The Crown and Cabinet Government: The Executive Function

The legislative function of a political system is to make laws. In Canada that function is performed, according to the constitution, by Parliament. The executive function of a political system is to put the laws into effect, to carry out or to execute acts of Parliament. In Canada, the executive power is defined by section 9 of the BNA Act: "the Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen." Formally, therefore, the executive function in Canada is performed by the Queen, and we can be said to have a monarchical form of government. The most significant implication of this fact is the consequent transferal of all prerogative rights of the Crown in Britain to the Crown in respect of Canada. This statement, however, requires some explanation, particularly the terms 'the Crown and prerogative rights.'

The term "the Crown"^{21} is used to describe the collectivity of executive powers that, in a monarchy, are exercised by or in the name of the sovereign. There is nothing mystical about the term. It does not imply the existence of an authority greater than that possessed constitutionally by the reigning monarch. These executive powers vested in the Queen flow from the historic common-law rights and privileges of the Crown in England that are referred to as the royal prerogative.

Prerogative rights exist primarily because they always have, and not because they have been created at some point in time by statute. The prerogative rights and privileges of the Queen are the residue of authority left from an age when the power of the reigning monarch was absolute. This absolute power has been whittled away bit by bit, until today there are only a few remnants of it left to the Queen. It is important to emphasize here that prerogative rights cannot be created by statute. If a statute formally increases the power of the Crown, the effect is to delegate some of the authority of Parliament to the executive, but not to vest any new prerogative rights in the person of the monarch.

On the other hand, the prerogative can be limited by statute. An example of this is in the Crown Liability Act (1952), which took away the prerogative right of the Crown not to be held liable in tort for damages resulting from acts done by public servants or for acts done by the monarch personally. This prerogative can never be returned as a prerogative right, although a future parliament could return it as a statutory right. Hence, the royal

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^{21} See F. MacKinnon, The Crown in Canada (Calgary: Glenbow-Alberta Institute, 1976), for an excellent analysis of a subject that has been to a large extent neglected in Canadian political science.
prerogative is slowly shrinking, and in Canada it is being replaced by statutory provisions that define the real limits of executive power.

While the royal prerogative is not what it used to be, there are still some significant executive powers that are based on it. Among these are the right of the monarch to all ownerless property (Crown land); the right to priority as a creditor in the settlement of bankruptcies; and the right to summon, prorogue, and dissolve Parliament. Because of the convention that these powers are all exercised "on the advice" of the ministers of the Crown, in fact, they are almost all possessed in reality by the prime minister and the government of the day.

In Britain, the formal functions of the monarch are performed personally by the Queen. In Canada, while the Queen can still be called "Queen of Canada," most of the monarchical functions are performed in her name by the Governor General at the national level and the Lieutenant Governors at the provincial level. The appointment of the Governor General was originally the responsibility of the Queen acting on the advice of the government of Britain. This made the Governor General effectively independent of the Canadian cabinet. Since the Imperial Conferences of 1926 and 1930, however, the Governor General has been independent of the imperial government and is now removable by the Queen only on the advice of the government of Canada. While the appointment of the Governor General is, formally, a function of the Queen, in fact it is always made today with the advice of the Canadian cabinet. Also, while the normal term of office of the Canadian Governor-General is five years, the term can be shortened or stretched according to the wishes of the government of the day.

While the BNA Act defines many of the powers of the Governor General, the office itself is a creature of letters patent from the monarch. By the Letters Patent of 1947, the Governor General is empowered to exercise "all powers and authorities" that belong to the Queen in right of Canada. This means that the exercise of the royal prerogative in Canada is a function of the Governor-General, to be carried out by the Governor-General, at personal discretion, with the advice of the Queen's Privy Council for Canada. Among the powers specified by the letters patent are the use of the Great Seal of Canada, the appointment of judges, commissioners, diplomats, ministers of the Crown, etc., along with the power to dismiss or suspend them, and the power to summon, prorogue, and dissolve Parliament. In addition to the prerogative powers bestowed upon the Governor General by the letters patent, there are certain other powers that are ceded to the Governor-General by the BNA Act. Among these are the authority to appoint senators and the Speaker of the Senate; the exclusive right to recommend legislation involving the spending of public money or the imposition of a tax; and the right, formally, to prevent a bill from becoming law by withholding assent or by reserving the bill "for the signification of the Queen's pleasure." The Governor-General has the power, by section 56 of the BNA Act, to "disallow" any provincial legislation of which he or she disapproves. The real significance of the disallowance power is that it gives the federal government a potential veto power over all provincial acts. While it has not been used since 1943, the legal power to use it still remains as a reminder to the provinces that the Fathers of Confederation viewed the provincial legislatures as "second-class citizens."

The office of Lieutenant Governor was created by section 58 of the BNA Act. The holder of the office is appointed by the Governor-General in Council, and the salary is set by the

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22 See chapter 15 for a discussion of the Privy Council office. 23 BNA Act, section 55.
Canadian parliament. Furthermore, the Lieutenant Governor is removable "for cause" by the Governor-General in Council. This means that, in some respects, the Lieutenant Governor is an officer of the federal government who is responsible to the Governor General. On the other hand, the courts have decided that, in fact, the Lieutenant Governor is a representative of the Queen directly, despite the fact that the appointment and salary are controlled by the government of Canada, formally by the Governor-General in Council.

In an important constitutional case in 1892, the judicial committee of the Privy Council held that the Lieutenant Governor was a representative of the Queen in right of the province directly, and therefore could exercise all the prerogative powers that the monarch could. The significance of this is that the Lieutenant Governor, while in some respects the subordinate of the Governor-General, is in other respects an equal and enjoys the same power in right of the province that the Governor-General enjoys in the right of Canada. In turn, this has the effect of making the provincial governments, which are personified in the Lieutenant Governors, more important than they would otherwise be. The BNA Act provides that the Lieutenant Governor of the province has the power to assent to or to refuse to assent to acts of the provincial legislature, and furthermore, by the BNA Act, is given the power to reserve a bill for the signification of the Governor General's pleasure. In sum, the Lieutenant Governor in the province has powers that are analogous to and commensurate with the powers of the Governor General at the level of the federal government.

Up until now we have been speaking in rather formal and legalistic terms about the powers of the Governor General and the Lieutenant Governors. The intention has been to clarify the strict constitutional nature of the executive function in Canada. Now, however, it is necessary to bring the discussion of the executive function down from this rarefied atmosphere and to deal with the constitutional realities of the executive function in Canada.

The BNA Act provides for a body of advisors to assist the Governor General in performing the onerous burden of executive responsibilities that come from the same Act, and from the letters patent of 1947. Section 11 of the BNA Act states that:

There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada; and the Persons who are to be Members of the Council shall be from time to time chosen and summoned by the Governor General and sworn in as Privy Councilors, and Members thereof may be from time to time removed by the Governor General.

The BNA Act states quite specifically that the Governor-General does not have to listen to advisors, but in fact even at the time of Confederation there was a well established convention that the governor of the colony would, in almost all cases, act purely on the advice of the government of the day. The Queen's Privy Council for Canada includes a great number of people, such as ex-Cabinet ministers, who never function as advisors. The Cabinet, which is not mentioned at all in the BNA Act, is really a committee of privy councilors, chosen by the leader of the majority party in the House of Commons from among supporters in Parliament.

Formally, all executive acts are performed by the Governor General in Council, but in reality, executive decisions are made by the prime minister and Cabinet, and are rubber-stamped by the Governor-General.

24 "The Liquidators of the Maritime Bank" the Receiver General of New Brunswick (1892), Olmsted, vol. I.
There is still a body of opinion among prominent experts that argues that one should not dismiss the Governor General as merely a rubber stamp for the prime minister and Cabinet, for the simple reason that the Governor General still does possess a great deal of executive authority by virtue of the BNA Act and the prerogatives. The argument is that if the government of the day attempted to violate a basic principle of our political culture, for instance by abolishing free speech, the Governor General could step in and refuse assent to the bill, thus thwarting the culprits. In doing so, however, the Governor General would be violating another fundamental norm of our system of government, by claiming to represent the public interest better than the public's elected representatives. To say that a Governor General would never dare to oppose the will of the prime minister is pure speculation, but the fact remains that the norm of popular sovereignty at the core of the Canadian constitution imposes severe political limitations on the actual powers of the Queen's representative. The last time a Governor General went against the wishes of the prime minister was in 1926, when Lord Byng refused Prime Minister Mackenzie King a dissolution of Parliament. The result was a general outcry, led by Mackenzie King, against the unilateral action of the Governor General, and a subsequent electoral disaster for the man who had immediately benefited from Byng's decision.25

The relationship between the Lieutenant Governor of a province and the provincial premier is almost identical to that between the prime minister of Canada and the Governor General, and the BNA Act provides that the Lieutenant Governor may act with the advice of the executive council of the province. The executive council is, in fact, the provincial cabinet, which is chosen by the premier. All executive decisions are made by the premier and Cabinet, and the Lieutenant Governor, like the federal counterpart, more or less rubber-stamps them. As with the Governor General, the one time a Lieutenant Governor might be called upon to exercise some discretionary authority is in the case of the death in office of the leader of the government, where the successor is not obvious. Clearly, the Lieutenant Governor must seek the advice of the Cabinet ministers, but in some cases their advice might not be unanimous. In such a situation, the Lieutenant Governor must decide whose advice to take, on the basis of personal discretion and political acumen, for above all else the Lieutenant Governor must insure that there is a government. Such a situation appeared to develop at the death of Quebec Premier Maurice Duplessis in 1959. Initially, the Cabinet was by no means solidly united behind one candidate to succeed Duplessis. Apparently the Cabinet managed eventually to achieve a consensus by itself, but the incident makes it clear that there is a potentially important political role to be played by the formal executive in such rare, but conceivable, circumstances.26

To conclude, the formal executive power in Canada is vested in the Crown and, in a very formal sense, Canada can be said to have a monarchical form of government. The Governor General exercises all of the prerogative rights and privileges of the Queen in right of Canada, according to the BNA Act and the letters patent that define the office. The constitutional doctrine of popular sovereignty has, however, reduced the de facto role of the Governor General to that of a figurehead. The real power is exercised by the prime minister and the Cabinet, who obtain their legitimacy from the fact that they possess a popular mandate.
