

**"The Governor General and Lieutenant Governors:  
Canada's Misunderstood Viceroys"**

by

David S. Donovan,  
2008-2009 Intern,  
Ontario Legislature Internship Programme (OLIP)  
1303A Whitney Block,  
Queen's Park,  
Toronto, Ontario M7A 1A1

Phone: 416-325-0040

Email: [davidd@olipinterns.ca](mailto:davidd@olipinterns.ca)

[www.olip.ontla.on.ca](http://www.olip.ontla.on.ca)

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## Introduction

Whether it is due to a deteriorating understanding of Canada's model of parliamentary democracy or because of a removal from the public eye; it seems clear that the general understanding of many of our nation's fundamental institutions which form the basis of democracy in Canada is in decline. In the words of former Governor General Adrienne Clarkson, there is "an abysmal lack of knowledge about the system."<sup>1</sup> This point could not be illustrated greater than by the events of December of last year, when Prime Minister Harper was forced to visit Rideau Hall to request the prorogation of parliament rather than face the potential defeat of the government. The Prime Minister made this request to the country's Governor General, Her Excellency Michaëlle Jean, at a time when an *Ipsos-Reid* poll confirmed that three-quarters of Canadians could not even name our own head of state;<sup>2</sup> which begs the question, what did the majority of Canadians think was occurring on that December morning?

Rather, it seems more likely that if asked, the average Canadian, presuming they were familiar with the term 'Governor General' or 'Lieutenant Governor', would identify the officeholders as strictly ceremonial, with roles that entailed: bestowing occasional awards; hosting a few afternoon teas; and lots and lots of ribbon-cutting! In essence, a contemporary misconception exists in Canada that our vice-regal appointees are politically impotent. Michael Valpy writes,

The crown's role in the machinery of Canada's constitutional monarchy rarely sees daylight. Only a handful of times in our history has it been subjected to glaring sunshine, unfortunately resulting in a black hole of public understanding as to how it works.<sup>3</sup>

But in truth, there is a long-standing legal foundation in Canada which endows our vice-regals with wide-ranging and significant political powers. The legal groundwork of which appears throughout *The British North America Act, 1867*, *The Letters Patent, 1947*, *The Constitution Act, 1982*, as well as Commonwealth law and tradition which encompasses the Royal prerogatives. Nevertheless, despite this legal foundation, misconceptions remain in both the public mind and the Canadian body politic, including conventions. Yet, then again, throughout Canada, instances exist in which these political powers have been invoked, upon the discretion of the vice-regal, which seem to snub convention; suggesting that they remain in full legal effect.

To date, none of the legal powers of Canada's vice-regals have been repealed; instead they remain firmly entrenched in the country's constitution. Moreover, due to several events since Confederation it can be said that these powers have not only remained but they have been further entrenched since 1867. It is because of the immense legal potential of the office that it is imperative that Canada's vice-regals are seen and act as independent figures, rather than as arm of the governing party.

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<sup>1</sup> Adrienne Clarkson, Foreword to *Parliamentary Democracy in Crisis*, ed. Peter H. Russell and Lorne Sossin, (Toronto: University of Toronto Press, 2009), pp. ix.

<sup>2</sup> "In Wake of Constitutional Crisis, New Survey Demonstrates that Canadians Lack Basic Understanding of our Country's Parliamentary System," *Ipsos-Reid*, 15 December 2009 <<http://www.dominion.ca/DominionInstituteDecember15Factum.pdf>>.

<sup>3</sup> Michael Valpy, "The 'Crisis'," *Parliamentary Democracy in Crisis*, ed. Peter H. Russell and Lorne Sossin, (Toronto: University of Toronto Press, 2009), pp. 4.

### *The Legal Basis behind Canada's Vice-Regals*

The most common quote in reference to vice-regal offices is that of Walter Bagehot who outlines the sovereign's three rights as "the right to be consulted, the right to encourage, and the right to warn."<sup>4</sup> However, this quote is misleading as Canada's vice-regals possess a set of powers which exist outside this statement.

*The British North America Act* states that "All Powers, Authorities, and Functions"<sup>5</sup> shall be vested in and "may be exercised by the Lieutenant Governor"<sup>6</sup> of the respective province. Essentially this states that the Lieutenant Governors would fulfill a role in the provinces similar to the role that the Governor General plays in Ottawa or the monarch in London. Consequently, Canada's four Lieutenant Governors in 1867 would become the chief executives in their respective provinces with all expected powers placed upon them.

From the outset, the vice-regal offices were created to protect the greater interests of unity while at the same time permit a greater autonomy and self-governance. Thus, the Lieutenant Governors were appointed by and expected to be agents of the Dominion government in Ottawa, while the Governor General was appointed by and expected to be an agent of the Imperial government in London. This arrangement, however, officially changed due to two separate events. The first occurred in 1892 when the Judicial Committee of the Privy Council, the highest court in the British Empire, ruled that in the case of *The Liquidators of the Maritime Bank of Canada v The Receiver General of New Brunswick*, "the Lieutenant Governor...as much the representative of His Majesty for all purposes of Provincial Government as the Governor General himself is, for all Dominion Government."<sup>7</sup> This ruling went clearly against Macdonald's dream of a centrist nation, as the law lords declared that the crown of the provinces was equal to, rather than subordinate to the federal crown; no longer would the Lieutenant Governors be agents of the federal government.<sup>8</sup>

The second instance which changed Canada's original vice-regal arrangements was the *Statute of Westminster* of 1931 which in effect created a separate crown for the United Kingdom and each of the six dominions of the Empire, thus creating legislative equality between all seven parties. This in effect, restricted the British government from advising the King or Crown in respect to Canadian matters. Hence forth the monarch was only to accept advice from the Canadian Privy Council on Canadian issues. The repercussions of these two cases meant that the 'crown' in Canada was actually 'divided' into ten; a federal crown represented in Ottawa by the Governor General and nine provincial crowns represented by the Lieutenant Governors (the eleventh to be added when Newfoundland joined confederation in 1949).

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<sup>4</sup> Frank MacKinnon, *The Crown in Canada* (Calgary: McClelland and Stewart West, 1976), pp. 122.

<sup>5</sup> *British North America Act*, 1867.

<sup>6</sup> *British North America Act*, 1867.

<sup>7</sup> David E. Smith, *The Invisible Crown: The First Principle of Canadian Government* (Toronto: University of Toronto Press, 1995), pp. 23.

<sup>8</sup> Ronald I. Cheffins, "The Royal Prerogative and the Office of the Lieutenant Governor," *Canadian Parliamentary Review*, Vol. 23, no. 1 (2000).

<<http://www.parl.gc.ca/infoparl/english/issue.htm?param=74&art=163>>.

From a strict reading of the *British North America Act*, 1867, it might seem that Canadians live under a “benevolent dictatorship.”<sup>9</sup> However, it is understood that the broad sweeping powers granted to the vice-regals by the constitution have been fairly limited by convention. The question which remains is not whether or not Canada’s vice-regals are restricted by convention, but rather how far convention actually limits their use.

Section 12 of the *British North America Act* essentially transfers all of the powers of the former Governors and Lieutenant Governors of the former colonies to their respective federal and provincial governors in the new Canadian confederation. But the vagueness of the office seems to arise in the provision which reads, “By the Governor General with the Advice, or with the Advice and Consent of or in conjunction with the Queen’s Privy Council for Canada, or any member thereof, or by the Governor General individually.”<sup>10</sup> J.R. Mallory notes that, “the power of the Governor General, as set in the Constitution [especially Section twelve], are formidable, though vague...it is by no means clear where the line is between powers exercised on advice and on the responsibility of the government of the day and powers the Governor General may exercise on his or her discretion.”<sup>11</sup>

The *British North America Act*, however, does speak to the Governor General’s significant role in regards to the legislative branch. In fact there is absolutely no mention of a Prime Minister or Premier in the document; which clearly indicates that the intent of the Fathers of Confederation and the Imperial Government was to ensure the supremacy of the Crown.<sup>12</sup> It is the Governor General that appoints Senators as well as the Speaker of the Senate. The Governor General summons and dissolves sessions of Parliament and “any Vote, Resolution, Address or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost,” must first be recommended by the Governor General beforehand.<sup>13</sup> Also, Section 55 clearly states that a bill may only become law after it receives Royal Assent from the Governor General.

In regards to the Lieutenant Governors, the *British North America Act* provides Executive Councils to fulfil the role of the Privy Council in the provinces and the Act clarifies their role in the provincial legislative branches. In essence, Section 90 bestows many of the same powers granted to the Governor General to the Lieutenant Governors in respect to their province.

Another constitutional document that deals with the role of Canada’s vice-regals is the *Letters Patent*, 1947. While it is often claimed that many constitutional conventions resulted from the Imperial Conferences of 1926 and 1930, the *Letters Patent*, 1947 did not confirm them.<sup>14</sup>

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<sup>9</sup> Alfred T. Neitsch, *In loco Regis: The Contemporary Role of the Governor General and Lieutenant Governor in Canada* (Edmonton: University of Alberta, 2006), pp. 39.

<sup>10</sup> *British North America Act*, 1867, Section 11.

<sup>11</sup> J.R. Mallory, “The Continuing Evolution of Canadian Constitutionalism,” from Cairns, Alan & Williams, Cynthia, *Constitutionalism, Citizenship and Society in Canada*. Royal Commission on the Economic Union and Development Prospects for Canada. Vol. 33 (Toronto: University of Toronto, 1985), pp. 63

<sup>12</sup> *In loco Regis*, pp. 54.

<sup>13</sup> *British North America Act*, 1867, Section 54.

<sup>14</sup> *In loco Regis*, pp. 42.

The *Letters Patent*, 1947, signed by King George VI, are probably the most important constitutional document in regards to the Governor General. However, unlike the *Constitution Acts*, they cannot be repealed by the Canadian Parliament as they are, in fact, a creation of the monarch's royal prerogative. Essentially, this document transferred almost all of the powers of the monarch with respect to Canada to the Governor General. As Article II reads, "And We do hereby authorize and empower our Governor General, with advice of Our Privy Council for Canada or of any members thereof or individually, as the case requires, to exercise all power authorities lawfully belonging to us in respect of Canada."<sup>15</sup> This statement alone seems to elevate the Governor General from a simple governor to a viceroy. And yet, the statement is further bolstered by Article V, which allows the Governor General "to remove from his office, or to suspend from the exercise of the same, any person exercising any office within Canada."<sup>16</sup>

Lastly the final change to the institution of the crown occurred with the *Constitution Act*, 1982, when the crown was further entrenched into the Canadian entity. Section 41 of the *Constitution Act*, 1982 indicated that the office of the Queen, the Governor General and the Lieutenant Governors, were among the select group of five matters, that could only be amended "through a resolution of the Senate and House of Commons and of the legislative assembly of each province."<sup>17</sup> This constitutionally enshrined decision not only reaffirmed the importance of these offices in the Canada's parliamentary democracy but also guaranteed their institutional structure and powers from the threat of tampering by future cabinets.

In addition to these three constitutional documents, a single court ruling in particular stand out in regards to the powers of Canada's vice-regals. This occurred in 1937 after the Lieutenant Governor of Alberta decided to reserve provincial legislation for the review of the Governor General. However, following the Governor General's decision to disallow, essentially vetoing the legislation, the Premier of the province decided to refer the question of reservation and disallowance to the Supreme Court. The decision of the court on March 4, 1938 was that the crown's powers to reserve and subsequently disallow legislation were "subject to no limitation or restriction."<sup>18</sup>

### *What about Convention?*

While the account described so far of Canada's vice-regals may indeed seem all-powerful and even, perhaps, alarming, it is of course incomplete as it neglects the role of convention. The foremost purpose of constitutional conventions is to ensure "that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period."<sup>19</sup> The conventions in place today

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<sup>15</sup> *Letters Patent*, 1947, Article II

<sup>16</sup> *Letters Patent*, 1947, Article V

<sup>17</sup> "The Royal Prerogative and the Office of the Lieutenant Governor."

<sup>18</sup> Alfred Thomas Neitsch, "A Tradition of Vigilance: The Role of Lieutenant Governor in Alberta," *Canadian Parliamentary Review*, Vol. 30 No. 4 (Winter 2007),

<<http://www2.parl.gc.ca/Sites/LOP/Infoparl/english/issue.asp?param=187&art=1263>>.

<sup>19</sup> Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753, pp. 880.

usually relate to the democratic principle of responsible government, being that “the powers of the state must be exercised in accordance with the wishes of the electorate.”<sup>20</sup>

Thus, today convention seems to dictate that a vice-regal should not interfere in the daily business of government, except in rare circumstances. Frank Mackinnon perhaps best describes the use of the crown's discretionary powers when he writes,

The Office of the Governor General and the Lieutenant Governor are Constitutional fire extinguishers with a potent mixture of powers for use in great emergencies. Like real extinguishers, they appear in bright colours and are strategically located. But everyone hopes their emergency powers will never be used; the fact that they are not used does not render them useless; and it is generally understood there are severe penalties for tampering with them.<sup>21</sup>

These emergency powers are properly known as the ‘royal prerogatives’ or ‘reserve powers’; and they include, the prerogative to dismiss and appoint first ministers, to disallow or reserve legislation and to refuse the dissolution of parliament. Essentially, should circumstances arise, these eleven so-called ‘ceremonial’ vice-regals have the power to dismiss their premier or prime minister, call for an election, offer the government to an opposition party or coalition and even veto legislation. All of which powers do not seem too ‘ceremonial’. Yet, while it is true that the royal prerogatives are rarely used this does not preclude their future use, as in 1938, the Supreme Court ruled “that even though a power has not been used for a long time, it does not mean that it is no longer legal authority.”<sup>22</sup>

However, while convention is a quite powerful ‘understanding’ in the minds of political players, the conventional rules of the constitution have no legal standing. In fact, the Supreme Court ruling, *Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753*, stated that;

In contradistinction to the laws of the constitution, they [constitutional conventions] are not enforced by the courts...Perhaps the main reason why conventional rules cannot be enforced by the courts is that they are generally in conflict with the legal rules which they postulate and the courts are bound to enforce the legal rules...As a matter of law, the Queen, or the Governor General or the Lieutenant Governor could refuse assent to every bill passed by both Houses of Parliament or by a Legislative Assembly as the case may be. But by convention they cannot of their own motion refuse to assent to any such bill on any ground, for instance because they disapprove of the policy of the bill. We have here a conflict between a legal rule which creates a complete discretion and a conventional rule which completely neutralizes it. But conventions, like laws, are sometimes violated. And if this particular convention were violated and assent were improperly withheld, the courts would be bound to enforce the law, not the convention. They would refuse to recognize the validity of a vetoed bill...This conflict between convention and law which prevents the courts from enforcing conventions also prevents conventions from crystallizing into laws, unless it be by statutory adoption.<sup>23</sup>

Thus, while in many respects, convention curtails the power of Canada’s vice-regals, convention is not legally enforceable. Instead, if a vice-regal were to exercise their power

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<sup>20</sup> Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753, pp. 880.

<sup>21</sup> MacKinnon, pp. 122.

<sup>22</sup> “The Royal Prerogative and the Office of the Lieutenant Governor.”

<sup>23</sup> Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753, pp. 880-882.

to the detriment of convention, the sanction, if one were needed, would have to come from the Queen, the Governor General (most likely on the advice of the Prime Minister) or simply from public opinion.

### *Misconceptions Surrounding the Role of Canada's Vice-Regals*

As previously stated, there seems to be a misconception in the general understanding of the role of Canada's vice-regals. As Lowell Murray suggests, "The Crown has become irrelevant to most Canadian's understanding of our system of Government."<sup>24</sup> Rick Mercer describes the office in this way,

Everyone knows what Lieutenant Governors are: they are an elite group of politically connected senior citizens who represent the Queen in each of the provinces. These brave men and women are required to attend cocktail receptions on a daily basis for their country.<sup>25</sup>

It seems that the role of Canada's vice-regal appointees has become trivialized and their offices seen merely as a ceremonial post. Alfred Neitsch points out that "When vice-regals enter political debate, there is typically uproar, illustrating that the office is for the most part not a legitimate check and balance, both in the eyes of the people and by convention."<sup>26</sup> Michael Valpy of the *Globe and Mail* illustrates this widespread misconception regarding the crown's role with a personal experience.

I was assigned by my *Globe and Mail* editors through early December to explain the governor general's constitutional role. Of six articles I wrote, two required next-day published corrections and the accuracy of a third was politely but unambiguously challenged [by a renown constitutional scholar]...The scandal-sheet *Frank* magazine, now departed, claimed 50 per cent accuracy in its articles; one would think the *Globe and Mail* could do better.<sup>27</sup>

Accordingly, when mainstream Canadian media prints statements such as, "Although she [Governor General Adrienne Clarkson] can't force an election, the Governor General can advise the Prime Minister to dissolve Parliament and call for a vote. He doesn't have to follow her advice."<sup>28</sup> As well as, "...steering clear of trouble is the principle measure of vice-regal success",<sup>29</sup> how could we expect a better understanding by the general public? It is the Governor General, not the Prime Minister, who dissolves Parliament, with or without the Prime Minister's advice; depending on the

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<sup>24</sup> Lowell Murray, "Which Criticisms are Founded?" *Protecting Canadian Democracy: The Senate You Never Knew*, ed. Serge Joyal. (McGill-Queen's University Press: Montreal, 2003), pp. 136.

<sup>25</sup> Rick Mercer, "Priority Six – We are a bunch of Pricks," *Rick Mercer's Blog*, <<http://rickmercer.blogspot.com/2006/04/priority-six-we-are-bunch-of-pricks.html>>.

<sup>26</sup> *In loco Regis*, pp. 17.

<sup>27</sup> Valpy, pp. 4.

<sup>28</sup> "Chaos Reigns over Ottawa: Paul Martin calls Governor-General amid demands for action," *Examiner*. Barrie, Ontario: 13 May 2003, pp. A1

<sup>29</sup> Doug Fischer, "Hnatyshyn was vice-regal hit: But Governor-General is leaving an office diminished by politics," *Calgary Herald*. Calgary, Alberta: 05 February 1995, pp. A10

circumstance. Moreover, it is the role of the vice-regals to protect the constitution and adjudicate according to their constitutional mandate, not to avoid such situations.<sup>30</sup>

Lowell Murray contributes this misconception, that most people regard the vice-regal offices as ceremonial and utterly powerless, to the “fault of successive generations of politicians, of an educational system that has never given the institution due study, and of past vice-regal incumbents themselves.”<sup>31</sup> Nevertheless, to prove these misconceptions baseless, clear evidence must be provided to suggest that that Canada’s vice-regals do in fact wield the powers as described earlier and furthermore are willing to use them.

### *Wielding the Royal Prerogative: Refusing Dissolution*

Certainly one cannot review the royal prerogative of dissolution without being reminded of the most renowned circumstance involving the use of reserve powers, the King-Byng Affair. Liberal Prime Minister Mackenzie King had been in power leading a minority government from 1921 to 1925 and subsequently hoped for a majority in the election of 1925. However this did not occur.

Instead, again in a minority position, King led 101 Liberals, in a parliament of 116 Conservatives, 24 Progressives, two independents and two Labour, dependant on the support of the Progressives.<sup>32</sup> However, in early 1926 a scandal erupted involving the government and the Customs Department. This resulted in a motion of non-confidence being introduced in the House and subsequently debated. However, rather than face the vote of non-confidence, King abruptly asked Governor General Lord Byng for dissolution, arguing that as His Excellency’s advisor he was entitled to it. Yet, considering an election had occurred only eight months previous and that the Conservatives had a larger number of seats than the Liberals did, the Governor General declined the request for dissolution. King subsequently resigned and Byng invited Conservative Leader Arthur Meighan to form the government.

Mackenzie King responded publically and critically about the Governor General’s ‘interference’ and Meighan’s ‘usurpation’. Yet, the Conservative government did not last and King was re-elected in the following autumn. However, despite losing the public relations war of his day, many including Dr. Forsey believe “that Lord Byng was completely within the purview of constitutional correctness.”<sup>33</sup>

A more recent example which comes to mind is found in a statement written in former Governor General Adrienne Clarkson’s memoirs. Recalling the election of Paul Martin in 2003, she writes,

The question arose during Paul Martin's minority government of whether or not I as Governor General would grant dissolution and allow an election to be called if the prime minister requested it. After considering the opinions of the constitutional experts whom I consulted regularly, I decided that, if the government lasted six months, I would allow dissolution. To put the Canadian people through an election before six months would have

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<sup>30</sup> *In loco Regis: The Contemporary Role of the Governor General and Lieutenant Governor in Canada*, pp. 19-20.

<sup>31</sup> Murray, pp. 136.

<sup>32</sup> MacKinnon, pp. 129.

<sup>33</sup> “The Royal Prerogative and the Office of the Lieutenant Governor.”

been irresponsible, and in that case I would have decided in favour of the good of the Canadian people and denied dissolution.<sup>34</sup>

While not actually an instance of the use of the royal prerogative, the statement suggests that the Governor General felt fully within her purview to deny the Prime Minister's possible request.

### *Wielding the Royal Prerogative: Appointing First Ministers*

By far, in most cases, the vice-regal's decision as to who to appoint as premier or prime minister is a simple one; as the leader with the highest electoral success is usually the leader who will command the confidence of the legislature. However, this is not always the case. In rare instances such as Newfoundland (1908) and more recently in Ontario (1985) and Manitoba (1988), a difficult decision was required and it fell upon the vice-regal to make it.

The Newfoundland general election of 1908 produced a perfect tie between the two leading parties, Robert Bond's Liberals with 18 seats and Edward Morris' People's Party with the same. As Premier, Bond quickly met the House, however, was unable to elect a speaker, consequently he sought dissolution. The Governor, Sir William Macgregor, refused him, causing Bond to resign and Macgregor to invite Morris to form the government. However, when Morris arrived in the same position as Bond, unable to elect a speaker, he too sought dissolution. This time dissolution was granted as the Governor had done all he could to ensure Newfoundlanders with a stable government, preventing premature elections. Morris went on to win the subsequent election and Bond never held office again.<sup>35</sup>

The Ontario general election of 1985 also yielded an unclear result, Frank Miller's Progressive Conservatives winning 52 seats, David Peterson's Liberals with 48 and Bob Rae's New Democrats 25. The incumbent at the time, Frank Miller retaining a plurality but not a majority, "sought to deny the Liberals and New Democrats an opportunity to form an accord."<sup>36</sup> However, following defeat on a confidence motion, Lieutenant Governor John B. Aird granted the request of the Liberals and NDPs to form a government together, rather than call a second election only 55 days later.<sup>37</sup>

The Lieutenant Governor of Manitoba faced a similar dilemma in March 1988 when the NDP government lost its majority when a single member defected and voted against the government's budget. Following this loss of confidence Lieutenant Governor George Johnson dissolved the legislature and Premier Howard Pawley resigned immediately. Norman Ward recounts that, Pawley "seemed to think he could simply hand over the premiership to whatever individual won the leadership contest, thus making him an instant premier."<sup>38</sup> So, rather than appointing to the premiership, the new party leader,

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<sup>34</sup> Adrienne Clarkson, *Heart Matters* (Toronto: Penguin Group, 2006), pp. 192.

<sup>35</sup> Edward Roberts, "Ensuring Constitutional Wisdom During Unconventional Times," *Canadian Parliamentary Review*. Vol. 32, no. 1 (Spring 2009), pp. 15.

<sup>36</sup> Peter Boyce, *The Queen's Other Realms: The Crown and its Legacy in Australia, Canada and New Zealand* (Leichhardt, Aust.: The Federation Press, 2008), pp. 105.

<sup>37</sup> Boyce, pp. 105.

<sup>38</sup> *The Invisible Crown: The First Principle of Canadian Government*, pp. 57.

who had not yet met the legislature as leader of the government; the Lieutenant Governor requested that Pawley should stay on as “a sort of caretaker premier until the actual election,”<sup>39</sup> which he accepted.<sup>40</sup>

### *Wielding the Royal Prerogative: Dismissing First Ministers*

While it is true that a Governor General has never used their royal prerogative to dismiss a sitting prime minister, there have been two occasions where reserve powers have been used to force the resignation of a prime minister. The first occurred in 1896, when Prime Minister Sir Charles Tupper refused to resign as prime minister following his election loss. Instead, rather than handing over his resignation to Governor General Aberdeen, he submitted a list of names for senatorial and judicial appointments. Aberdeen refused these requests and Tupper resigned soon after.<sup>41</sup> The second occasion occurred in 1926 as described previously, when Prime Minister King resigned following Governor General Byng’s refusal to his request for dissolution.

Yet, while Governor Generals have avoided the royal prerogative of dismissal, Canada’s Lieutenant Governors have seen the need arise more than twice. In fact, five premiers have been dismissed by Lieutenant Governors. However, the last three of these dismissals took place in British Columbia between 1898 and 1903.<sup>42</sup> Yet, while contemporary Canada has not seen the royal power of dismissal, the threat of its power remains quite powerful as is shown in the following instances.

An early incident took place in Manitoba in 1915. At the time, the Premier, Sir Rodmond Roblin, was found involved in a scandal over construction contracts. However, on top of this, Roblin actively blocked all attempts to set up a Royal Commission to investigate his involvement. This resulted in Lieutenant Governor D.C. Cameron’s decision to threaten the premier with dismissal if the Commission was not set up. The following days saw the creation of a Royal Commission and the resignation of Premier Roblin.<sup>43</sup>

Another instance where the Lieutenant Governor was forced into a position where he was required to prevent the premier from abusing their power occurred following the 1971 Newfoundland election. In this instance, Premier Smallwood, who had been in power since 1949, lost the fall election. However, he subsequently refused to resign and instead requested the dissolution of the House, calling for a second election. The Lieutenant Governor was reported to have rejected not one but “refused five requests [for dissolution], presumably insisting that the new House must at least meet, and show its incapacity to transact public business, before he would consent.”<sup>44</sup> Thus, Premier Smallwood’s request to have an election immediately following an election, much like Prime Minister King’s was denied again on the basis that another party might be able to consolidate the confidence of the House. Smallwood was subsequently voted out as

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<sup>39</sup> *The Invisible Crown: The First Principle of Canadian Government*, pp. 57.

<sup>40</sup> Boyce, pp. 105.

<sup>41</sup> J. W. Longley, *Sir Charles Tupper* (Toronto: The Makers of Canada [Morang] Ltd., 1916), pp. 236.

<sup>42</sup> “The Royal Prerogative and the Office of the Lieutenant Governor.”

<sup>43</sup> Frank MacKinnon, pp. 127.

<sup>44</sup> *The Invisible Crown: The First Principle of Canadian Government*, pp. 58.

leader of the Liberal Party due to his refusal to resign as premier. Peter Neary perhaps words it best when he describes Smallwood's last exertions to hold office as "testing the limits of responsible government."<sup>45</sup>

This incident corresponds directly to a ruling of the Supreme Court, *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753. The court ruled that there is a clear mandate for the Governor General and conversely the Lieutenant Governor to remove their first minister;

...if after a general election where the opposition gets the majority at the polls the government refused to resign and clung to office, it would thereby commit a fundamental breach of convention, one so serious that it could be regarded as tantamount to a *coup d'etat*. The remedy in this case would lie with the Governor General...who would be justified in dismissing the ministry and in calling the opposition to form government... [As] the government is in office by the pleasure of the Crown.<sup>46</sup>

A third and more recent incident occurred in British Columbia in 1991 when the Premier, Bill Vander Zalm, found himself in the centre of an RCMP investigation involving conflict of interest allegations. The investigation arose due to speculation that the Premier had used his public office to move the sale of his family-owned theme park *FantasyLand*.<sup>47</sup> The Lieutenant Governor, David Lam, sought to persuade the Premier to resign following a report on the contents of the Premier's own business affairs. The Premier resigned and the Lieutenant Governor accepted the advice of the chairman of caucus as to whom to appoint as Premier.<sup>48</sup> Edward McWhinney further complimented Lam in the *Vancouver Sun* stating, "The exercise was handled with constitutional elegance, as a low-key and graceful interposition of the reserve powers."<sup>49</sup>

Frank MacKinnon compares these situations to the American 'Watergate Affair', "where in the absence of such a threat [by the vice-regal] a crisis of frightful proportions became inevitable." He further suggests that, votes of confidence or impeachment may not be reliable or practical as a strong majority may hamper the former and lengthy burdensome proceedings, the latter. Often a threat can bring a more immediate response and can force a leader to realise the seriousness of his situation. However, these threats must come from a person such as a vice-regal, as there must be power behind their warning to force a first minister to act.<sup>50</sup>

### *Wielding the Royal Prerogative: Disallowance and Reservation*

As discussed previously, the *British North America Act*, 1867 permits Canada's vice-regals to disallow or refuse Royal Assent to bills and to reserve the legislation for the jurisdiction above. For example, Lieutenant Governors may reserve legislation for the

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<sup>45</sup> *The Invisible Crown: The First Principle of Canadian Government*, pp. 57.

<sup>46</sup> *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, pp. 882

<sup>47</sup> "The Royal Prerogative and the Office of the Lieutenant Governor."

<sup>48</sup> Boyce, pp. 106-107.

<sup>49</sup> Boyce, pp. 107.

<sup>50</sup> MacKinnon, pp. 127

review of the Governor General, and the Governor General may reserve legislation for the Queen. In fact, upon;

... Confederation an explicit restraint on Canadian autonomy took the form of eight classes of legislation upon which the governor general's instructions required him to reserve the royal assent; that is, to refer bills in question to Britain for a decision on assent. The items so affected included, among other subjects, divorce, legal tender, imposition of differential duties, and control of the military. Between 1867 and the issue of Letters Patent in 1878, when obligatory reservation ceased, twenty-one bills were reserved for imperial assent.<sup>51</sup>

Yet, with the *Statute of Westminster*, 1931, legislation may no longer be reserved for the British Privy Council's review.

Since Confederation, Lieutenant Governors have withheld assent twenty-eight times and reserved bills seventy-one times however, over the last forty years both disallowance and reservation have fallen into disuse.<sup>52</sup> The last instance of disallowance occurred in 1945, when the Lieutenant Governor of Prince Edward Island, B.W. LePage vetoed a bill that would have repealed prohibition which began in the province in 1906.<sup>53</sup> Yet, while reservation has not been used since 1961 and disallowance since 1945<sup>54</sup>, David E. Smith suggests that "failure to exercise these powers in no way circumscribes the authority to use them."<sup>55</sup>

In fact, following the decisions of the Justice Committee of the Privy Council (*Board of Commerce, Combines and Fair Practices Act*, 1922 and *Labour Conventions Case*, 1937), the crown retains the ability to reserve or disallow legislation in "matters unquestionably of Canadian interest and importance"<sup>56</sup> as well as in situations of emergency or in order to comply with international treaties.<sup>57</sup> J.R. Mallory furthers this by suggesting that reservation remains justifiable in the event that legislation would violate civil liberties.<sup>58</sup>

Nowhere in Canada has the use of disallowance or reservation been exercised as much as in Alberta in the last century. In fact, by 1937 "the regularity of unconstitutional bills passed by the Alberta legislature made it necessary for a mode of intervention independent from time consuming judicial reviews: vice-regal intervention."<sup>59</sup>

William Aberhart took office as Premier of Alberta in 1935 and promised sweeping changes which would free the province from the Great Depression. As part of these changes, Aberhart passed three bills which raised alarm in Ottawa; the *Credit of Regulation Act*, the *Judicature Act Amendment Act* and the *Bank Employees Civil Rights*

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<sup>51</sup> *The Invisible Crown: The First Principle of Canadian Government*, pp. 43.

<sup>52</sup> Jacques Monet, *The Canadian Crown* (Toronto: Clarke, Irwin and Co., 1979), pp. 63-64.

<sup>53</sup> Boyce, pp. 105.

<sup>54</sup> Boyce, pp. 102.

<sup>55</sup> David E. Smith, "Comment Re: The Royal Prerogative and the Office of Lieutenant Governor," *Canadian Parliamentary Review*. Vol. 23, No. 3 (Autumn 2000), <<http://www2.parl.gc.ca/Sites/LOP/Infoparl/english/issue.asp?param=76&art=187>>.

<sup>56</sup> John T. Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2004), pp. 139.

<sup>57</sup> Saywell, pp. 139.

<sup>58</sup> *In loco Regis*, pp. 103.

<sup>59</sup> "A Tradition of Vigilance: The Role of Lieutenant Governor in Alberta."

Act all of which received Royal Assent from Lieutenant Governor John C. Bowen. The *Credit of Regulation Act*, called for further regulation of banks, a federal responsibility, the *Judicature Act Amendment Act* would make the review of the constitutionality of provincial legislation illegal without the permission of the government and the *Bank Employees Civil Rights Act* essentially removed all civil rights from unlicensed employees of chartered banks.<sup>60</sup> In response to these acts, the Governor General-in-Council quickly moved to disallow the legislation in August 1937, rightly claiming that the legislation violated the constitutional division of powers.<sup>61</sup>

Yet this was not the end of Aberhart's conflicts with the crown. The autumn of 1937 saw the reintroduction of elements of the disallowed legislation. *An Act to amend the Credit of Alberta Regulation Act* was the *Credit of Regulation Act* simply "rewritten to drop all reference to the banks and substitute the words 'credit institutions.'"<sup>62</sup> While the *Bank Taxation Act* would allow the province to "to levy taxes of one-half per cent per annum on all paid-up capital of the banks and one per cent per annum on their reserve funds and undivided profits."<sup>63</sup> Lastly, the *Accurate News and Information Act* would have required that all newspapers publish any statements requested by the chair of the Social Credit party "which has for its objective the correction or amplification of any statement relating to any policy or activity of the Government of the Province."<sup>64</sup> As well, newspapers would also be required to reveal all sources of their information as well as their sources home addresses. In response to these three bills, Lieutenant Governor Bowen decided to reserve each for the Governor General-in-Council. In turn, the Governor General requested review by the Supreme Court, which found that all three were in fact, *ultra vires*; unconstitutional.<sup>65</sup>

Another interesting case took place forty years later in 1977, when Alberta's first aboriginal Lieutenant Governor, Ralph Steinhauer, was faced with amendments to the *Land Titles Act*. The *Land Titles Amendment Act* of Premier Peter Lougheed was intended to further place restrictions on the filing of caveats on Crown land, which were often used by native groups to secure land claims. The legislation met with fierce opposition from native leaders and the province's Human Rights and Civil Liberties Association who called on Steinhauer to refuse Royal Assent. Lieutenant Governor Steinhauer spoke openly against the legislation and even suggested that he was considering withholding Royal Assent, however in the end he did permit the bill to pass. While in this final instance Royal Assent was not refused it does provide a contemporary example where it could have been. Essentially proving David E. Smith's point that;

The issue of reservation and disallowance is not 'resolved.' Nor, in light of the constitutional amendments of 1982, is there any prospect of its being resolved, if by that term is meant the removal of federal power over the provinces.<sup>66</sup>

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<sup>60</sup> "A Tradition of Vigilance: The Role of Lieutenant Governor in Alberta."

<sup>61</sup> "A Tradition of Vigilance: The Role of Lieutenant Governor in Alberta."

<sup>62</sup> "A Tradition of Vigilance: The Role of Lieutenant Governor in Alberta."

<sup>63</sup> "A Tradition of Vigilance: The Role of Lieutenant Governor in Alberta."

<sup>64</sup> "A Tradition of Vigilance: The Role of Lieutenant Governor in Alberta."

<sup>65</sup> "A Tradition of Vigilance: The Role of Lieutenant Governor in Alberta."

<sup>66</sup> "Comment Re: The Royal Prerogative and the Office of Lieutenant Governor."

## *Snubbing Convention*

As stated previously, constitutional conventions are not enforceable by law when they conflict with a written rule. Also as conventions represent the prevailing constitutional values and principles of the period, when they are violated the question remains, whether or not the violation is in fact a violation or simply a change in values and principles. Four incidents come to mind when thinking of a vice-regal's clear snub of convention.

The first occasion arose with Governor General Roland Michener. In February 1968, Prime Minister Pearson's government was defeated on a money bill, which came as a surprise to all involved and was due to many ministers skipping their duties in the House; including Prime Minister Pearson who was away in the Caribbean. Governor General Michener was also away attending Winter Carnival in Quebec City, however instead of returning to Ottawa to accept Pearson's resignation and call an election, as convention dictated he remained. Michener believed that the vote was a fluke and believed Pearson still had the confidence of the House. Pearson subsequently returned to Ottawa and with the help of the Governor of the Bank of Canada, convinced opposition leader Robert Stanfield that the fall of the government would damage the Canadian economy. The situation ended when Stanfield permitted Pearson to re-group his party and demonstrate that he did indeed still possess the confidence of the House.<sup>67</sup> However, had Michener wished, he could have quite easily granted the Conservatives the election they had been waiting for, as dissolution was firmly within his purview.

Another example of a vice-regal toying with convention occurred in 1979, with Edward Schreyer, who was Premier of Manitoba from 1969 to 1977 and then appointed as Governor General in 1979, serving until 1984. During this time, he controversially refused to immediately give Joe Clark an election in 1979, following a failed vote of confidence in the House. Schreyer, instead decided to take a few days to make a decision. Some have speculated that he was attempting to be helpful to the new Prime Minister, allowing him time to consider other options.<sup>68</sup> Nevertheless, to do anything other than grant an election under the circumstances would have been clearly against convention.

Furthermore, less than a week before the defeat of the Clark government, Governor General Schreyer taped a television interview (which was never broadcast in entirety), in which he discussed his reserve power to seek "alternatives...to a series of elections" in a situation where a recently elected government lost its mandate. David E. Smith notes, that "although it was unprecedented for a Governor General to discuss his reserve power so publicly, the interview had the virtue, said one commentator, of letting the public know how a Governor General interprets his role: 'He was really saying "Look, the GG has authority at one end and at the other. If parliament tries to go on [too] long there may be a problem. If parliament tries not to go on long enough (admittedly a much more difficult area) there may be a problem.'"<sup>69</sup>

A third, far more controversial incident occurred with Mr. Schreyer in 1982 when the Rene Levesque refused to sign on to the agreement to patriate the constitution. While Mr. Schreyer considered the agreement of the nine provinces and the federal government

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<sup>67</sup> *In loco Regis*, pp. 117-118.

<sup>68</sup> Boyce, pp. 56-57

<sup>69</sup> *The Invisible Crown: The First Principle of Canadian Government*, pp. 58.

acceptable, he noted that had it had failed and there had been no willingness shown to reach an accord, Schreyer said, “the only way out...would have been to cause an election...and [let] the people...decide.” While some constitutional authorities were “inclined to think that he...[was] right in the general principle that there still exists a ‘reserve’ power to compel elections in crisis situations,”<sup>70</sup> many others argued that it was disturbing to think that the Governor General would begin to empower himself to dissolve parliament without advice.<sup>71</sup> However, if Schreyer were to have used his royal prerogative to dissolve parliament and call an election on the matter he would have been clearly in tune with the democratic principle for which conventions are based, stating that “the powers of the state must be exercised in accordance with the wishes of the electorate.”<sup>72</sup>

Lastly, while no longer a vice-regal, more recently in December 2008, a week before Governor General Michaëlle Jean’s decision to prorogue parliament, Schreyer stated publicly that,

If he were still the Queen's representative he would have no choice but to support the proposed Liberal-NDP coalition government in Ottawa... We are a parliamentary democracy, and governments are elected according to whether or not they have and are able to maintain the confidence of a majority in Parliament. And if we are to remain a parliamentary democracy, then the parliamentary will must not be ignored, nor must it be avoided or evaded.<sup>73</sup>

In this instance, Schreyer clearly states his disagreement with the decision of Governor General Jean, believing that the situation clearly called on the Governor General to break convention and ignore the advice of the Prime Minister despite not yet losing the confidence of the House.

### *Conclusions*

Again, echoing the words of former Governor General Adrienne Clarkson, there is “an abysmal lack of knowledge about the system.”<sup>74</sup> It is quite clear that a misconception exists in Canada, which suggests that the Governor General and Lieutenant Governors are politically and legally impotent. This misconception leads people to believe that the vice-regal does nothing more than cut ribbons and bestow awards. This is poignantly displayed each time a Governor General or Lieutenant Governor conveys a political statement or suggests intervention into the political arena, as the media is quick to portray the situation as either a blunder or mistake on the part of the vice-regal, when in fact no such restrictions exist. However, this perception has infiltrated popular opinion, including the average citizen, politicians and even the media. Perhaps much like the Canadian Senate, if an office is seen as illegitimate over time, it

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<sup>70</sup> *The Invisible Crown: The First Principle of Canadian Government*, pp. 58.

<sup>71</sup> *The Invisible Crown: The First Principle of Canadian Government*, pp. 58.

<sup>72</sup> Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753, pp. 880.

<sup>73</sup> “Former GG Said He Would Support Coalition,” *CBCNews.ca*, <<http://www.cbc.ca/canada/manitoba/story/2008/12/03/parl-schreyer.html>>.

<sup>74</sup> Foreword to *Parliamentary Democracy in Crisis*, pp. ix.

will eventually become illegitimate.<sup>75</sup> This misconception seems to be sustained due to successive generations of politicians, the media who, for the most part, have not given the institution due study, the Canadian education system, and past vice-regal incumbents themselves.

Yet despite popular belief, Canada's Governor General and Lieutenant Governors are not impotent, but rather endowed with quite substantial legal powers. While it is true, that for the most part these powers are exercised upon the advice of the first minister to conduct the daily business of government; this is not always the case. It must not be forgotten that on occasion, a vice-regal may reject the advice tendered by their first minister, and act alone. As previously stated, Canada's vice-regals retain six royal prerogatives; the prerogative to dismiss and appoint first ministers, to disallow or reserve legislation and to refuse the dissolution of parliament. Furthermore, the question of acting without advice is never one of legality, but instead, a question of whether or not the occasion warrants the vice-regal to breach the standard convention that the crown acts only upon the advice of its first minister.

The vice-regal is the country's supreme decision maker. In difficult situations it falls to them to protect the Constitution and Canadian parliamentary democracy. The vice-regal must protect Canadians against first minister's attempts at "testing the limits of responsible government"<sup>76</sup> and from first ministers who make statements such as, "What's the constitution among friends?" when asked to justify extraordinary tactics.<sup>77</sup> It is because of the immense legal potential of the office that it is imperative that Canada's vice-regals are seen and act as independent figures, rather than as arm of the governing party and its first minister. "The governor general, like a physician, should first of all 'do no harm.' This is all very well, but it must not be interpreted to mean 'do not do anything.'"<sup>78</sup>

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<sup>75</sup> *In loco Regis*, pp. 232.

<sup>76</sup> *The Invisible Crown: The First Principle of Canadian Government*, pp. 57.

<sup>77</sup> MacKinnon, pp. 127.

<sup>78</sup> Foreword to *Parliamentary Democracy in Crisis*, pp. xi.

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