Ensuring Constitutional Wisdom During Unconventional Times

by Hon. Edward Roberts

The Governor General and Lieutenant Governors are viewed by many as mostly ceremonial figures and for the most part this is the case. But they have substantial constitutional powers which are used very sparingly because the need seldom arises. There have, however, been cases where the Crown has been called upon to make decisions that have a profound impact on the political landscape. This occurred in December 2008 when the Governor General Michaëlle Jean approved Prime Minister Stephen Harper's request to prorogue Parliament after only a few days and while the Government was facing a motion of non confidence by the Official Opposition. In this article a former Lieutenant Governor of Newfoundland and Labrador reflects on the Vice-Regal role and offers some insights into the recent situation in Ottawa.

The extraordinary if not entirely unprecedented antics of Canada's parliamentary and political leaders last December made the constitutional powers of the Crown an issue for the first time in a generation. Therefore I want to offer some reflections and observations upon the events that may very well dominate political and public discourse in our country during the coming weeks and months.

The Lieutenant Governor's Job Description

I usually offer some rather light hearted advice to anyone considering an offer to become Lieutenant Governor – a position I enjoyed immensely during my tenure.

The three cardinal rules are:

1) Be on time, as the event cannot start without you;

2) Keep your speeches short, because people have not come simply to listen to you; and

3) Never pass a washroom because – as my long-time mentor and dear friend Jack Pickersgill used to tell me – there is no time in public life as long as when one has to but cannot.

However there is a very serious side to the Office. Canada is a constitutional monarchy. Queen Elizabeth II is our Head of State. As she also has other responsibilities, most of her Canadian duties have devolved upon the Governor General and the Lieutenant Governors.

There is a common misconception that Lieutenant Governors are somehow subordinate to the Governor General in the constitutional sense. That is not correct. Each is the Queen's personal representative and the institutional embodiment of the Crown. Each is governed by the same rules and conventions, and each has the same responsibilities. Everything that I say about the

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powers of a Lieutenant Governor is equally applicable to those of the Governor General. The sole distinction between them is that the Governor General deals with matters which fall within the authority of Parliament and the Government of Canada while a Lieutenant Governor is circumscribed by the constitutional rules that define the ambit of the provincial legislatures, in our case the House of Assembly. This being so, I shall use the term "vice regal" to embrace all 11 of Canada's constitutional offices.

An authoritative, well-expressed contemporary definition of the vice regal office today was developed a few years ago by the British Columbia Citizens' Assembly on Electoral Reform. They said:

> The head of state is the name given to the officer who exercises the formal executive power of the government and, on official occasions, represents the whole political community. While British Columbia is nominally monarchical in form, the powers of the Crown as head of state are exercised by the lieutenant governor of the Province. The head of state in parliamentary systems is an official who is seen to be above politics, in contrast to the head of government who is the prime minister or premier.
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> Substitute Canada for British Columbia and you have a precise and authoritative description of the powers of the Governor General.

Vice-regal duties and responsibilities fall into two broad categories – representative and constitutional. I need say only a few words about the first. A very great part, if not all, of the work of most Lieutenant Governors casts them as the Crown's representative. Inevitably and properly, this is the best known aspect of a vice-regal office, and becomes the way in which they are seen by their fellow citizens. Within each province, they represent Canada's Queen personally, while the Governor General speaks for all Canadians.

Their mandate is to reflect the best in their community – and I use that word in a very broad sense to include, in our case, everybody who lives in Newfoundland and Labrador. They are a voice for the community: they salute praiseworthy accomplishments and honour those among us who deserve to be recognized.

Constitutional Powers

Lieutenant Governors are also given very substantial constitutional powers, and charged with equally great responsibilities. Some wise soul once compared them to a fire extinguisher – they are not needed very often, but they become of supreme importance when the need does arise. They are in no way diminished by the fact that they are seldom used. The powers stem from arcane constitutional doctrines, and are set down for the greater part in conventions and precedents as opposed to statute law or regulations. Because they are so seldom needed and so seldom seen, the vice regal powers are largely unknown. But they are nonetheless real, nonetheless available, and nonetheless potent for that.

Let me offer some proof that the vice-regal powers are founded in our Canadian constitutional theory. Section 9 of the original 1867 *British North America Act*, now known as the *Constitution Act*, says:

> 9. The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in The Queen.

Section 10 lays it down that the Governor General carries on "the Government of Canada in the Name of the Queen". These two sentences, as amplified and expanded by centuries of British and Canadian constitutional practice, are the foundation upon which our entire system of executive government rests. These few words make Canada and her provinces a parliamentary democracy, governed in the name of a constitutional monarch. (And, let me note that later Sections vest comparable powers in the individual Lieutenant Governors).

The traditional formulation of vice regal powers was formulated by Walter Bagehot 150 years ago.

> The Sovereign has, under a constitutional monarchy such as ours, three rights – the right to be consulted, the right to encourage, and the right to warn. And a King of great sense and sagacity would want no others.

Bagehot's description is well-known, and still cited frequently. Lieutenant Governors (including me!) are fond of quoting it. I claim no particular constitutional expertise, but I have been interested in these issues for many years, and with eight years as a Minister and five as Lieutenant Governor I have had a certain amount of experience, on both the "advising" and the "being advised" sides. My own view is that the way in which a wise vice-regal office-holder attempts to exercise the "rights" attributed to him by Bagehot is determined very greatly by the relationship between the Governor General or the Lieutenant Governor on one hand, and the Prime Minister or the Premier on the other.

The two Premiers with whom I worked as Lieutenant Governor – Roger Grimes, and succeeding him Danny Williams – both held the Crown and the Office of Lieutenant Governor in high regard, and acted accordingly. But I do know, from personal knowledge, that this has not always been so across Canada. Practices have evolved differently, in some cases because of the personalities of those who have held office from time to time and in other cases because of events. Bage-

hot, in a phrase, makes good reading, but should no longer be regarded as a definitive statement.

But that neither diminishes nor destroys the powers vested in the vice-regal office. These still exist. And so do the commensurate responsibilities.

Choosing the First Minister

Chief among the vice-regal constitutional duties – indeed, one could accurately call it the first and most important responsibility of any Lieutenant Governor or the Governor General – is to ensure that the Queen's government continues to function. In a parliamentary democracy such as ours, that means giving due deference to the men and women elected by the citizens of our country to the legislatures, be they provincial or national. The link between the executive government and the legislature is the foundation of responsible government. 'Responsible' means responsible to the elected legislature. The right to govern, the right to be the executive, belongs to those who command the support of the legislature. That is the bedrock principle of our entire governmental structure – the way in which we conduct our affairs as a "free and democratic society", in the words of the *Canadian Charter of Rights and Freedoms*.

The viceroy must ensure that those who enjoy the support of the legislature are entrusted with the powers of the executive government. The principle is so basic and so much a part of our day-to-day life in this country that we very seldom think about it. We acknowledge that we must act together, as a people, to deal with our common interests. We elect men and women to our legislatures and parliament to make the laws that make this possible. But legislatures cannot do the work of the executive. They entrust that to the men and women who command the support of the legislature. They hold office because they have this, and only as long as they retain it.

That makes our system fundamentally different from that used by the United States of America, among other countries. There, citizens elect the President separately and apart from their legislatures – the Congress, in the national sense. The President may or may not enjoy the support of the Congress on any particular issue. That could not be the case in Canada or in any of our provinces.

Centuries of constitutional precedents ordain that the viceroy appoints the First Minister. But they also ordain that the right to choose the Prime Minister rests solely with Parliament, and specifically with the men and women of the elected body, the House of Commons. We do not elect a Prime Minister in Canada: we elect Members of Parliament. They choose the Prime Minister: the Crown's role is to appoint him or her. We do not elect a Premier in Newfoundland and Labrador, nor in any other province: we elect Members of the House of Assembly. The Crown – the Lieutenant Governor – then appoints that person the Premier

The power to appoint is accompanied by the duty to exercise it, and to decide whom to appoint. Almost without exception, the question is easily answered – the man or woman who leads the majority party in the legislature has won the right to lead the government. And even where no group contains a majority of the elected members, there is seldom any difficulty in coming to a decision: the leader of the largest group in the House is appointed. That is how and why Mr. Harper has twice been appointed Prime Minister. The only wrinkle in such a case is that the First Minister must seek the confidence of the legislature at the earliest opportunity, and forfeit office if that confidence is not forthcoming.

That is the rule that determines who becomes Prime Minister or Premier. There is a companion rule, equally deeply founded in centuries of tradition. The viceroy, representing the Crown, acts only on advice – and the advice comes from the Ministers, and specifically the First Minister. Parliament is supreme. The Crown must always give way to the legislature. That is the very essence of a constitutional monarchy. Charles the First lost his head – literally – because he forgot this.

Some Newfoundland Precedents

Newfoundland, interestingly enough, has given the world of parliamentarians and political scientists some clear examples of the constitutional conventions of responsible government.

The 1908 General Election produced a tie – Robert Bond and his Liberals won 18 of the 36 seats in the House of Assembly, and so did Edward Morris and his People's Party. Bond, as Premier, met the House in good time. He failed to elect a Speaker, and subsequently sought a dissolution. The Governor, Sir William Macgregor, refused to grant one. Bond thereupon resigned, and Macgregor sent for Morris, who undertook to form a Ministry. Morris in turn met the House, and was equally unable to elect a Speaker. He, in turn, sought dissolution. Macgregor granted it. Morris won the subsequent election, handily. Bond never again held office.

Subsequent scholars have agreed that Macgregor acted appropriately, and in accordance with the constitutional conventions of the age. Bond, as the sitting Premier, was entitled to meet the House. His

failure to elect a Speaker demonstrated that he no longer possessed the confidence of the House. His request for dissolution was properly denied, because there was another parliamentary group that had at least as good a chance as Bond to obtain the support of the House. That group, Morris and his colleagues, were entitled to seek to do so. Their failure to get it meant that the Governor had no alternative but to dissolve the House.

I have no knowledge of what transpired in Ottawa between the Prime Minster and the Governor General last December. He advised her to prorogue Parliament until January 26, 2009. She, appropriately in my view, accepted his advice and did so. He and his colleagues will meet the House which will be given an opportunity to express confidence. If a majority of the Members sustain Mr. Harper and his colleagues, they will be entitled to carry on as the Queen's Ministers.

An interesting question would arise if the House declares a lack of confidence in Mr. Harper and the present Ministry. The decision would rest with him in the first instance, and then with the Governor General. Should he ask her to dissolve the House, to hold a general election, she would have to decide whether to accept that advice. Should she do so, an election would follow. The decision is hers to make. But should she refuse a dissolution, Mr. Harper would have no choice but to resign as Prime Minister. The imperative constitutional requirement that the Crown acts upon the advice of the Ministry requires that a Prime Minister whose advice is rejected must resign. And if he resigns as Prime Minister, she will have to ask another Member of Parliament to try to form a Ministry if there is one with a reasonable expectation of winning the confidence of the House.

Again, there is a Newfoundland precedent. Frank Moores became Premier early in 1972, and almost immediately sought a dissolution, before the House met. There were two reasons why he did so. The first was that he sensed that the political tides had swung in his favour– "the time had come", in the slogan of the day. But he was also afraid of meeting the House, because in the turbulence of the time, the Opposition consisted of 21 Members, while Mr. Moores led a group of 20, in a House of 42. (There was one seat vacant).

The Lieutenant Governor, John Harnum, acting in my understanding on the advice of Eugene Forsey, the foremost constitutional expert of his day, refused to dissolve the House, and instead directed Mr. Moores to meet the Legislature. He did not resign, but instead agreed to do so. He knew full well that the Opposition was both prepared to form a Ministry and had the declared support of a majority of the Members of the House – although looking at some of those who had been elected in the 1971 election, there was cause for concern about several members, drawn from both sides of the House. Had there been no alternative government, Mr. Harnum would have had no constitutional alternative except to grant the request – couched as advice – of the Premier in office. Had he done otherwise, he would have been in the completely untenable situation of being without a Premier. But his refusal, in the circumstances, was both appropriate and correct. And so was his order that Mr. Moores meet the House.

In the event, it all turned out for the best. One of the Liberal Members-elect resigned the day the House met, for reasons which have never become public and in circumstances which have never been satisfactorily explained. Mr. Moores won an overwhelming victory in the March election.

He and Mr. Harnum did me an immense favour, quite unwittingly I hasten to add. I was Leader of the Opposition, and had absolutely no desire to be called upon to form a Ministry. I knew full well that the Smallwood era had come to an end, and that the people of Newfoundland and Labrador wanted political change. An election defeat and a number of years as Leader of the Opposition were a small price to pay for the opportunity to contest the next election on my own merits. That election came in 1975. All that I shall say for the moment is that I never did get the opportunity to fight an election on my own merits. After losing to me in the 1974 Liberal leadership contest, Mr. Smallwood formed his own party in 1975. By doing so, he "spoiled" a likely Liberal victory, and Frank Moores and the PCs won a second term. But that is another story.

Early Dissolution

There is another constitutional convention which comes into play in these circumstances. An early dissolution – one soon after an election – should not be granted unless there is either an overwhelming issue of public policy upon which the electorate should speak at once or no alternate Ministry can be found in the existing legislature. The practice is well-enshrined in the constitutional precedents. There need be no doubt that the formation in Ottawa, before Christmas, of the coalition between the Liberals and New Democrats, with the support of the Bloc Québécois, came about as

a result of this. The letter that Mr. Dion and Mr. Layton sent to the Governor General is clear proof.

You may hear much talk in the weeks to come of the King-Byng crisis in 1926. It offers no clear guidance on these matters. MacKenzie King, the Liberal Leader, did not resign as Prime Minister after the 1925 General Election, although the Conservatives elected more MPs, 116 to 101 Liberals in a House of 245. He remained in office, with the support of the third parties, and won several confidence votes in the House. Some eight months after the election, however, he unsuccessfully sought a dissolution in an attempt to avoid a vote of censure that he was certain to lose. He resigned at once as Prime Minister, and Lord Byng, the Governor General, asked Arthur Meighen, the Conservative Leader to form a Ministry. He did so, but less than a week later, the House voted no confidence in his administration, by one vote – the famous "broken pair". The Governor General, on Mr. Meighen's advice, then dissolved parliament, and ordered a General Election be held.

Mr. King made Lord Byng's decision the centre of the ensuing election campaign. His victory in the 1926 election is held up in support of the suggestion that no Governor General may ever again refuse a request for dissolution. That statement is incorrect, in my view. The correct statement is that no holder of the vice-regal office may refuse to act on advice from the first Minister unless the legislature is prepared to sustain an alternate Ministry. The governing principle is that the decision is one for the elected Members of the legislature. The 1926 crisis was not brought about by Lord Byng's refusal to accept Mr. King's advice, but rather by Mr. Meighen's failure to win a subsequent vote of confidence in parliament. That failure cost both of them their offices – Meighen as Prime Minister and Byng as Governor General.

I will not speculate what will happen when Parliament resumes but the options are fairly clear. Mr. Harper will seek the confidence of the House at an early and appropriate moment. Should he get it, then it will be business as usual. But should he fail to get it he will either have to seek a dissolution or resign. The Governor General will decide his fate by either calling an election or asking another Member of Parliament to form a Ministry. In any case I am sure the events of December 2008 and January/February 2009 will find a permanent place in the long history of constitutional development in our country.