The Office of Governor General in Canada

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It is perhaps valuable, with the new letters patent of 1947 in mind, to summarize the status and functions of the Governor General of Canada. I should like to make it clear at once that I venture into no elaborate discussions of the relations between the Governor General and his ministers. Fate has preserved me from entering that quagmire; I have no intention of now doing so—I am too old for that and my armour is on the walls.

If the causes of the American Revolution can be summed up in a single phrase, they centered on whether the colonies "belonged to" the United Kingdom. Even when the Parliament of the United Kingdom repealed some of the obnoxious legislation that same Parliament passed the Declaratory Act which emphasized the supremacy over the colonies of the Parliament of the United Kingdom. The colonies, until the final break, were loyal enough to the monarchial principle, but they were clear that they "belonged to" no one but themselves. When finally they left the Empire many colonists who did not accept this result came to the western sections of the province of Quebec and this clearly meant changes through the division of that province into Upper Canada and Lower Canada, under the Constitutional Act of 1791. The most significant fact in that Act was the new oath to be taken by members of the legislature, which compelled them to swear for the first time to the fact that the two new provinces "belonged to" the United Kingdom,[1] whose government preferred to believe that the American Revolution arose because of the fact that the law had not been strict enough—another example of legality taking the place of statesmanship. Indeed the phrase "belonging to" appeared in the

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[1] 31 Geo. III, c. 31. For the term "belonging to" see my Essays in Constitutional Law (Oxford, 1934), Essay I. It is interesting to note that the same term survived in the Canadian Act respecting Oaths of Allegiance (R.S.C., 1927, c. 143, s. 2) until that section was repealed in 1934.

coronation oath up to the coronation of George VI in May 1937. My purpose is to trace broadly the effect of that decision on the executive principle and to bring out simply and clearly the evolution in Canada of the office of Governor General since 1791 to the present day. In doing so I must refer to well-known history. Without going into minute details, my references will only be such as are necessary for my present purposes.

All the instruments connected with the office remained in control of the government of the United Kingdom; and, however convinced the popular House of Assembly in the colonies were of the necessity and wisdom of legislation, such legislation could easily be thwarted by action on the part of the Governor General acting on advice from London—there was representative government without ministerial responsibility. In due course, with the development of political experience, a group of colonial reformers arose led by such men as Joseph Howe in Nova Scotia, Robert Baldwin in Upper Canada and Hippolyte La Fontaine in Lower Canada. In asking for colonial responsible cabinet government, they tried to solve the alleged difficulties by dividing the functions of the Governor General: (a) his duties in relation to purely colonial matters, and (b) his duties in matters external to the colonies, which were to remain under the control of the United Kingdom, while, in internal matters, he was to follow the advice of a colonial ministry responsible to the House of Assembly. All this was most clearly enunciated by Robert Baldwin, whose views were fully placed before Lord Durham before he arrived on his famous mission. In his report, Durham accepted the Baldwin scheme. In the United Kingdom, however, Lord John Russell saw in the Baldwin-Durham suggestions an insoluble dilemma: the Governor is an Imperial officer legally responsible in the last resort to the Parliament of the United Kingdom. If he must accept the advice of a colonial "cabinet" in connection with the internal affairs of the colony, that advice may not be acceptable to the government and parliament of the United Kingdom, with the result that, if he follows the advice of the "colonial" cabinet, he ceases to be an Imperial officer, while if he follows his official instructions, he cannot follow the advice of his colonial "cabinet". Colonial "cabinet government" is incompatible with the legal organization of the Empire. Russell's view prevailed with a variety of executive experiences through the régimes of Sydenham, Bagot and Metcalf. And so things remained until the United Kingdom abandoned its policies of trade protection and of the navigation laws, and became a free-trade state.

Thus the keystone in the arch of the old mercantilist system was removed, and colonial responsible cabinet government came almost as a matter of course.[2]

The years after this coming of colonial cabinet government saw few difficulties. When some of the Australian colonies asked that the power to nominate a Governor General should pass to the colonies, Sir John A. Macdonald emphatically rejected the proposal[3] and adhered strictly to the position which he had taken during the confederation debates on February 5th, 1865: the monarch must have "unrestricted freedom of choice".[4] Indeed Macdonald differed in this connection from the Governor General (Lord Lorne), who was thoroughly in favour of consultation.[5] One other episode may be noted. In 1878, Edward Blake, as Minister of Justice, succeeded in obtaining modifications in the Governor General's instructions in relation to the enumeration of certain subject matters on which bills must be reserved and to the power of pardon.[6] However, in spite of Macdonald's disapproval there gradually grew up a strong convention that, while the responsibility of the government of the United Kingdom was fully preserved, there should be informal consultation with Canada before a new Governor General was appointed. Indeed, so strong had this convention become that, when it was broken, Sir Robert Borden was forced to protest "in strong terms" against the appointment of the Duke of Devonshire without previous Canadian approval.[7]

Nothing else of importance happened until the Canadian "crisis" of 1926. It may be that the general election of that year solved the problem of the Governor General's position in relation to a dissolution recommended by the Cabinet. However that may be, it was inevitable, with continued discussions in South Africa and the Irish Free State, that the status and functions of the Governor General should come up for consideration at the conference of 1926. There were some in Canada who thought it most unwise that Canada should support these two Dominions, others in turn

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[2] It is unnecessary to give in full the history as I have outlined it. For details see my Constitution of Canada (2nd ed., Oxford, 1938) *passim.*

[3] See A. B. Keith, Responsible Government in the Dominions (1st ed., Oxford, 1928), vol. I, *passim.*

[4] This can be consulted most easily in A. B. Keith, British Colonial Policy (Oxford, 1918), vol. I, p. 433.

[5] Sir Joseph Pope, Correspondence of Sir John Macdonald, p. 433.

[6] See my Constitution of Canada, pp. 340-342.

[7] See H. Borden (ed.), Robert Laird Borden: His Memoirs (Toronto, 1938), vol. II, p. 601: "I sent a cable to Perley pointing out in strong terms that our [previous] approval should have been asked . . .".

thought it equally unwise that they should follow Canadian leadership. In the issue and after careful consideration, the conference of 1926 laid down that it is an essential consequence of equality of status that the Governor General should be the representative of the Crown and not of the cabinet of the United Kingdom and hold in all essential respects the same position in relation to the administration of public affairs in Canada as is held by His Majesty the King in Great Britain—a statement which in fact homologated Mr. King's position during the general election of 1926.[8] In connection with the first part of these principles there could be no difficulty; but I pointed out in 1926 and I still maintain that the statement concerning the Governor General's relation to public affairs is too vague, for opinions differ widely on many aspects of the monarch's position in relation to his cabinet in the United Kingdom. Indeed, it soon became clear that the conference of 1926 had not resolved the issues, and in many of the Dominions close attention was paid to the complications involved. The result was that clarification was called for and this resulted in a clearer statement agreed to at the conference of 1930:

> (1) The parties interested in the appointment of a Governor General of a Dominion are His Majesty the King, whose representative he is, and the Dominion concerned.
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> (2) The constitutional practice that His Majesty acts on the advice of responsible ministers applies also in this instance.
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> (3) The ministers who tender and are responsible for such advice are His Majesty's Ministers in the Dominion concerned.
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> (4) The ministers concerned tender their formal advice after informal consultation with His Majesty.
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> (5) The channel of communication between His Majesty and the Government of any Dominion is a matter solely concerning His Majesty and such Government. His Majesty's Government in the United Kingdom have expressed their willingness to continue to act in relation to any of His Majesty's Governments in any manner in which that Government may desire.
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> (6) The manner in which the instrument containing the Governor General's appointment should reflect the principles set forth above is a matter in regard to which His Majesty is advised by his ministers in the Dominion concerned.[9]

Certain points seem to emerge: (i) to make the Governor General the personal representative of the monarch was accomplished with ease; (ii) a reasonable deduction from Canada's power to appoint

[8] Imperial Conference Report, 1926, section 3(b) (Cmd. 2768). Cf. King's speech at Ottawa, July 23rd, 1926 (A. B. Keith, Speeches, etc. 1918-1931 (Oxford, 1931) p. 149).

[9] Imperial Conference Report, 1930, section 2(g) (Cmd. 3717).

seems to be that there is a corresponding power to ask for the removal of a Governor General and that the monarch must act in accordance with such a request. Perhaps this is the solution to the constitutional "crisis" of 1926. It is hoped, however, that the occasion will never arise for such drastic action in Canada, and that we shall never be driven to such a position as led to the abolition of the office in the Irish Free State.

With regard to the instruments connected with the office of Governor General, Canada moved slowly after 1930—indeed all that was done was to record the fact that proceedings were being taken on the request and responsibility of the Prime Minister of Canada, who, in addition, signed the commission. For example, Mr. R. B. Bennett (as he then was) signed the commission of Lord Bessborough in 1931 and that of Lord Tweedsmuir in 1935, while Mr. Mackenzie King signed that of the Earl of Athlone in June 1940.[10] No further changes took place until September 1947, when all the instruments were reconsidered and consolidated in one document under the Great Seal of Canada signed by the Canadian Prime Minister. Thus the instructions—inexpert and almost Gilbertian—for which Canada was responsible up to 1947 have fortunately disappeared.[11] I have not thought it necessary for my purpose to reproduce the letters patent of September 1947, as it may be consulted with ease.[12] I merely point out that under that document the Governor General is not only authorized to carry out his duties under the British North America Acts 1867-1946, but is also given a new authority "to exercise all powers and authorities lawfully belonging [to the Sovereign] in respect of Canada" with the advice of the Privy Council for Canada, or any members thereof or individually as the case requires. How broad this new authority may eventually become is not as yet apparent and we must be content for the time being with the statement made in the House of Commons by the Prime Minister (Rt. Hon. L. S. St. Laurent) who said:

> The royal documents relating to the office of Governor General had not undergone a careful revision since 1931. The Canadian Government accordingly recommended to His Majesty the issue of letters patent consolidating the former documents and bringing them up to date. Apart from the textual alterations designed to bring the new letters patent into line with constitutional developments and practices

[10] These documents can easily be consulted in Canada: Sessional Paper No. 273 (April 7th, 1941).

[11] For criticism of these instructions see my Constitution of Canada (*supra*) pp. 507-508.

[12] See *in extenso* in (1948), 7 U. of Toronto L. J. 474.

in Canada and within the Commonwealth, the principal alterations may be summarised as follows: By the introductory words of clause 2 of the new letters patent, the Governor General is authorized to exercise, on the advice of Canadian ministers, all of His Majesty's powers and authorities in respect of Canada. This does not limit the King's prerogatives. Nor does it necessitate any change in the present practice under which certain matters are submitted by the Canadian Government to the King personally. However, when the letters patent come into force, it will be legally possible for the Governor General, on the advice of Canadian ministers, to exercise any of these powers and authorities of the Crown in respect of Canada, without the necessity of a submission being made to His Majesty. The new powers and authorities conferred by this general clause include among others royal full powers for the signing of treaties, ratifications of treaties and the issuance of letters of credence for ambassadors. There will be no legal necessity to alter existing practices. However, the Government of Canada will be in a position to determine, in any prerogative matter affecting Canada, whether the submission should go to His Majesty or to the Governor General.[13]

Finally, it must be noted that the Governor General of Canada is not a viceroy and does not enjoy that absolute immunity from suit enjoyed by the Monarch or by the Lord Lieutenant of Ireland.[14] All the old case law and statutes—surviving from Colonial Office rule—still apply.[15] It may be that they have fallen into disuetude but it would be well if the entire situations which they cover were carefully reviewed and brought into line with the constitutional position which obtains today.

La loi vue par le juriste

Les juristes étudient les lois civiles comme si elles établissaient les seules règles que la Raison puisse concevoir. Le triomphe de la loi est pour eux le triomphe de la Raison. Sans doute, ils ne se gênent pas pour critiquer la technique législative. En présence des imperfections de la rédaction des lois modernes, leur critique souvent a été dure; mais elle n'a presque jamais atteint que la technique. En tant qu'expression de la volonté du législateur, la loi leur paraît toujours respectable. Tout juriste est le successeur d'un pontife. Etant le gardien du droit, il se croit obligé d'être le défenseur des lois. Le texte promulgué au Journal officiel devient sacré. Les universités et les tribunaux sont les édifices consacrés au culte. (Georges Ripert, Le régime démocratique et le droit civil moderne (2iéme éd., Paris, 1948) p. 5)

[13] House of Commons Debates (1948) p. 1126.

[14] *Tandy* v. *Earl of Westmoreland* (1800), 27 St. Tr. 1246; *Luby* v. *Lord Wodehouse* (1865), 17 Ir. C. L. R. 618; *Sullivan* v. *Spencer* (1872), Ir. R. 6 C.L. 173.

[15] These old cases and statutes can easily be followed in any text-book on English constitutional law.