



Flag of the Governor General of Canada

# The Canadian Crown:

## The Role of the Governor General

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In late 2008, Prime Minister Stephen Harper paid two notable visits to the Governor General of Canada at Rideau Hall and offered Her Excellency, Michaëlle Jean, advice which sparked controversy among intellectuals, pundits and editorialists. Canadians from across the country soon joined the discussion, but in their letters to newspaper editors and chatter on radio talk shows, they revealed how ill-informed their opinions were about our political system, and especially about the role of the Governor General and the significance of the Office to our constitutional monarchy. Our exasperated former Governor General, Adrienne Clarkson, had already noted two years earlier that while Canadians have shown “an enormous interest in the functioning of our political system”, they have revealed “an abysmal lack of knowledge about the system.” Clearly, a review of the nature and purpose of the Canadian Crown is timely, and particularly the role of the Governor General as an integral part of that institution.

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The Canadian Crown is not an easy institution to understand; it is the only monarchy, other than Belize, in all of continental America. The Canadian Crown is a constitutional parliamentary monarchy made manifest in a team of persons: the Queen who lives outside the country; the Governor General who resides in Ottawa and exercises all prerogatives of the Crown within the federal sphere of jurisdiction; and the ten Lieutenant-Governors who reside in their respective provincial capitals and exercise the prerogatives of the Crown within the provincial sphere of jurisdiction. While sovereignty is divided within Canada between federal and provincial jurisdictions, the Queen combines the two in her own person, giving unity to these three elements of our Maple Crown.

Canadians observe the public manifestation of the Crown largely through the acts of the Governor General and Lieutenant-Governors. They witness our Governor General, Michaëlle Jean consoling the families of fallen soldiers at Trenton, Ontario at the time the bodies of their loved ones arrive home from Afghanistan in flag-draped coffins. They read about her as she helps our newest territory, Nunavut, celebrate 10 years of existence by munching on raw seal meat in order to celebrate Inuit culture, much to the consternation of anti-seal hunters. Canadians are reminded that they live in a monarchy as they observe Lieutenant-Governors perform countless ceremonial acts in the provinces such as visiting schools and rewarding outstanding citizens for acts of bravery. The Queen also highlights the good deeds of Canadians on her many visits to Canada. While this role of the Crown is important, it has another essential part to play within the political and constitutional structure of our country. In this regard, the Crown is at the very centre of our political life, and the Governor General and Lieutenant-Governors find their places in the administration of the state through the Queen.

As our Queen, Elizabeth II exercises both legislated and prerogative powers which are derived from two sources: statute and common law. For example, statute law, the written part of our Constitution, states that only the Queen can move the capital of Canada from Ottawa and only she can appoint extra Senators (ss. 16, 26 and 27) *Constitution Act*, 1867 (U.K.). The prerogatives of the Crown, such as the right to grant mercy, are derived from common law. The powers of the Crown, however, are also prescribed by “convention”. For example, while the Constitution allows the Governor General to disallow provincial legislation, by convention this power is not exercised. Under our system of responsible government, if a government loses its majority support in the House of Commons, it must resign or seek a dissolution and election. Yet this convention is not part of the law of the Constitution, but rather, part of the “conventions of the Constitution.”

The *Letters Patent, 1947* is one of the most important documents respecting our Canadian Crown. Through the *Letters Patent*, King George VI allowed the Governor General to exercise all the power of the monarch with respect to Canada, significant because the *Letters Patent* cannot be altered or repealed by parliament since they are a creation of the monarch’s royal prerogative. The only powers George VI could

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not, and did not, transfer to the Governor General were those powers specifically legislated to the sovereign in the Canadian Constitution, such as appointing extra Senators. Consequently, in 1990, in order to pass the goods and services tax (GST) legislation through an obstructionist Liberal Senate, the Conservative government of Brian Mulroney was obliged to ask the Queen, not the Governor General, to use her power to summon extra Conservative Senators under section 26 of the *Constitution Act, 1867*. The *Letters Patent* could not override the legislated authority given to the Queen alone in the Constitution to call extra Senators to the Upper House.

Adrienne Clarkson (1999-2005), in *Heart Matters: A Memoir*, wrote that “Even many politicians don't seem to know that the final authority of the state was transferred from the monarch to the Governor General in the *Letters Patent* of 1947....”

Constitutional authority James R. Mallory points out in his book *The Structure of Canadian Government* (1984) that legally “the Governor General can exercise any of the Queen's powers in Canada.” The converse is not true, however; “the Queen cannot exercise the Governor General's powers because they are conferred on him, and not on the Queen, by the *British North America Act*.” Mallory notes that where a function is purely ceremonial or does not require the production of some instrument of lawful effect, the Queen can officiate; otherwise she cannot. Therefore, the Queen might give royal assent to legislation at the federal level or open Parliament, but she could not approve an order-in-council or effectively replace the Governor General during a royal visit.

Over time the sovereign's powers, except those explicitly enshrined in the Constitution, came to be exercised by the Governor General through the *Letters Patent*. For example, in 1977, the Queen agreed that if necessary, the Governor General could sign Declarations of War and other international documents, on Her behalf.

Because of the *Letters Patent, 1947*, new institutions and practices related to the Crown have taken the enhanced role of the Governor General into consideration. For example, with the establishment of the Order of Canada in 1967 and the Order of Military Merit in 1972, the Queen became the Sovereign of these Orders, while the Governor General became the Chancellor, with the secretary of the Canadian

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system of honours housed at Rideau Hall. Although state visits by Governors General predate the issuance of the *Letters Patent*, these visits have become an important function performed by the Governor General rather than the Queen since the days of Governor General Roland Michener (1967-1974). In *Roland Michener: The Last Viceroy*, biographer Peter Stursberg claims that Michener told him that the Queen encouraged him to go abroad on visits as Canada's "head of state". Persuaded by the Queen, Roland Michener began to represent Canada abroad on state visits, and so did subsequent Governors General. Michaëlle Jean has toured Africa, represented Canada at the installation of the President of Haiti and Argentina, made a state visit to Brazil and visited Canadian troops in Afghanistan twice on behalf of Canadians.

Some argue against this expanded role of the Governor General because they claim these new responsibilities replace Elizabeth II as our head of state. For many years, journalists and broadcasters have contributed to the confusion and fuss about who is, in fact, the Canadian head of state. In his biography on Michener, Stursberg referred to the Governor General as the Canadian head of state. Governors General themselves have contributed to this dialogue of confusion. In her memoir, Adrienne Clarkson stated that "the Governor General is the head of state in Canada, and is treated as such when abroad." The present Governor General, Michaëlle Jean, has adopted a somewhat different position, preferring instead to refer to the Governor General as Canada's "*de facto* head of state" in a September 2006 media release. Possibly a way out of this muddle would be to return to the Pierre Trudeau proposal of 1978 whereby the Queen is Canada's head of state, while the Governor General is "the first Canadian."

While linguistic recklessness persists in describing the Governor General as our head of state, mischievous politicians seeking political gain continue to encourage an uninformed public dialogue over another vice-regal function. The public's attention has turned to the duty of the Governor General to safeguard the integrity of our political system while complying with our system of responsible government which

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dictates that the Governor General acts solely on the advice of her Prime Minister. In both September and December 2008, Governor General Michaëlle Jean was torn between these two responsibilities when her Prime Minister came to visit to offer advice on dissolution, and then prorogation.

In September 2008, in flagrant violation of the spirit of the law his own government had passed, Stephen Harper asked the Governor General to dissolve the House of Commons and call an election rather than wait until October 2009 as his legislation stipulated. Harper had inserted a clause into his new law which explicitly stated that “Nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General’s discretion” (*An Act to Amend the Canada Elections Act*, S.C. 2007, c. 56). By relying on the latitude given by this clause, Harper was able to advise the Governor General to override his own legislation. The setting aside of this law was most surprising since Parliament was about to reconvene within two weeks, but Harper refused to await a decision by the members of Parliament.

Constitutional experts agree that a Governor General is not empowered to dissolve Parliament without advice, but not all of them believe that Governor General Michaëlle Jean was required to accept Harper’s advice and dissolve Parliament in September 2008.

Controversy still persists over whether the King-Byng affair of 1926 set a constitutional convention whereby a Governor General must accept the advice of a Prime Minister requesting dissolution. Governor General Lord Byng, exercising the royal prerogative, denied the request of his Liberal Prime Minister, Mackenzie King to dissolve Parliament when facing certain defeat. King had the right to make such a request, but controversy erupted when the Governor General, using the reserve powers of the Crown, refused. An election had occurred just nine months previously and the Conservatives under Arthur Meighen held more seats in the House of Commons than King’s Liberals. King resigned and Arthur Meighen, the Conservative leader, agreed to become the Prime Minister and thus take responsibility for the Governor General’s actions. Meighen went down to defeat by a vote of non confidence within hours of taking office. King won the subsequent election, thus calling into question the Governor General’s disregard of his advice. Constitutional authority Errol Mendes wrote that because of the 1926 precedent, refusal “to grant the request of a Prime Minister for dissolution, no matter how contrived...” would present a serious political problem for a Governor General (*Edmonton Journal*, 29 August 2008 at A16).

Adrienne Clarkson argued in her memoir that the power of the Governor General to refuse dissolution exists but “it would be justified only in the most exceptional of circumstances.” She said that if a government were to last six months, she would grant a Prime Minister a dissolution, because “To put the Canadian people through an election before six months would have been irresponsible, and in that case I would have decided in favour of the good of the Canadian people and denied dissolution.”

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In addition to bringing to public attention to the Governor General's prerogative with respect to dissolution in September, Prime Minister Harper's December visit highlighted the Governor General's powers with respect to prorogation. When it appeared that he would face certain defeat in the House of Commons four days later, at a two-hour meeting, Stephen Harper asked for, and Michaëlle Jean granted, a prorogation of Parliament, a session she had just opened on 19 November. Before the visit, she had received a memo signed by all opposition members proposing a coalition between the Liberals and NDP supported by the Bloc. The Governor General faced a dilemma: her Prime Minister wanted to prorogue the session of Parliament which had just begun and which was very likely to see the government fall on a vote of non-confidence. At the same time, the opposition parties claimed they could provide her with a new Prime Minister, a necessity if she were to reject the advice of her Prime Minister. Fortunately, Michaëlle Jean had a precedent to follow in deciding whether to follow her Prime Minister's advice or in asking the "coalition" leader to form a new government and take responsibility for her actions in rejecting Stephen Harper's advice.

Early in the post-Confederation period, a similar situation had occurred. Less than a year after the October 1872 general election, Prime Minister John A. Macdonald asked the Governor General, Lord Dufferin, for prorogation in the midst of the Pacific Scandal. Both Macdonald and Cartier had received campaign funds for that election from Sir Hugh Allan, president of the Canada Pacific Company, who hoped to secure a charter to build the transcontinental railway. Fearing a non-confidence vote, Macdonald asked Dufferin to prorogue the session of Parliament. Some Conservatives signed a memorandum pledging their support for a Liberal ministry under Alexander Mackenzie. After agonizing reflection, Dufferin granted Macdonald prorogation. Parliament reconvened in October, and Macdonald, faced with certain defeat on a non-confidence vote, resigned.

Although it is unknown whether the Governor General used this historical precedent as a guide, in December 2008, Michaëlle Jean accepted Prime Minister Harper's advice. When granted the prorogation, Harper promised his government would introduce a new budget immediately following the opening of a new session of Parliament. It is not known whether this promise was an initiative of the Prime Minister or a condition set by the Governor General before granting prorogation.

At any rate, it became clear during January 2009 that the Governor General did not set any other restrictions on him. She was unwilling to treat the situation similar to the 1896 tiff between Prime Minister Sir Charles Tupper and Governor General Lord Aberdeen following the election defeat of Tupper. After his defeat but before leaving office, Tupper wanted to make Senate and judicial appointments. Aberdeen refused Tupper his requests unless he could command the majority in the House of Commons, which he plainly could not do. In 2009, Governor General Michaëlle Jean allowed Prime Minister Harper to appoint Thomas Cromwell to the Supreme Court, pre-empting the interview process by members of Parliament which had been

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established. She also allowed Stephen Harper to appoint 18 Senators despite the fact that it was unclear whether he could obtain a majority in the House of Commons, reconvening in a matter of days. Her acquiescence to her Prime Minister's wishes in this case set an unsettling precedent for her successors.

Through these incidents at the end of 2008, Canadians have come to realize how vital the role of the Governor General is to the functioning of our political system. While the Queen embodies the country and unifies federal and provincial sovereignty in her own person, in present-day Canada, the Governor General, one of the three elements of the Canadian Crown, has a primary role to play at the very centre of our communal life. Although the Governor General's role is paramount, all three elements of the Crown – the Queen, the Governor General and the Lieutenant-Governors – are essential for the proper functioning of the Maple Crown in Canada.

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The author acknowledges the following sources:

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