry, but that... all ministers have been particularly scrupulous to shield the Sovereign from the necessity of making any debatable use of the royal discretion. (Heasman 1985)

If ever there was such a convention in Canada (or even appreciation of the issue), that is no longer the case. The greater frequency of minority governments here than in the United Kingdom may be one explanation, since the pressure of governing increases when legislative majorities disappear. The aura, the experience and the independence of the Sovereign from government in London contrasts with the absence of these characteristics for the governor general in Ottawa. The visibility of the Sovereign is one of her strengths—just being there is enough. Arguably, the more visible the governor general the more vulnerable he or she appears. Governors general must do something—charity, sports, arts, the North, the disadvantaged, in addition to the conferring of honours, to anchor themselves in the public’s mind and in public life.

It is too early to pronounce definitively, but there is reason to believe that events of the last two years may be interpreted as repositioning the office of governor general. It is one thing to intone, in textbook style, Bagehot’s trinity of rights due the Crown; it is another for a governor general, enveloped by constitutional controversy and the focus of media attention, to make a decision that he or she knows will inevitably lead to public criticism. That said, the most significant feature of this rare constitutional ‘moment’ lies in this: as ‘the crisis’ mounted, the governor general seemed more and more relevant to the situation. The media and the public paid close attention to the issue as it developed, and at no time did the subject of the utility of constitutional monarchy as Canada’s form of government enter the debate. Tom Flanagan, who advanced the argument that ‘only voters have the right to decide on the coalition,’ also acknowledged that it was ‘the Governor General, as protector of Canada’s constitutional democracy, [who] should ensure the voters get [that] chance.’ Significant too, no governor general’s ‘party’ emerged. (Michael Ignatieff’s decision in May 2010 to press publicly for an extension to Michaëlle Jean’s term as governor general suggests that qualification to that general statement may yet be required.) Throughout the prorogation controversy the positions taken by participants were defined by where they sat in the House of Commons. Among the ranks of the public, partisan allegiance was almost as predictable an indicator of support for or opposition to the prime minister’s request. In contrast, the governor general was perceived by public and politicians alike as impartial. Thus the constitutional issue at stake remained clear because the principal actors—prime minister, leaders of the opposition parties and governor general—played the roles assigned to them.

Whether or not the prime minister’s initiative and the response it elicited constituted a parliamentary crisis remains an open question; it is tangential as well. None the less, the fact that since late 2008 the governor general has acceded twice to the request of her first minister to prorogue Parliament is of major importance to the conduct of politics in Canada. Constitutional choices are not just events from the past; they continue at all levels and at all times. Recent precedents are no less compelling as guides to future decisions than precedents that arise out of the actions by prime ministers of a century ago.

From the perspective of the topic of this paper, and especially its sub-title-- ‘sustaining democracy,’ the key element to understand is the logic of the constitutional choice that is made. To echo a theme mentioned earlier, is this best accomplished if the governor

general gives reasons for his or her actions? Although the analogy with the courts may not be perfect, still it needs emphasizing that the work of the courts is not just about judging. On the contrary, the law is found, it is enunciated, it is delivered and it is debated in the press, scholarly journals and by the public. In this manner law and understanding of the law develop.

This is not the way of the Crown, but should it be? One of the features of the prorogation controversy, as indeed of all activity that might be defined as constitutional—and this is distinct from other gubernatorial work that involves ceremony, or the military, or patronage of institutions—is that it is the subject of commentary or interpretation. It was in this capacity that Bagehot made his reputation. Monarchy, he wrote, is ‘strong government ... [because] it is intelligible government.’ By contrast, he said: ‘The nature of the constitution, the action of an assembly, the play of parties, the unseen formation of a guiding opinion, are complex facts, difficult to know, and easy to mistake’ (Bagehot 1961, 89). That is, they have to be explained.

Bagehot was a journalist, and especially well-qualified for the role he assigned himself. Afterward came the scholars: among them Ivor Jennings, K.C. Wheare and Geoffrey Marshall in the United Kingdom and Eugene Forsey, J.R. Mallory and Peter Russell in Canada. The merit of their work does not require comment because it is not at issue. What deserves notice is that the part of the constitution that is the Crown’s component of Parliament has long been deemed as foreign to popular understanding and deserving of specialists’ treatment. There may be just cause for this tradition, popular ignorance of the constitution’s provisions (for example, belief that the prime minister is elected) being one of them. Notwithstanding that explanation, the consequence of this interpretive tradition is to establish in matters constitutional a division between those who are insiders and those who are outsiders.

It is the specialist who answers not the most arcane but rather the most basic of constitutional questions: What constitutes a defeat of a government; When there is a defeat, what options does a government have; Where no party secures a majority of seats at a general election, which party forms the government; What constitutes sufficient grounds for a prime minister to secure assent from the governor general to a request for a dissolution or prorogation of Parliament? The answers are based less on knowledge of rules than they are on understandings of courses of action suitable to a particular constellation of facts. How else to explain why the political party with the largest number (but not a majority) of legislative seats may form a government but sometimes it does not?

The concept of democracy does not fit well with the conventions of constitutional monarchy because whatever else it may be the former concerns numbers. Democracy is about counting while constitutional monarchy is about weighing. The exercise of discretion is the foundation of the latter: when and whether the first minister advises dissolution (or prorogation) of Parliament; when and whether the governor general decides to accept that advice. Judgment on the part of all participants is required to make responsible government operate effectively. The system also requires a governor general

who is perceived by the public to be impartial. Unlike the monarch in the United Kingdom, who can assume an authority that derives from tradition and public loyalty, the governor general requires approval (or acceptance) of the elected and the electors. These dual ‘constituencies,’ so to speak, have always existed. It is their comparative standing, vis à vis one another, that has changed, and changed relatively quickly.

The symbolic role of the governor general, that is representing Canadians to themselves as well as to non-Canadians, remains a highly visible activity. One might say that it always has been visible. Still, a qualitative change has accompanied the transformation of communication in the last couple of decades. The protests about prorogation and the rallies organized across the country to communicate that opposition owed much of their rapid organization to the democratizing power of new technologies. Of course, this development is not unique to matters touching the Crown in Canada; it is the fact that the development now extends to the Crown that is significant. From this perspective, it is arguably deceptive in the prorogation controversy to focus attention on the persons, or even offices, of the governor general and prime minister. The deception lies in this: limiting discussion to those ‘parties’ omits the innovative feature of what has been happening with regard to the governor general, which is the emergence, outside of the walls of Parliament and the traditional organs of communication, like the print media, of the public as an engaged participant in the debate. To the degree that this is the case, then arguments that making and unmaking of governments is a prerogative of the House of Commons and dissolution or prorogation of Parliament a prerogative of the prime minister as sole adviser to the governor general do not accord with public sentiment.

There is a paradox about democratic government in the early twenty-first century, one that is not limited to Canada. American scholars have discovered that people in the United States ‘desire to increase the influence of ordinary people’ and are willing to achieve this end by increasing the influence of ...unelected experts’ (Hibbing and Theiss-Morse 2002, 140). This is the same rationale that explains Ipsos-Reid’s finding in 2004 that the current auditor general is ‘immensely trusted’ by Canadians because ‘she has no vested interest and is viewed as being above politics’ (Ipsos-Reid 2004). Admittedly, it would be rash to apply these findings directly to the governor general without further study, which is not possible here. Yet, as the pre-eminent office under the constitution lacking a ‘vested interest’ and, moreover, perceived to be ‘above politics,’ the office of governor general may be a candidate for inclusion in the category of non-partisan institutions that people disaffected with the conduct of electoral politics find attractive. At best a surmise, that comment helps to explain the increased attention the office has received in the last decade. To be more specific, controversy surrounding prorogation has augmented rather than initiated interest in the governor general who, in the person of either Michaëlle Jean or Adrienne Clarkson, has generated far greater publicity and in turn public awareness of the position than their predecessors ever did.

There is another paradox in the offing: if the governor general were to be perceived as sustaining democracy in a popular sense because he or she had become less identified with the operation of Parliament only, then the three parts of Parliament, once so close-knit, would become less so. The movement over time that has seen cabinet separate from

the Commons and prime minister from cabinet would be followed, in this scenario, by a growing space between prime minister and governor general. With apologies to William Wordsworth, one can only say: 'Bagehot! Thou shouldst be living at this hour: Canada hath need of thee.' Or perhaps not: one of the few Canadians from the Confederation period to refer to Bagehot was Alexander Campbell, himself a Father of Confederation, who, in a letter to Sir John A. Macdonald, succinctly summarized his opinion of *The English Constitution*: 'You must have experience in a colony to enable you fully to appreciate the inapplicability of much of the book' (LAC. Macdonald Papers, 83495-8).

Nonetheless, Bagehot perceived where others had not that the constitution was a construct. Each piece (in Canadian nomenclature -- Crown, Senate and Commons) interlocks in myriad patterns over time producing a shifting set of relationships, although in Canada the political executive has always been dominant. The image that Bagehot painted of the constitution was one of hierarchy. A century and a half later, when the country is much more a mass political culture, that depiction is under scrutiny. Where do the people enter this arrangement? Reform of the Senate and reform of the plurality electoral system of the Commons are now promoted as means of aggressively injecting popular opinion into institutions of government. Participation of the public along with members of Parliament in the selection of members of the Supreme Court of Canada has also been proposed. Is it any wonder then that the office of governor general should attract the same popular desire when the issue is selecting its occupant (public consultations or Internet straw polls [Chase 2010]) or assessing the performance of his or her duties once selected?

How can the Crown, in the words of the sub-title of this paper, 'sustain democracy' when the people have no direct role to play in its composition and activities? Then again, how can they have more of a role when popular politics in Canada is partisan politics, and for the Crown neutrality is everything? No one serves the Crown by exposing it to suspicion or criticism. In Canada, its reservoir of legitimacy is constrained by virtue of the relatively short terms of its appointees (as another paper in this conference notes, that term is shorter than for any officer of Parliament) and thus their frequent turnover, by the demanding set of criteria prospective appointees must meet, and by a political culture that seems ever more ready to exploit the Crown's powers for partisan advantage or, alternatively, to weaken them.

Does the Crown sustain Canadian democracy? The answer is a qualified 'yes,' if democracy is understood to mean constitutional government, such as, for instance, the rights of Parliament, and if it is understood that the Crown is not involved in a form of gladiatorial combat with the political executive. The Crown does not triumph over the executive by vanquishing it so much as it stands in the breach, so to speak, and bears the brunt of the attack on behalf of the people. It is in that respect that the relationship between the Crown and the Canadian constitution has become manifest in recent years in a manner hitherto unacknowledged and the implication of whose development remains uncertain.

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