Letter to the Editor

Constitutional Guidelines for a Governor General in Minority Government Situations

Sir:

Further to the review of my book *The Governor General and the Prime Ministers: The Making and Unmaking of Governments* by Professor Tom Urbaniak in the Summer 2006 issue please allow me to explain why I think we need Constitutional Guidelines for a Governor General in Minority Government Situations.

The Reserve, Prerogative, discretionary powers of the head-of-state are Conventions of the Constitution and they are not to found spelled out in constitutional charters and legislative codes, although Continental European countries with a rather similar dualist executive (head-of-state/head-of-government) have found no particular difficulty in legislating their main elements in the new, post-World War II constitutions.

Such a codification has been recommended by two of the foremost Empire and Commonwealth constitutionalists of modern times, Justice Herbert Vere Evatt in 1936, and Professor Zelman Cowen (later Governor General of Australia) in 1968, as a means of avoiding politically difficult confrontations between head-of-state and head-of-government over their respective constitutional roles in the formation or continuance of governments of that sort that had already occurred in some jurisdictions (as in Canada in 1926 in the King-Byng conflict) and that would recur spectacularly in Australia in 1975. The Evatt-Cowen proposal has not been acted upon, for reasons that Canadians, remembering the twin disasters of Meech Lake and Charlottetown as ventures in legislating fundamental constitutional change, will fully understand. The nearest example, perhaps, is to be found in the 1937 Constitution of the Republic of Ireland.

The Conventions of the Constitution have to be found in the records of government, inter-institutional practice over the years, ripening eventually, like the historical English Common Law, in concrete problem situations, into a form of custom of varying degrees of authority according to the context in which it first emerged. There is a particular difficulty, with the Conventions as to the Reserve, Prerogative powers in potential political crisis situations i.e. the making and unmaking of governments, that we have found ourselves with in Canada, on a continuing basis, since the June 2004 federal elections.

The needed constitutional precedents consistent with the Governor General's primary constitutional duty of finding and maintaining a stable government are simply not there.

In 2004, the only real "Canadian" precedent - King Byng of 1926 went back eight decades to the era before the enactment of the Statute of Westminster in 1931 and Canada's attainment of full legal sovereignty within the emerging British Commonwealth, when the Governor General was still a British national, appointed in law and in fact by the Imperial government and considered, quite properly, as an agent of Imperial authority.

When this 1926 precedent is studied in the context of its immediate historical origins, the claimed political vindication of Mackenzie King's argument that the Governor General must always yield to the constitutional "advice" of the Prime Minister, sought to be derived from King's majority election victory in a battle fought out, in large nature, over the issue, is hardly persuasive constitutional authority in a present-day context where the Governor General is, and has been for over half a century, a Canadian citizen chosen and effectively appointed by the Prime Minister of Canada.

The Governor General is now fully part of the internal Canadian system of constitutional checks and balances, with his or her own constitutional autonomy in relation to other, coordinate institutions of government at the federal level - Prime Minister and Cabinet, Parliament, and the Supreme Court, and capable on that account of, exercising the residual, Reserve powers in his or her own legal right, subject to the general obligations of Comity and mutual deference accorded to those other institutions. Establishing what these latter are or should be today may call for a creative approach both to old Conventions, and also to old doctrines formulated in another, rather different time era in the evolution of democratic constitutionalism such as Bagehot wrote for in 1867, immedi-

ately before the enactment of Disraeli's great Second (electoral) Reform Bill and still further years before Gladstone's Third Reform Bill.

As for the Conventions themselves they are not and were never intended to be frozen once and for all at the time of origin. The British have not had a minority government since 1931 and have had no occasion, therefore, to re-examine constitutional formulations on the proper exercise of head-of-state discretionary powers. The more lively and interesting present-day examples tend to come from countries like India that, with the basic Westminster-model duality of head-of-state/head-of-government, have had to deal, over the past three decades, with frequently recurring minority government situations in which the President, as head-of-state, in fulfillment of his duty to obtain and facilitate formation of stable, continuing government, has moved to fill the gap and to assume something of a pro-active role in the encouragement of building coalition administrations out of a number of disparate parties or parliamentary blocs. To ensure that such ad hoc coalitions, once granted the mandate to form a government, will not be ephemeral or fleeting, the Indian President adopted an innovatory practice of requiring potential partners in such coalitions to pledge, in advance, their support and to evidence that commitment in written form. The Indian practice was introduced into Canadian discussion in the extended constitutional seminar, organized on then Governor General Schreyer's initiative at a reunion of Canada's federal and provincial heads-of- state held in Victoria, B.C. in February 1982.

Lieutenant Governor John Black Aird of Ontario, who was present at the Victoria discussions had no difficulty in accepting a similar, properly evidenced public undertaking, in writing, furnished by then Provincial Opposition Leader, David Peterson and third party (NDP) leader Bob Rae, as the basis for granting a mandate to form a new government to Peterson, in spite of the objections of "unconstitutionality" advanced by the incumbent Conservative Premier who had emerged from the recent Provincial elections in a minority situation but with still the largest number of seats in the Provincial House. In the result, a stable, continuing provincial government emerged, with the Peterson-Rae agreement honoured by the two parties for its guaranteed two year term. This is how Conventions of the Constitution emerge as precedents: they are validated in action by their evident commonsense and reasonableness and community acceptance.

Governor General Clarkson's exercise of the discretionary Reserve, Prerogative powers inherent in her office was carried out in politically difficult times, but with full awareness of the larger Commonwealth body of precedents and the different national societal contexts in which they emerged and their opportunities and also limits of relevance in contemporary Canadian terms. Her performance, which was achieved without any apparent confrontations or discord with any of the main political players, against a background of a particularly unruly House of Commons, will be widely studied as an exercise in the process of up-dating and modernisation of old constitutional practices and routines to meet new political challenges. I suggest the following limiting constitutional parameters for the head-of-state's use of discretionary powers in an era of participatory democracy and public involvement and criticism. First any actual exercise of the Reserve powers today has to be transparent, with the grounds for acting or for not acting in a particular case clear and obvious enough to all of the main contending parties. Second the decision itself must be rational, as demonstrated concretely in a government capable of obtaining and maintaining majority support in the House. Third the decision should be perceived and accepted as equitable and politically fair as between all the main political players.

One other issue now undergoing some further public discussion in Canada is whether the Governor General, for the past half century effectively chosen by the Prime Minister of the day, should be accorded the extra constitutional legitimation of some form of public involvement in that choice, whether by parliamentary ratification vote by special or even simple majority of the House of Commons, or in direct democracy by vote of the population at large. To the argument that such a procedure would "politicise" the office and render it subject to the give-and-take of partisan conflict, or, separately from that argument, perhaps embolden the ultimate choice to become involved gratuitously in high policy choices more properly in the domain of Cabinet and Parliament, the answer has to be that the empirical record in those parts of the Commonwealth that have some system of public involvement in the choice suggests otherwise, and that the heads-of-state concerned have displayed a studied degree of self-restraint with no pretensions to political self-aggrandizement. In the Republic of Ireland which has gone furthest of all with direct popular election of the head-of-state, we have just seen an incumbent President re-elected, unopposed, to a second term in office in what was clearly a display of non-partisan cooperation by all main political groups.

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