

The Office and Powers of the Governor General:  
Political Intention and Legal Interpretation

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A bill eliminating the royal prerogative of dissolution has now reached report stage in the British House of Lords, having already been passed by the House of Commons (UK Parliament, 2010-11). The bill sets May 7, 2015, as the date of the next general election and fixes the date for subsequent general elections as the first Thursday of May every five years thereafter. The bill states clearly that “Parliament cannot be otherwise dissolved” (section 3(3)), but has two specified exceptions. The House of Commons may, by a two-thirds vote, set an earlier date for an election, or an election may occur if a government is defeated on a confidence vote. In the latter case, an election will take place but only if the House has not passed a motion expressing confidence in an alternative government within fourteen days following the non-confidence vote. The bill gives to the Speaker of the House the authority to determine whether the conditions for dissolution have been met and, if so, he issues a certificate to that effect. The certificate is said to be “conclusive for all purposes” (section 3). Throughout the extensive debate on the bill in the House of Commons and the House of Lords, members of Parliament and legal experts assumed that the Parliament of the United Kingdom has the power

In contrast to the situation in Britain, some Canadian legal scholars and Crown lawyers maintain that, even though Canada has a “constitution similar in principle to that of the United Kingdom”, the Parliament of Canada does not have the power to limit by ordinary statute the prerogative powers of the executive branch, nor do the provincial legislatures. Indeed, this interpretation appears to have momentum and be gaining currency, despite its shaky foundations (Dodek, 2010; Hazell, 2010). The difference between the Canadian and British situations is said to lie in the amending formulae introduced in the *Constitution Act, 1982*, under which amendments in relation to “the office of the Queen, the Governor General and the Lieutenant Governor of a province” require the unanimous consent of the Parliament of Canada and all ten provincial legislatures (section 41(a)). The claim is that the term “office” includes the powers of that office. Some legal experts take the argument one step further, maintaining that the protection afforded to the powers of the Crown by section 41(a) also extends to advice to the Governor General by the Prime Minister (and therefore also the advice by Premiers to Lieutenant Governors).

The purpose of this paper is to challenge this interpretation of the amending formula, which has serious and undemocratic implications for the relationship between elective legislatures and their executive branches in Canada. The first part of the paper surveys the political background to the adoption of the amending formula in section 41(a) of the *Constitution Act, 1982*, covering the public debate and federal-provincial negotiations surrounding the final text. It shows that the central issue leading to the unanimity formula was Canada’s status as a

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constitutional monarchy and the place of the Queen as head of state. It shows further that the architects of the *Constitution Act, 1982*, amending formulae explicitly rejected the view that the proposed section 41(a) should or did include the powers of the office.

The second part of the paper examines critically the legal arguments being advanced in support of the view that the word “office” in section 41(a) protects the prerogative powers of the Governor General (and therefore also of the Queen and Lieutenant Governors). This is important because it is influential legal scholars who have embraced this position and Crown lawyers who have advanced it, with some limited success so far, before the Courts. Should it be endorsed by the courts, reversing the interpretation would require agreement by the federal Parliament and all ten provincial legislatures. There is no “notwithstanding clause” covering judicial interpretation of Part V of the *Constitution Act, 1982*, and no opportunity for dialogue after a judicial decision has been rendered. It is therefore essential for political scientists to be aware of and engage with the interpretations being advanced. This paper contributes to such a dialogue through the presentation of an alternative explanation of a key legal text that is being relied upon to support the position that the Parliament of Canada does not have the authority under the unilateral amending procedure in section 44 of the *Constitution Act, 1982*, to legislate regarding prerogative powers and instead must secure the unanimous support of all the provincial legislatures under section 41(a).

## PART 1: POLITICAL BACKGROUND

The decades long federal-provincial negotiations that led up to the patriation of the constitution do not provide support for the argument that the phrase “office of the Queen, the Governor General and the Lieutenant Governor” includes the powers of that office. Nor do the statements of the architects of the *Constitution Act, 1982*, made during the negotiations and after.

The amending formula for the constitution of Canada in place prior to patriation was section 91(1) of the *British North America Act, 1867*, enacted by the Parliament of the United Kingdom in 1949 at the request of the House of Commons and Senate without provincial involvement. Section 91(1) gave Parliament the power to amend the “constitution of Canada” with the exception of exclusive provincial powers, and the rights and privileges of provincial legislatures and governments; constitutional provisions respecting the use of English and French languages and minority education rights; and the requirement for an annual session of Parliament and the five year maximum parliamentary term. Until the Supreme Court of Canada delivered its advisory opinion in the *Upper House Reference* in 1980, section 91(1) was interpreted as giving the Parliament of Canada powers of amendment so extensive that some legal experts thought even extended to the abolition of the monarchy as head of state in Canada or of the Senate without provincial consent (Forsey, 1977; Scott, 1966-67: 531). Between 1950 and 1982, the federal and provincial governments attempted to find a way to complete the patriation of the amending formula. The federal and provincial governments shared the objective of finding procedures to cover the matters exempted under that section but the provinces also sought to narrow the scope of the federal amending powers under section 91(1). In this, they were hugely successful. In the *Constitution Act, 1982*, all that remains of section 91(1) is section 44, which recognizes that, “Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and

House of Commons”. The part of sections 41 and 42 relevant to the executive government is 41(a).

The primary focus of the provinces throughout the decades of negotiations was on the powers of their own legislatures, particularly division of powers issues. To the extent that the powers of the Governor General were a concern for provinces, this was in relation to the statutory powers of appointment of Lieutenant Governors, Senators and Supreme Court Justices, and the powers of reservation and disallowance. The prerogative powers of the Governor General in relation to the Parliament of Canada were not a matter of concern to the provinces. The Fulton-Favreau formula, agreed to by all the provinces in 1964 but later rejected by Quebec, is the one proposed constitutional amending formula that might implicate these powers. That proposal recognized that the amendment of the constitution in relation to the executive Government of Canada as an exclusive responsibility of the Parliament of Canada except as regards “the functions of the Queen and the Governor General in relation to the Parliament or the Government of Canada” (Hurley, 1996: 186). Guy Favreau, the Minister of Justice in the Pearson government who sponsored the formula, did not provide any explanation of this clause in the paper he released as background to the amending formula (Favreau: 1965). Analysis of the Fulton-Favreau formula by legal experts writing in a special issue of the *McGill Law Journal*, many of whom were closely involved in negotiations with either the federal or provincial governments, also did not highlight the language of the provision in their commentaries and it does not seem to have been an issue in the negotiations (McGill, 1966-67).

Whatever the intention behind the Fulton-Favreau wording, it did not survive long as an option on the constitutional negotiating table after its final rejection by the Quebec Liberal government of Jean Lesage under tremendous public opposition to the proposal. The preferred approach of Liberal governments under Pierre Elliott Trudeau, reflected in federal proposals advanced in 1969 and 1978, was to place the powers of the Governor General on a statutory basis, and in the process to Canadianize the position of head of state and codify limitations on the traditional prerogative powers of the Governor General. The Government of Canada published a comprehensive set of proposals under the title *The Constitution and the People of Canada : an Approach to the Objectives of Confederation, the Rights of People and the Institutions of Government* in advance of the February 10, 11 and 12, 1969, federal-provincial constitutional conference. Under the proposals, the Queen would remain as head of state but the Governor General would exercise all the monarch’s functions. He would exercise his powers on the advice either of the Governor-in-Council, as already specified in the text of the constitution, or of the Prime Minister “except to the extent of the discretion he retains to select a Prime Minister and to decline advice to dissolve Parliament” (Canada, Government, 1969: 66). In the 1978 version, introduced into the House of Commons as Bill C-60, the Queen was named as “the sovereign head of Canada” but the executive government was to be “vested in the Governor General” rather than the Queen, and he was to be Commander-in-Chief of the Armed Forces. The Governor General was to represent the Queen and to “exercise for her the prerogatives, functions and authority belonging to her in respect of Canada” (Canada, 1978: s. 2). Bill C-60 contained numerous provisions that would codify and limit the Governor General’s prerogative powers, some of which drew heavy criticism from constitutional experts (Forsey, 1978(a) & (b) ; Lederman 1978(a) & (b); McConnell, 1978).

On both occasions a main effect of the Canadianization proposals was to mobilize monarchist opposition in English Canada to changes in the head of state. It is hard to imagine today the intensity of the debates in the 1960s around removing royal symbols from postal boxes and adopting a distinctive Canadian flag. The issue of Canadianizing the head of state position favoured by Trudeau Liberal governments was frequently seen as linked to the abolition of the monarchy, certainly by monarchists but also sometimes by liberal nationalists. The 1972 final report of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada raised the issue directly, stating:

The Committee itself prefers a Canadian as Head of State, and supports the evolutionary process by which the Governor General has been granted more functions [as] the Head of State for Canada. Eventually, the question of retaining or abolishing the Monarchy will have to be decided by way of clear consultation with the people of Canada (Canada, 1972: 26).

In 1970, the Monarchist League of Canada was formed and was a vigilant participant in constitutional debates throughout that decade and around the patriation process in the early 1980s. The League had an influential ally in constitutional expert Eugene Forsey who was a member of the Senate until 1979 and active on its Constitution Committee. In an op ed published in the *Globe and Mail* Forsey raised the fear that the amending formula in the Liberal government's 1978 constitutional proposals, which limited the Senate to a suspensive veto on most matters, would permit the unilateral abolition of the monarchy by the House of Commons: "Under Bill C-60, a Government with a majority in the House of Commons could, within two months, make us into a republic (American-style, French-style, Italian-style or any other), or make us the only one-chamber federation in the world" (Forsey, 1978(a): 7).

The monarchy continued to be an issue during debates around patriation in 1980-81, where the spectre of republicanism was again raised, although Forsey himself (now out of the Senate) was satisfied with the Liberal government's proposals. Forsey was even supportive of the referendum procedure contained in the initial 1980 federal proposals (Forsey, 1980). However, the monarchist banner was taken up by Conservative members of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada. Jake Epp raised the alarm about subjecting "the office of the Queen, the Governor General and the Lieutenant Governor of a province" to an amending formula requiring either the approval of the Parliament of Canada and a majority of the provincial legislatures or a popular majority in a referendum. He feared that it meant that "the power of the Crown can either be abrogated, reduced or eliminated". (Canada, 1981: 31:77). The issue reached the broader public in a somewhat silly way after New Brunswick Premier Richard Hatfield stated in London, England, that "if this resolution is unduly delayed, or if it is not accepted in the terms in which it is presented by the Parliament of Canada, then the constitutional monarchy in Canada will be severely threatened. In fact, I think it will have a short life" (January 15, 1981). A February 3, 1981, editorial in the *Globe and Mail* saw Prime Minister Trudeau's preference for a republic over a monarchy as the mysterious motive behind the crisis in federal-provincial relations and asked "Does he hope to be Canada's first president?" This was followed up the next day by Jake Epp who introduced a motion in the Special Committee to change the wording of what became 41(a) to "the office of the Queen and her status as head of state of Canada and of the

provinces and the office of the Governor General and the Lieutenant Governor of a province” (53:56). He gave as the reason behind his amendment: “I want to avoid and prevent any means whereby the constitution could be amended in such a way that in fact a republican system of government could be introduced through this clause and that is why the amendment”. ( 53:57) In stating the Liberal government’s reasons for opposing the amendment, then Minister of Justice Jean Chretien maintained that the proposal did not change the status of the Queen at all and the intention was to stick with the wording agreed to by all the governments in 1970. (53:58). This did not satisfy Jake Epp who brandished a comment made by Prime Minister Trudeau twelve years earlier about a Quebec Liberal resolution calling for the abolition on the monarchy. Trudeau was reported to have said he viewed the Queen as “below skiing and snow shoeing” in importance (53:64).

The monarchist opposition in English-speaking Canada forced a federal retreat both after 1969 and 1978. In 1971, the federal government reached agreement with the provinces on the Victoria formula, which recognized in article 53 that “the Parliament of Canada may exclusively make laws from time to time amending the Constitution of Canada, in relation to the executive Government of Canada and the Senate and House of Commons” with the exception of specified matters that required the approval of the Parliament of Canada and a majority of the provinces according to a regional formula. Among the exceptions was “the office of the Queen, of the Governor General and of the Lieutenant-Governor” (Hurley, 1996: 189-90). After Quebec’s rejection of the Victoria Charter, the Trudeau Liberals returned in 1978 to their Canadianization proposals, only to be defeated in the 1979 general election. After returning to office in 1980, the Liberal government of Pierre Trudeau again took refuge in the Victoria formula, this time with a twist: a referendum procedure was to be an additional approval mechanism. At that time, the monarchists in the public and in Parliament had a strong supporter inside federal-provincial negotiations in Manitoba Premier Sterling Lyon. Quite apart from the issue of the head of state, the premiers disliked the referendum procedure and it was dropped from the final text. Section 41(a) the *Constitution Act, 1982*, is basically the same as that in the Victoria formula with the significant difference that the unanimous approval of the Parliament of Canada and all ten provincial legislatures is required for an amendment in relation to “the office of the Queen, the Governor General and the Lieutenant Governor of a province” .

The issue of whether the formulation “the office of the Governor General” included the powers or functions of that position was directly raised in hearings of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada on November 13, 1980. Perrin Beatty, a Conservative member of the Committee, asked “Is the government prepared to change Clause 50(a) so that it would read: (a), the office, powers and functions of the Queen, the Governor General and the Lieutenant Governor of the Province? That deals with the responsibility of Her Majesty in Canada” (4:46). In reply, Barry Strayer, then Assistant Deputy Minister of the Public Law division of the Department of Justice, clarified that the clause did not deal with the office, powers and functions and the reason for that:

Mr. Chairman, the proposal does not deal with the functions or office of the Queen or the Governor General in any substantive way at all and that was the concept, that those issues would not be dealt with in this proposal. So I think that what Mr. Beatty is suggesting goes to defining the role of the Monarchy.

Just by way of background on that, you may recall Bill C-60 did have a number of provisions that were subject of some debate and the First Ministers agreed in February, 1979, that those issues be put aside and not dealt with in constitutional reform at that time. So there is nothing in this proposal dealing with the definition of the functions of the Monarchy or the Governor General or the Lieutenant Governors (4:46).

Jean Chretien, Justice Minister during the patriation process, supported Strayer's interpretation in his testimony before the Special Joint Committee on February 4, 1981, stating "we had a long discussion about this problem with the First Ministers in 1970 and it was discussed again in 1979 and it was agreed that we should not make any move and remain in the situation which we are." (53:60). Strayer and Chretien's understanding of events is confirmed by the account of three Saskatchewan participants centrally involved in negotiations around patriating the Constitution: Roy Romanow, then Intergovernmental Affairs Minister; Howard Leeson, Deputy Minister of Intergovernmental Affairs; and John D. Whyte, Director of the Constitutional Law Branch of the Department of the Attorney General. They maintain that opposition from provincial premiers and the public to the 1978 proposals substituting the governor general for the monarch led Ottawa to finally concede "that the existing constitutional position would be neither modified or codified in the Constitution. As a result, provincial concerns were met and this item disappeared from future discussions" (Romanow et al, 2007: 51).

The debate in 1980-1981 around what became section 41(a) was posed in terms of the monarchy versus a republic. The suggestion by Perrin Beatty that the provision should be amended to include the "powers and functions" of these offices was specifically rejected as inconsistent with the intended meaning and previous federal-provincial agreements. Furthermore, throughout the decades long search for a constitutional amending formula, the provinces evinced no interest in limiting the prerogative powers of the Governor General in relation to the House of Commons or subjecting the prerogative powers of provincial Lieutenant Governors to vetoes by the federal Parliament or any one other legislature. The interest of the provincial governments in the powers of the Governor General had always been, and continued to be, with the statutory powers of the appointment and the powers of reservation and disallowance. To the extent that there was a concern among provincial Premiers about section 41(a), it related to the status of Canada as a constitutional monarchy and the symbolic role of the Queen as the head of state.

## PART 2: LEGAL ARGUMENT

The two main elements of the argument that the phrase "office of the Queen, Governor General, and Lieutenant Governor" found in section 41(a) covers the powers of those offices was concisely summarized by Patrick Monahan in an affidavit in the case *Conacher v. Canada (Prime Minister)* heard by the Federal Court in 2009. The case centred around Prime Minister Harper's advice to the Governor General to dissolve Parliament in 2008 contrary to the Conservative "fixed date elections" amendment to the *Elections Canada Act*. In a comment on the bill containing that amendment (Bill C-16), the affidavit stated:

18. The power to dissolve Parliament is part of the Office of the Governor General of Canada, having been delegated to the Governor General by His Majesty in the *Letters Patent Constituting the Office of Governor General of Canada* of October 1, 1947. Amendments to the Office of the Governor General of Canada cannot be accomplished through ordinary statute but, instead, require amendments authorized by section 41 of the *Constitution Act, 1982*. Thus, had Bill C-16 purported to limit the power of the Governor General to dissolve Parliament at her discretion the provision would have been an unconstitutional attempt to amend the Office of Governor General without following the procedure prescribed by section 41 .

19. For the same reason, any attempt to legally limit the discretion of the Prime Minister to advise the Governor General to dissolve Parliament would also require a constitutional amendment under section 41. The Governor General can only exercise the power of dissolution on the advice of the Prime Minister. Therefore, limiting the power of the Prime Minister to request a dissolution would be a fetter on the Office of the Governor General and require a constitutional amendment. (Monahan, 2008).

Monahan cites a Privy Council Minute of October 25, 1935, as authority for the view that the Governor General can only exercise the power of dissolution on the Prime Minister's advice. Warren Newman, a Crown lawyer with the federal government and legal scholar in his own right, elaborates a similar argument in a 2009 article in the *National Journal of Constitutional Law* (Newman, 2009).

Under the Monahan/Newman interpretation, section 41(a) removes the prerogative powers from the jurisdiction of the legislatures to which the executive branch is accountable and places them within the shared jurisdiction of the Parliament of Canada and all the provincial legislatures. This is a significant departure from constitutional tradition dating from the 1890s that saw the prerogative powers as divided along the same lines as the legislative division of powers in the *Constitution Act, 1867*. In *Hodge v. the Queen*, an 1883 case dealing with the scope of the powers of delegation of the Ontario legislature, the Judicial Committee of the Privy Council (JCPC) held that the Imperial Parliament had conferred on the provincial legislature an

authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances (Hodge: para 36).

The 1892 decision of the JCPC in *Liquidators of the Maritime Bank of Canada v. the Receiver-General of New Brunswick* built on the decision in *Hodge*, affirming that the supremacy of provincial legislatures within their areas of jurisdiction carried with it the implication that prerogative powers were divided along the same lines as legislative powers. The provincial legislatures were coordinate with and not subordinate to the Dominion parliament. Within the spheres assigned by the 1867 Act, the relationship of the executive branch at the provincial level with the sovereign was as direct as that of the executive branch at the Dominion level (Maritime Bank, 1982: para 4).



The extension of the “protection” of section 41(a) to the Prime Minister’s exercise of prerogative powers would drain the principle of responsible government of its democratic content. The principle, as understood at the time of confederation and as emphasized by Eugene Forsey in his work, means an executive branch accountable to the people through the elected legislature (Forsey, 1943; Forsey & Eglington, 1985). The concept is reduced here to the main convention by which the principle is secured, the convention that the Governor General (normally) acts on the advice of Ministers and particularly that of the Prime Minister. It is difficult to imagine what purpose section 41(a) would have on this interpretation, other than to insulate the First Ministers in their exercise of prerogative powers from accountability to their own elected legislatures. As a practical matter, it is hard to see how any limitation on these powers would ever occur. Intergovernmental negotiations around constitutional amendment have always been an executive federalist process in Canada. There are no mechanisms for legislature to legislature coordination. Consequently, any restrictions on the exercise of prerogative powers would be entirely in the hands of the executive branch itself.

One final point should be raised before the examination of the argument in more detail begins. Section 41(a) of the *Constitution Act, 1982*, sets out “the office of the Queen, Governor General and the Lieutenant Governor” as an exception to the general power the Parliament of Canada has under section 44 to “exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada”. This provision is all that remains of the very broad unilateral amending power of the Parliament of Canada that was added to the *British North America Act, 1867*, as section 91(1) in 1949. Section 44 would appear to protect the traditional constitutional principles of parliamentary supremacy and responsible government. Yet the Monahan/Newman interpretation of section 41(a) seems to leave no real substance to section 44 and so conflicts with a basic rule “that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution” (*New Brunswick Broadcasting*, 1993: para. 105).

As Monahan’s concise summary indicates, there are two steps in the argument. The first step centres on establishing that the word “office” in section 41(a) of the *Constitution Act, 1982*, includes the powers of the Governor General. The second step invokes the principle of responsible government to extend the claimed protection of section 41(a) to a Prime Minister’s exercise of prerogative powers. It would be possible to advance an argument regarding the first step, the meaning of the term “office”, without also arguing that the “protection” afforded by section 41(a) extends to the Prime Minister. The second step depends on the first and is necessary if one wishes to insulate the Prime Minister’s (and other First Ministers’) exercise of prerogative powers from legislative control. Because of the problem of space, this paper will focus on the first step of the argument and forego any further comment on the problematic aspects of the presentation of the principle of responsible government.

In the support of his position that the “office of the Governor General” includes the powers of that office, Monahan appears to rely on the language of the *Letters Patent*. Other than their use of the words “office” and “powers” in the same document -- although not precisely in the way suggested -- it is not clear what the relevance of this document is. The *Letters Patent* is a prerogative instrument that deals with relations between the executive branches in the United

Kingdom and Canada (Mallory, 1956). It does not define or limit the scope of the legislative powers of the Parliament of Canada, which is what matters when it comes to limiting prerogative powers. In any case, the *Letters* repeatedly employs the adjective “lawful” and the adverb “lawfully” in connection with the word “powers” indicating that the powers are subject to regulation by law. For example, article VI reads: “we do further authorize and empower Our Governor General to exercise all powers lawfully belonging to Us in respect of summoning, proroguing or dissolving the Parliament of Canada” (Letters Patent, 1949). In his *Constitutional Law* text Monahan does argue that that the *Letters Patent*, although not listed in the section 52 of the *Constitution Act, 1982*, should be considered as coming within the definition of the Constitution of Canada “at least to the extent that it creates the office of the governor general and defines the powers of the office” (Monahan, 2006: 198). He sees this as consistent with 41(a) but does not explore the relationship such an entrenchment would have to section 44 or foundational constitutional principles generally (Monahan, 2006: 199).

Warren Newman relies mainly on judicial precedent for his argument that the “protection afforded to the ‘office’ of the Queen and those of her representatives, the Governor General and the Lieutenant Governors extends to their royal powers” (Newman, 2009: 222). The most important of these is the *Initiative and Referendum Reference*, which is examined in detail below. Two other judicial decisions he cites will be dealt with briefly first. These cases are *Ontario Public Service Employees Union v. Attorney General of Ontario* (OPSEU) and *Conacher v. the Prime Minister of Canada* (Conacher) at the Federal Court and Federal Court of Appeals levels (OPSEU, 1987); and Conacher, (2009 & 2010).

*OPSEU* began prior to the 1982 constitutional amendment and centred on restrictions the Ontario government placed on the political activity of Ontario public servants during elections, both as candidates and campaigners. The case was decided by four of the Justices based in part on an interpretation of section 92(1) of the *British North America Act, 1867*, which gave provincial legislatures the power to amend “the constitution of the provinces, except for the office of Lieutenant Governor”. The focus of the decision was the meaning of the phrase “the constitution of the province” in section 92(1), however, Justice Beetz added the following caution:

Thus it is uncertain, to say the least, that a province could touch upon the power of the Lieutenant-Governor to dissolve the legislature, or his power to appoint and dismiss ministers, without unconstitutionally touching his office itself. The principle of responsible government could, to the extent that it depends on those important royal powers, be entrenched to a substantial extent (OPSEU, 1987: para. 101).

Leaving aside the odd notion that responsible government depends to any extent on the royal prerogative, the remark can hardly be considered determinative of the matter. The case did not deal with amendments affecting prerogative powers and the definition of the term “office of the Lieutenant Governor” was not argued in the case and was not considered by the Court. The comment was clearly made *in obiter* and a very tentative *obiter dictum* at that.

The most recent and directly relevant case is the 2009 decision of the Federal Court in *Conacher v. Canada (Prime Minister) Canada*, which centred on the 2008 dissolution of Parliament contrary to the government's own fixed date election amendment to the *Elections Canada Act*. Adopting the argument advanced by the Crown, Justice Shore stated that “[a]ny tampering with [the Governor General’s] discretion may not be done via an ordinary statute, but requires a constitutional amendment under Section 41 of the *Constitution Act, 1982*, which requires unanimous consent of all provincial governments as well as the federal government before a change can be made to the ‘office of the Governor General’” (Conacher, 2009: para 53). The Crown factum relied almost exclusively on Monahan’s affidavit and Justice Shore does not cite any additional authority. The Federal Court of Appeal dismissed Democracy Watch’s appeal of the decision, without taking a position on the constitutionality of statutory limitations on a Prime Minister’s advice to the Governor General (Conacher, 2010: para 5). Leave to appeal was denied by the Supreme Court of Canada, leaving the matter unresolved.

The more interesting support for Newman’s argument comes from his interpretation of the Judicial Committee’s decision in the *Initiative and Referendum Reference*. The case centred on a 1916 Act of the Manitoba legislature that allowed laws to be made or repealed by a direct vote of electors. The bill was reserved by the Lieutenant Governor of Manitoba and the Manitoba government, whose legislation it was, referred the matter to the courts. The Manitoba Appeals Court found the legislation outside the jurisdiction of the provincial legislature granted under section 92(1) of the *British North America Act, 1867* which gave a provincial legislature power to amend “the constitution of the province, except as regards the office of Lieutenant Governor”. The Dominion and Manitoba governments agreed to refer the case directly to the Judicial Committee of the Privy Council, bypassing the Supreme Court of Canada. The JCPC upheld the decision of the Manitoba court.

In his discussion of the *Reference*, Newman relies particularly on two sentences in the judgment. As the sentences are central to Newman’s argument and the language is confusing, it is worth reproducing them in full:

The references their Lordships have already made to the character of the office of Lieutenant-Governor, and to his position as directly representing the Sovereign in the province, renders natural the exclusion of his office from the power conferred on the Provincial Legislature to amend the constitution of the Province. The analogy of the British Constitution is that on which the entire scheme is founded, and that analogy points to the impropriety, in the absence of clear and unmistakable language, of construing s. 92 as permitting the abrogation of any power which the Crown possesses through a person who directly represents it (para. 11).

Newman’s view seems to be that the second sentence is an interpretation of the phrase “office of the Lieutenant Governor” in the first sentence. On that reading, the sentence means something like: a comparison with the British Constitution leads to the conclusion that it is improper for a legislature to eliminate (or even limit) any power the Crown possesses. But such a reading is not credible. It would have to presume that the Law Lords knew nothing about the evolution of the British constitution from the Magna Carta forward or choose to ignore it. The reduction and

elimination of the prerogative powers of British monarchs has been at the centre of British constitutional history, and continues today in the Fixed Term Parliaments bill. Parliament's power to limit and displace prerogative powers through statute was settled in the seventeenth century through the English civil wars, and the "Glorious Revolution", and was reflected in the terms of the 1689 Bill of Rights. (Loveland, 2009: 25-29)

Based on the analogy with the British constitution, the sentence says something quite different: if a legislature wishes to abrogate a royal power it must do so in clear and unmistakable language. The second sentence should be understood as referring to a rule of statutory interpretation employed by the courts in determining the meaning of legislative provisions. Courts in England provided (and still provide) some protection to royal power through what Rodney Brazier describes as the "[t]he well known rule of statutory interpretation . . . that legislation will not affect the Crown unless it expressly so provides, or if that result flows by necessary implication. The monarchy will not, therefore, be affected by legislation by accident" (Brazier, 2007: 94). This approach is followed by Canadian courts and the rule is included in Canadian statutory interpretation laws (Sullivan, 2007: 275). The Act in question is the *British North America Act, 1867*, which empowered Canadian legislatures. Had that Act been intended to alter the position of the monarch in relation to the legislatures, then it would have contained language to that effect.

The central issue in the *Initiative and Referendum Reference* was the scope of the powers of delegation of a colonial legislature, not the powers of the legislature with respect to the executive branch. The British North American colonies had achieved responsible government in the 1840s and enjoyed self-government within areas not involving British imperial interests. The matter of the relationship of the executive branch to these legislatures was already settled prior to confederation. The *BNA Act* did not change that, it confirmed it in the phrase "a constitution similar in principle to that of the United Kingdom". The question the court had to consider in the *Reference* was whether the Manitoba legislation affected the rights and interests of the Crown and, if so, did it do so in ways contemplated by the *BNA Act*. The answer to the second and crucial question was no. Had the Act intended to remove the Crown as part of the legislative process, it would have contained language to that effect. That it did not is evident in the language of the Act which describes the legislature as involving the Crown and the legislature and specifically mentions the requirement of royal assent in some passages.

This interpretation of the decision makes sense of what is otherwise puzzling in the Judicial Committee's decision, which is that it does not reverse but rather confirms the descriptions in *Hodge* and *Maritime Bank* of the plenary powers of a provincial legislature and the nature of the provincial executive. Paragraph 9 of the judgment summarizes the position of the legislative and executive branches as established in the Court's previous decisions on the nature of the Canadian constitutional order stating that under the *British North America Act, 1867*,

. . . each Province was to retain its independence and autonomy and to be directly under the Crown as its head. Within these limits of area and subjects, its local Legislature, so long as the Imperial Parliament did not repeal its own Act conferring this status, was to be supreme, and had such powers as the Imperial Parliament possessed in the plenitude of its own freedom before it handed them over to the Dominion and the Provinces, in accordance with the scheme of distribution which it enacted in 1867 (para 9).

This emphasis on the plenary powers of a colonial legislature within its areas of jurisdiction was a theme of imperial jurisprudence generally. However, this recognition gave rise to complexities perhaps not originally envisaged as the legislative delegation of powers increased significantly with the expansion of the role of the state in the late nineteenth and early twentieth centuries. The *Initiative and Referendum Reference* and in other cases raised question of the scope of the powers of delegation of those legislatures. (Moore, 1922). This larger context of colonial jurisprudence is helpful in understanding the JCPC's judgment regarding the Manitoba legislation.

Under section 5 of the *Colonial Laws Validity Act, 1865*, which covered Canada until its repeal by the *Statute of Westminster* in 1931, a representative colonial legislature had the power "to make laws respecting the Constitution, Powers, and Procedure of such Legislature" provided these were consistent with Acts of the Parliament of the United Kingdom, letters patent or U.K. Orders-in-Council, or colonial law generally (CLVA, 1865). Section 92(1) of the *British North America Act, 1867*, recognized that the provincial legislatures had these powers with respect to their own constitutions, with the exception of "the office of the Lieutenant Governor". In its decisions dealing with the powers of colonial legislatures to delegate power to other bodies, the Judicial Committee of the Privy Council had determined that these legislatures were not delegates of the Imperial Parliament and so were not barred (under the principle that a delegate cannot further delegate power or *delegatus non potest delegare*) from delegating powers ancillary to legislation. But did this mean that there were no limits to their powers of delegation within their areas of jurisdiction? Were they as extensive as those of the Parliament of the United Kingdom, which were unlimited under the doctrine of the sovereignty of Parliament? These were the questions underlying judicial consideration of the *Initiative and Referendum Act* (Moore, 1922). More specifically, the Act raised the question of whether or not the powers of delegation of a provincial legislature were so extensive that it could delegate its entire legislative power to another body. In the case of Manitoba, this other body was the people, raising the spectre of popular sovereignty.

In cases dealing with the scope of delegation of colonial legislatures, the JCPC found the answer in the language of the legislation that empowered the legislature, in this situation the *British North America Act, 1867* (Moore, 1922). The decision in the *Initiative and Referendum Reference* rests on the absence of language in the *British North America Act, 1867*, indicating an intention to affect the monarchy and on the presence of language regarding the Crown's role in the legislative process. It relies on the definition of legislature rather than of the "office of the Lieutenant Governor". The sentences Newman quotes are taken from paragraph 11 of the decision, which goes on to say:

Moreover, in accordance with the analogy of the British Constitution which the Act of 1867 adopts, the Lieutenant-Governor who represents the Sovereign is a part of the Legislature. . . . It follows that if the Initiative and Referendum Act has purported to alter the position of the Lieutenant-Governor in these respects, this Act was in so *far ultra vires*.

The next paragraph in the decision expands on this point, saying that the “Lordships are of opinion that the language of the Act cannot be construed otherwise than as intended seriously to affect the position of the Lieutenant-Governor as an integral part of the Legislature”. The fatal flaw of the act is that “the Lieutenant-Governor appears to be wholly excluded from the new legislative authority” (para. 12).

The matter of what the components were of a body authorized to make legally binding legislature was important in colonial jurisprudence and was also central to the evolution of the British constitutional principle of the supremacy of Parliament (Moore, 1922; Maitland, 1920). The answer with respect to colonial legislatures is that a legislative power had to be composed at a minimum of an elected representative body and the Crown, the abolition of appointed councils having been found to be within the power of the legislatures to amend their constitutions. In his *Constitutional History of England*, F.W. Maitland traces the “history of the legislative formula” in England as requiring the King, the House of Lords and the House of Commons, and the process whereby the prerogative instruments of the Crown became subordinate to the statute as the ultimate legislative authority (184-190; 297-306; 381-382). This is the legal process, secured politically through the English Civil Wars and “Glorious Revolution”, which established the sovereignty of Parliament (or the King-in-Parliament) over the sovereignty of the Crown. The Judicial Committee had previously made the point about the link between the components of a legislature and supreme legislative power in *Maritime Bank* in deciding that provincial legislatures were not analogous to municipal institutions and did not exercise delegated powers: “it would require very express language, such as not to be found in the Act of 1867, to warrant the inference that the Imperial Legislature meant to vest in the provinces of Canada the right of exercising supreme legislative powers in which the British sovereign was to have no share” (para. 5).

In the *Initiative and Referendum Reference* the Judicial Committee was faced with a measure that posed the principle of the sovereignty of the people against the principle of the sovereignty of Parliament. Requiring as the JCPC did that the Crown be part of the legislative process meant insisting that under a “constitution similar in principle to that of the United Kingdom” sovereignty lay with Parliament and not the people, as in the United States. These fundamental questions of constitutional theory are addressed more directly by the Justices of the Manitoba Court of Appeal. The Judicial Committee of the Privy Council side-steps them in a judgment that is as brief given the complexity of the legal questions as it is opaque. The Law Lords were quite capable of rendering a clear judgment; the reason they chose not to provide one is a matter of speculation. One possible explanation may be the legitimacy challenges of an Imperial court deciding the matter of popular sovereignty in the post-World War One era when colonial empires were collapsing and revolutionary struggles were convulsing many countries. Canadian politicians faced their own challenges from labour and farm populist movements

particularly in Western Canada, which may explain their agreement to ship a sensitive political matter off to the British high court bypassing the Supreme Court of Canada (as well as the political mechanisms afforded by the reservation and disallowance powers). The members of the Judicial Committee made clear in the judgment their irritation with the Canadian behaviour. The *Initiative and Referendum Reference* would not be the only time that Canadian politicians would use the reference device to avoid handling a political hot potato nor the only time that a high court responded by rendering a judgment that carefully obscured contentious political issues.

By 1919, the power of royal assent was a formality in Britain: the last time a monarch refused royal assent to a bill was in 1707 (Maitland, 423). Eugene Forsey quotes John A. Macdonald as saying in 1882 that “the power of veto by the Crown is now admitted to be obsolete and practically non-existent” (Forsey, 1984: 21). The significance of its absence in the Manitoba bill was that royal assent marked the place of the crown in the legislative process and signalled where sovereignty lies in a “constitution similar in principle to that of the United Kingdom”. The *Initiative and Referendum Act* was not about limiting a royal power but of abrogating, that is to say, eliminating it. The decision of the Judicial Committee of the Privy Council sets the outer limits to the plenary powers of colonial legislatures. In the absence of explicit language empowering them to do so, they cannot limit through statute the prerogative powers of the Crown to the point that the Crown is entirely eliminated as part of the legislative process. They cannot change the nature of the political system into something other than a constitutional monarchy founded on the principle of parliamentary sovereignty.

The judgment in the *Initiative and Referendum Reference* did recognize a barrier to constitutional amendment that a colonial legislature faced and the British Parliament did not. Unlike the imperial Parliament which was unrestricted in its legislative power, a colonial legislature was limited by the imperial statute that empowered it. In the case of a Canadian legislature (and other colonial legislatures), this statute did not foresee and therefore did not permit the elimination of the monarchy as part of the legislative process. The patriation of the constitution in 1982 finally eliminated any remaining remnants of colonial restrictions on the capacity of Canadian legislatures. Canadians can, if they choose, abolish the position of the monarch as head of state for Canada or the monarchy as an institution playing any role in the Canadian constitutional order. However, the First Ministers voluntarily agreed in 1982 to provide a high level of protection against such a decision by requiring under section 41(a) that amendments to the institution of the monarchy receive the unanimous consent of the federal parliament and the ten provincial legislatures.

## CONCLUSION

The discussion in this paper highlighted the distinction between the monarchy as an institution and the powers associated with that office. Very few of the royal prerogatives, however, are actually exercised by the Governor General or the Lieutenant Governors. Convention has narrowed the personal prerogatives of the Crown to a very few. The Governor General’s power of dissolution is a power of denial: the Governor General may in very limited circumstances deny a Prime Minister’s request for dissolution.. It is generally recognized by constitutional scholars that a Governor General has complete discretion constitutionally in a

situation where a Prime Minister has lost the confidence of the House of Commons. Many scholars recognize it would be proper for a Governor General to deny a recommendation of dissolution by a Prime Minister who has not yet lost a vote of confidence in very rare circumstances. These essentially amount to situations where the Prime Minister is abusing the prerogative power of dissolution, such as when he seeks to avoid a non confidence vote in the House of Commons or to engineer a House of Commons to his liking by recommending frequent dissolutions or a dissolution too soon after a previous election. Other than the purely formal power of royal assent, the other royal prerogative that the Governor General may exercise personally is to choose a Prime Minister. But again, his discretion has been circumscribed by convention and the operation of political parties so that the Governor General only plays a role of importance when the electorate has not returned a House of Commons that makes the choice of the Prime Minister obvious and when the parties themselves cannot sort the matter out.

In a “constitution similar in principle to that of the United Kingdom”, there is no reason why the discretion of the Governor General cannot be further limited, either through the Standing Orders of the House of Commons (as suggested by the Clerk of the Commons in the United Kingdom with regard to the Fixed Term Parliaments bill) or by statute. This should be a matter exclusively for the legislatures involved, as provided for in sections 44 and 45 of the Constitution Act, 1982. These provisions allow the federal Parliament to amend the constitution with respect to the executive government of Canada and the provincial legislatures their constitutions by simple statute. If they get it wrong, they can reverse it. There is, however, a practical limit on these powers of amendment. In a constitutional monarchy, the Crown must have a responsible government to advise it. If Parliament is unable to provide such a government, then the head of state must have the power to bring about one, either by calling on a leader who can command the confidence of the House of Commons or by dissolving Parliament to make way for an election and the possibility of a House of Commons capable of sustaining a government. But it is completely legitimate in a parliamentary democracy for Parliament or a provincial legislature to provide statutory mechanisms to bring about a responsible ministry without the intervention of the Crown. Indeed, it is preferable to avoid as far as possible the involvement of the Crown or its representatives in the political process because of problems of legitimacy of these offices, in Britain because those who hold them do so by right of birth and in Canada by political appointment.

The real issues from a democratic perspective do not centre today on a Governor General or Lieutenant Governor’s exercise of the royal prerogative but on the apparent lack of independence of these offices from the Prime Minister and, very importantly, the exercise by Cabinet Ministers and the Prime Minister of the “ministerial executive prerogatives”. This term emerged out of the British debate around “taming the prerogative” and, as a Select Committee of the U.K. House of Commons pointed out, “ the connection between these powers and the Crown, or The Queen, is now tenuous and technical, and the label ‘royal prerogative’ is apt to mislead” (U.K. Parliament, 2004: 6). Focusing on the powers of the Queen, Governor General or Lieutenant Governor disguises the central problem of democratic accountability which is the growing independence of the Prime Minister from Cabinet control and of the executive branch generally from the elected legislature. The rise of what Donald Savoie describes as “court government” is the result of many causes and there have been numerous attempts by legislatures



and academics to find ways to increase executive accountability (Savoie, 2008). In *OPSEU*, the Supreme Court warned about provincial legislatures using their constitutional amending power “to bring about a profound constitutional upheaval by the introduction of political institutions foreign to and incompatible with the Canadian system” (para. 106). Judicial confirmation of the argument that the “office of the Queen, the Governor General and the Lieutenant Governor” includes the powers of those positions would serve to further limit the capacity of legislatures and citizens to restore some kind of balance between the executive and legislative branches. The extension of the claimed protection of section 41(a) to the exercise of the prerogative powers by the Prime Minister would undermine the constitutional foundations of the executive/legislative relationship in a constitution modelled on that of the United Kingdom. Indeed, it would have the same practical effect as the elimination of the monarchy and the creation of a republic, but without the checks that Canadians would want to implement if they choose to go in that direction. Section 41(a) ensures that Canadians can abolish the role of the Crown in Canada’s political system if they wish but only with the unanimous consent of all the legislatures, ensuring that the conditions exist for full public debate on the matter. The courts should not presume to bring about profound changes to Canada’s constitutional order through judicial review when legislatures are prevented from doing this by the most restrictive of all the amending formulae, nor should the courts be asked to do so.

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