



Parliamentary Book Shelf

Edward McWhinney, *The Governor General and the Prime Ministers: The Making and Unmaking of Governments* (Vancouver: Ronsdale Press, 2005), 193 pp.

The title understates the book's objective. Edward McWhinney, professor and former MP, attempts to summarize the powers and duties of the Canadian Governor General and provincial lieutenant governors. He draws on federal and provincial precedents, as well as case studies from other Commonwealth countries. For a subject that can be dense and esoteric, McWhinney's writing style manages to be crisp and engaging. The book is weakened, however, by factual omissions and some dubious conclusions.

McWhinney deserves praise for the breadth of cases and for demonstrating that constitutional conventions are not straitjackets but are to be considered in the light of Lord Sankey's famous "living tree." The office-holder should have due regard to precedents but must be creative in responding to the circumstances. India's republican head of state, for example, has generally been successful in safeguarding British-style parliamentary government while adapting it to national conditions. This has entailed a delicate but sometimes active presidential role in navigating through minority-Parliament situations, a skill that has been noticed by Canada's vice-regal officeholders.

In extreme circumstances, the reserve powers may even include stepping in as the only legitimate re-

maintaining public authority. Here McWhinney aptly refers to Grenada's political convulsions of the early 1980s. There, the surviving and courageous Governor General managed to serve as a bridge to the reconstructed constitutional government. But the norm is restraint. The governor must avoid, as the author puts it, "gratuitous political bloodletting." The subtle and low-key approach of British Columbia Lieutenant Governor David Lam in 1991, on the eve of an election and in the face of a rebellion within the governing Social Credit party serves as a textbook case. Some of the Socred caucus members were trying to make representations to His Honour. Lam's minimalist and very cautious involvement helped indirectly to facilitate an intra-party resolution to the problem.

The book is weakest where McWhinney, with his impressive experience as a student of law and history, should be strongest. He omits or misconstrues some facts and precedents essential to trying to discern the constitutional conventions applicable to the vice-regal offices. He asserts, for example, without qualification that the reservation-and-disallowance powers of the lieutenant governors are no longer worth contemplating. He neglects to mention that a recent short-serving Quebec Lieutenant Governor, Jean Louis Roux, mused in 1996, shortly before being sworn in, that his authority to refer a Bill to the Governor General (read the federal Cabinet) may be of consequence in the event of a unilateral

declaration of independence. It was that comment and Roux's strong federalist credentials that earned the ill-fated Quebec vice-regal official the enmity of his province's sovereignist government. It arguably had more impact than the revelation, recalled by McWhinney, that as a 19-year-old in 1942 Roux had worn a lab coat with a swastika. Roux's constitutional error may have been to think out loud, and it is not inconceivable that the Lieutenant Governor may yet be used to thwart a unilateral secession. It is little wonder therefore that the Roux controversy led to a National Assembly resolution calling for that body to be given the right to select the Lieutenant Governor.

Referring to the elections of 1957, 1962, 1963, 1965, 1979, and 2004, none of which resulted in a majority of seats for any party, McWhinney is confident in concluding that there is a constitutional convention that the Governor General will make the first approach after an election to the leader whose party has won the plurality of seats. A better conclusion is that the Governor General will call on no one else until the incumbent Prime Minister has indicated his or her intention to resign. If the Prime Minister appears to be on weak ground, the Governor General would insist that the government meet the House at the earliest opportunity and would almost certainly deny any request for dissolution until the House has met. This is consistent with the Lieutenant Governor's disposition following the 1971 Newfoundland election, in which Premier Joseph Smallwood's

Liberals tied with the Conservatives in the seat count. It is also consistent with the events following the 1925 federal election, in which the governing Liberals won 15 seats fewer than the Conservatives. The latter were not approached by the Governor General immediately following that election. Instead, the Liberals met the House and were able to survive into the next year.

That Liberal government ran afoul of the Governor General in June 1926 when Viscount Byng refused Prime Minister Mackenzie King's request to dissolve Parliament to pre-empt a vote in which the Commons was likely to make clear its lack of confidence. McWhinney does not see the episode as precedent because the Governor General was then still considered an imperial officer. Let it be remembered, however, that the Governor General specifically declined Mackenzie King's suggestion that he consult with London before denying the dissolution. Although Mackenzie King successfully exploited the whole affair as an assault on Canadian independence, history appears to have vindicated Byng, thanks in large part to the exhaustive writing and precise logic of Eugene Forsey.

The famous Australian constitutional crisis of 1975 appears also to suggest that authoritative historians rather than the result of the subsequent election determine whether an extraordinary gubernatorial decision can stand as precedent. In that case, the Governor General dismissed the Prime Minister after the Senate's determination to obstruct a budget that had passed the lower house. The new Prime Minister, Malcolm Fraser, was successful at the polls, but most analyses after the fact have characterized the Governor General as precipitous, clumsy, or even biased and thus an

unwitting friend of the republican cause.

Although McWhinney acknowledges in a handy appendix the Governor General's right under constitutional convention to refuse to sanction potentially controversial post-election patronage appointments proposed by an outgoing government, his commentary in the main text forecloses all possibility of a vice-regal refusal to approve orders-in-council. In fact, there is a noteworthy Canadian example — Lord Aberdeen's refusal of Prime Minister Charles Tupper's Senate nominations following the 1896 general election. Tupper had been inclined to meet the new House as Prime Minister, confident that electoral recounts would sustain him, although the Liberals had emerged with a slim majority. Following this exercise of the vice-regal reserve power, Tupper resigned. It would also be worth considering whether a refusal by a Governor General could be justified *during* an election campaign if a sitting government proposes to take some non-urgent but dramatic and difficult-to-reverse decision that would violate what has sometimes been called the "caretaker convention." Would the Governor General have been justified, for example, in withholding his signature, during the 1993 election campaign, on the highly controversial privatization agreement for Pearson International Airport, the reversal of which proved to be costly to the new Liberal government?

And even if an outright refusal is difficult to fathom, what about the Governor General's role in upholding Sir Walter Bagehot's famous trilogy — "the right to be consulted, the right to encourage, the right to warn?" McWhinney leaves it to the end of the book to make only the briefest explicit mention, quoting

Adrienne Clarkson's comment that she had "done all three," of what could be characterized as the most important and potentially influential of the governor's political-constitutional functions. The author is satisfied that there has been an absence since 1926 of "any real difference or disagreement." Although, as John Saywell observes, many premiers have regarded their provincial governors as little more than a nuisance, the unseen may still be very real at both the federal and provincial levels.

Clarkson would have been in discussions with her prime minister following the vote in the Commons on 10 May 2005 directing the Finance Committee to amend its report to state that confidence in the government had been lost. McWhinney simply asserts that the vote posed no constitutional issues because it was on an amendment. In fact, a strong case can be made that the government was violating constitutional convention by waiting nine days after it appeared that confidence had been lost before allowing the House actually to deal with a clear question of confidence. Behind the scenes, Clarkson would not have remained utterly aloof. And had the government tried to prorogue, or had it tried to delay much longer following the first vote, she would probably have had to intervene formally.

Although a cautious reformer, and although effective in defending Adrienne Clarkson against some of her politically opportunistic critics, McWhinney makes clear that he does not think much of the "merely symbolic" role or the "mere constitutional symbols" of the Governor General. However, there is something to be said — and Frank MacKinnon has perhaps said it most eloquently in *The Crown in Canada* (Calgary: McClelland and

Stewart, 1976) — for reposing much of the pageantry and many of the trappings of state, including the command-in-chief of the armed forces, in a non-partisan person who reigns but does not rule. A citizen can thus be loyal to the country and to its commander in chief while being sharply critical of the government.

Perhaps it is McWhinney's tendency to undervalue the symbolic that leads him to float the idea that, without changing the Constitution, we might simply begin referring colloquially to the Governor General as "President." Although McWhinney's historical references virtually ignore the pre-Confederation period, it should be recalled that the almost 400-year-old Office of Governor General is the longest-standing continuous institution of government in Canada, spanning the French and British regimes. It has since acquired a distinctively Canadian personality, part of a graceful evolution within a rich historical tradition. It was a history that Adrienne Clarkson liked to trumpet, with good reason. Although a few rascals and bigots have occupied the office, most of the occupants have arguably been enlightened and gentle people who

did more to help rather than hinder Canada's political maturation.

There is some merit in McWhinney's proposal, advocated by others also, that the Prime Minister's choice for Governor General be submitted to a vote in the House of Commons and that perhaps a two-thirds majority be the required threshold. This could add stature to the office, prevent blatant patronage, and perhaps cause the Prime Minister to think twice before making a lacklustre nomination. But it could also be a golden opportunity for character assassination, a rhetorical assault on federalism, and publicity for hitherto marginal republican groups. In the long run, it could politicize the admirably non-partisan office. Perhaps, therefore, the Prime Minister could ask an independent and non-partisan parliamentarian, the Speaker of the House of Commons, to make the recommendation, which could then be conveyed by the Prime Minister to the Queen.

One can forgive most of the factual errors, such as the book's reference to Jean Chrétien becoming Liberal leader in 1989 (it was 1990), or that it was a Liberal broken pair that led to the fall of Arthur Meighen's short-lived government in 1926 (the error was committed by

Progressive member T.W. Bird), or that former British Columbia premier Bill Vander Zalm was "fully cleared" of conflict of interest (McWhinney may be confusing Vander Zalm with another former premier, Glen Clark). But when McWhinney tells us that Bob Rae's Ontario NDP minority government took office in 1988 on the heels of David Peterson's Liberal minority, we are left to question the editing. (The NDP won a majority in 1990. The 1985-87 Liberal minority government was followed by a Liberal majority, 1987-90.)

McWhinney is to be commended for tackling a subject that few recent writers have explored in detail and for dissecting functions that, though often low-key, are important to our system of government. However, those wanting an authoritative modern account and careful interpretation of the formal and ceremonial functions of the Queen's representatives in Canada are left waiting.

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