

CHAPTER 7

RECOVERING THE ROYAL PREROGATIVE

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The Law was the golden met-wand and measure to try the causes of the subjects and which protected his Majesty in safety and peace.

Sir Edward Coke, *Prohibitions del Roy*.¹

Can Canadians, as a country, still recover their Westminster system of governance?

This is a question that may well be asked, as hardly a month goes by that Canadians are not faced with some issue of governance: that is, some issue dealing with the proper functioning of one of our major public institutions or how one of those institutions should be related to another. Among the most prominent of such governance issues, we find the expansion of the Prime Minister's Office, in size and in the control it exercises; the accountability of Senators; the discretionary authority of the Governor General; the way the House of Commons conducts its business; and the proliferation of 'agents' of Parliament. While each of these issues has, as it were, its own etiology, all are symptomatic, in one way or another, of our collective straying from the set of constitutional arrangements that we have inherited and that are known as the Westminster system.

This article will examine two recent Canadian practices, less notorious than those just referred to, but which illustrate the same point. The two practices in question are the appointment of senior officials and the ratification of treaties – two practices grounded in the royal prerogative, but which have recently attracted Parliamentary involvement.

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1. Sir Edward Coke, "Prohibitions del Roy", *Reports*, Vol XII, 65, in Steve Sheppard ed, *The Selected Writings of Sir Edward Coke*, Vol 1 (Indianapolis: Liberty Fund, 2003) 481 [Coke].

In order to put those recent Canadian practices into perspective, we have first to sketch out what we mean by the Westminster system of governance and then to describe the central role of the royal prerogative within that system.

THE WESTMINSTER SYSTEM OF GOVERNANCE

The Westminster system is often reduced to a set of procedures for regulating the behaviour of politicians operating in an environment of a non-elected Head of State, a Parliament usually made up of two Chambers, and a Leader of Government or Prime Minister having a seat in the popularly-elected Chamber. In fact, much more is involved in the Westminster system: before all else, it refers to the Palace at Westminster where the monarch had a residence, where his private Council of advisors met, and out which evolved the four major courts of law: the Court of Chancery (for matters of equity), the Court of Exchequer (for tax matters), the Court of King's Bench (for matters of public law), and the Court of Common Pleas (for property disputes between subjects), all of which heard pleadings in, or adjoining, the great Hall of Westminster. The two Chambers of Parliament were also products of this same process of institutional differentiation: two special kinds of court that evolved to meet the need for representation and consent in the governance of the country. To speak of the Westminster system is to refer, therefore, not to some abstract political model that could be depicted in some organizational chart and applied willy-nilly to different countries, but to a long tradition of jurisprudence and institutional differentiation – the Common Law – that is constantly evolving but that has to be grounded in the culture of society in order for it to adapt and grow.

Partly as a result of the vigour of this legal tradition, the Westminster system can no longer be thought of as exclusively English. It has taken root in other countries. In our case, for over a century and a half, from the *Act of Quebec* in 1774 to the *Statute of Westminster* in 1931, the laws, institutions and jurisprudence of Britain were gradually implanted in Canadian soil.² The latter *Act* recognized that Canada had fully received the Westminster system of law and government as its own and that henceforth its evolution would be independent of that in the UK. The British Crown had propagated or multiplied

2. For an account of how the full range of English institutions and conventions were received and interpreted in the Province of Quebec following Confederation, see Paul Benoit, *The Programme of 1871: A Modern Instance of Natural Right Argumentation* (Ph D thesis, McMaster University, 1978) [unpublished].

into several Dominion Crowns. The *Constitution Act of 1982* marked the culmination of this process of reception or ‘patriation’.³

The golden thread running through this British tradition and its many institutional refinements – and what Canada, as an inheritor of that British tradition, has benefited from – is an ancient understanding of the rule of law.⁴

3. For an account of how we got to the stage that “we’re on our own now”, see John Pepall, “1982: Myths and Realities of ‘Patriation’” (Autumn/Winter 2013) 3:2 *The Dorchester Review* at 20-28.

4. In his *In Praise of the Laws of England* (Cincinnati: Robert Clarke & Co, 1874), Sir John Fortescue, Chancellor to Henry VI, explained what made the rule of law in England so excellent, when compared with the civil law on the continent:

“A King of England can not, at his pleasure, make any alterations in the laws of the land, for the nature of his government is not only regal, but political. Had it been merely regal, he would have a power to make what innovations and alterations he pleased, in the laws of the kingdom, impose tallages and other hardships upon the people whether they would or no, without their consent”. (25-26)

For as long as men could remember, through successive waves of conquest going back to the ancient Romans, England has always preserved its body politic; that is, it has never been ruled exclusively by men, by what Fortescue called regal government, but by law as well, by what held together or constituted the artificial body politic of the realm:

The law under which the people is incorporated, may be compared to the nerves or sinews of the body natural; for, as by these the whole frame is fitly joined together and compacted, so is the law that ligament (to go back to the truest derivation of the word, *lex a ligando*) by which the body politic and all its several members are bound together and united in one entire body.” (37)

The absolute prince is really at a disadvantage when compared to the constitutional prince: “to be able to do mischief, which is the sole prerogative an absolute prince enjoys above the other, is so far from increasing his power, that it rather lessens and exposes it.” (41)

Human laws, Fortescue goes on to explain, are of three kinds:

“Know then, that all human laws are either the law of nature, customs, or statutes, which are also called constitutions; but the two former, when they are reduced into writing, and made public by a sufficient authority of the prince, and commanded to be observed, they then pass into the nature of, and are accepted as constitutions or statutes, and, in virtue of such promulgation and command, oblige the subject to the observance of them under a greater penalty than otherwise they could do.” (44-48)

Although conquerors had the opportunity to impose their own laws, they recognized the goodness of the body politic and were content to leave it essentially intact. Tacit consent was constantly renewed, which made the English rule of law the best of rules:

“During all that time, wherein those several nations and their kings prevailed, England has nevertheless been constantly governed by the same customs, as it is at present: which if they were not above all exception good, no doubt but some or other of those kings, from a principle of justice, in point of reason, or moved by inclination, would have made some alteration or quite abolished them, especially the Romans, who governed all the rest of the world in a manner by their own laws... Nor, in short are the laws of any other kingdom

By ‘rule of law’ is not meant the sum total of statutes and regulations that are on the books, as though we were referring to a set of rules for a board game, a card game or a competitive sporting event. That is only one superficial manifestation of what might be called the rule of law. In the Westminster tradition of jurisprudence, the ‘rule of law’ comprises, even more importantly, a realm of unwritten natural law, customs and conventions.⁵ Informing both kinds of manifestation of law – the written and the unwritten – and making both kinds inwardly compelling, are norms. Norms are what express the rule of law in a given set of circumstances calling for human action. They are what Aristotle referred to as the virtuous mean (*meson*) or right measure.⁶ All human beings, kings included, are subject to this general rule of law and its prescriptive norms. It is this normative element that draws us and binds us to a particular course of action, regardless of any explicit external constraint that may have been enacted. Grounded in this intangible ethical dimension, the rule of law is always, already in force. This tradition of searching for and discovering the law that already exists and then appropriating it, rather than positing or imposing man-made law, is what we mean by the Common Law tradition. It was up to judges, sitting in different courts, to determine whether society’s particular statutes, regulations, or customs were legitimate expressions of this all-encompassing rule of law.⁷

in the world so venerable for their antiquity. So that there is no pretence to say, or insinuate to the contrary, but that the laws and customs of England are not only *good*, but the *very best*.” (52)

5. In his *History of the Common Law of England* (Chicago: University of Chicago Press, 1971), Sir Matthew Hale, Chief Justice of the King’s Bench under Charles II, clarifies what is meant by the unwritten part of the English constitution:

“And when I call those parts of our laws *Leges non Scriptae*, I do not mean as if all those laws were only oral, or communicated from the former ages to the later, merely by word. For all those laws have their several monuments in writing, whereby they are transferred from one age to another, and without which they would soon lose all kind of certainty... those laws of England which are not comprised under the title of Acts of Parliament, are for the most part extant in records of pleas, proceedings and judgments, in books of reports, and judicial decisions, in tractates of learned men’s arguments and opinions, preserved from ancient times, and still extant in writing. But I therefore style those parts of the law, *Leges non Scriptae*, because their authoritative and original institutions are not set down in writing in that manner, or with that authority that Acts of Parliament are, but they are grown into use, and have acquired their binding power and the force of laws by a long and immemorial usage, and by the strength of custom and reception in this kingdom”. (16-17)

6. See Aristotle, *Nicomachean Ethics*, (New York: Random House, 1941) Book II, ch 6 at 1106a-1107a [Aristotle].
7. Sir Edward Coke, arguably the greatest exponent of the Common Law, summarized its working in his Report on the Dr. Bonham’s case (Coke, *supra* note 1 at 118 a (Vol VIII)):

In searching for the norm defining the ‘rule of law’ in a particular set of circumstances, the Westminster system can be seen as a system of five different orders of right or jurisdiction embedded within each other. Beginning with the most all-encompassing or general and ending with the most individual or particular, we find:

- 1) natural law (*ius naturalis*), which is the order of reason that substantially unites all human beings among themselves and with the working of their natural environment; it is the transcendent or *a priori* backdrop against which all human deeds and words can be judged;
- 2) the law of nations (*ius gentium*), which provides a first empirical conditioning of the transcendent law of nature: it is the law of nature as manifest over time and among different peoples. It is the core of law common to the nations of the world, however much some of their accidental customary features may vary;
- 3) the common law, which, analogously with the law of nations, is the core of law found to be common among the different ethnic groupings inhabiting England (and subsequently the rest of the British Isles and territories overseas). From very early on, the common law of England was practically differentiated into three different orders or jurisdictions:⁸
 - I. royal law (*ius regem*), also known as the royal prerogative, the right of superintendancy, which treats of all issues

“And it appeareth in our Books, that in many Cases, the Common Law doth control Acts of Parliament, and sometimes shall adjudge them to be void: for when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will control it, and adjudge such Act to be void;” (*Selected Writings* at 275)

8. Sir Matthew Hale has described how these different orders of the body politic are meant to work together:

Insomuch, that even as in the natural body the due temperament and constitution does by degrees work out those accidental diseases which sometimes happen, and do reduce the body to its just state and constitution; so when at any time through the errors, distempers or iniquities of men or times, the peace of the kingdom, and right order of government, have received interruption, the Common Law has wasted and wrought out those distempers, and reduced the kingdom to its just state and temperament, as our present (and former) times can easily witness.

This Law is that which asserts, maintains, and, with all imaginable care, provides for the safety of the king’s royal person, his Crown and dignity, and all his just rights, revenues, powers, prerogatives and government, as the great foundation (under God) of the peace, happiness, honor and justice, of this kingdom; and this Law is also, that which declares and asserts the rights and liberties, and the properties of the subject; and is the just, known, and common rule of justice and right between man and man, within this kingdom. (*History*, 30-31.)

of state having to do with the realm as a whole and in particular with its preservation and protection against all manner of threat;

- II. public law (*ius publicum*), which deals with governmental issues having an impact on all subjects of a certain territory: it is the jurisdiction that we identify with Parliament, the passage of domestic legislation, the setting of limits to private interests, and the natural law notion of distributive justice; and
- III. private law (*ius privatum*), which covers all issues dealing with disputes between individual subjects, usually over their respective property interests (what is yours and what is mine); it is the order that we associate with the lower courts of justice, specialized tribunals, and the natural law notion of commutative justice.⁹

Of course, there have always been differences of opinion, sometimes leading to historical confrontations, as to where precisely the line should be drawn between one order of jurisdiction and the next.

9. For A V Dicey, the five orders of the English constitution and the concept of the rule of law underlying and uniting them can be reduced to this fifth order, the order of private law and the security given to the rights of individuals. In Chapter IV of his *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1889)[Dicey] he elaborates on the three different aspects of his definition of the rule of law and summarizes as follows:

That 'rule of law' then, which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three different points of view. It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government... It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals... The 'rule of law' lastly may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of the constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts; that, in short, the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land. (189-90)

My article may be read as a first step in trying to reverse the pernicious influence that Dicey's reductionism has had on Canadians' understanding of their constitutional heritage.

We can find down through the centuries learned debates, for example, between the courts of Chancery and the courts of Common Pleas on when a case deserved a *fair and equitable* hearing over and above a simply *just* hearing or between the courts of Admiralty and the courts of King's Bench on matters of extra-territoriality involving the *jus gentium*. Although the nature of the subject matter at issue would normally determine the appropriate jurisdiction, a clever lawyer could present his case in such a way as to elevate the nub of the issue to a higher tribunal if he thought that desirable. In many cases, as we shall see with regard to treaties, the roles of two jurisdictions were complementary.

It is noteworthy that while, physically, each jurisdiction arrived at its judgments in very different venues – from the most private to the most public, from the broadest of consultations to the most discreet of recommendations and advice – official decision-making in the Common Law tradition, at all levels, from a prime minister offering advice to a monarch through to a citizen choosing his representative in Parliament or serving on jury duty, involved the following *five formal elements*:

- 1) A fundamental belief in the *moral agency of individual men and women* and their freedom to will or to opt for one course of action or another, however constrained externally their circumstances may be.
- 2) That it was never a matter of a person's will alone: at whatever level of decision-making, individuals had *a responsibility, before making a decision, to consult* and to become as well-informed as possible in keeping with the nature of the issue to be resolved, whether that meant questioning current opinion, hearing testimony, calling on experts, trying to establish facts, etc.
- 3) That, with as much relevant empirical data as possible before one, a person had then to *exercise their reason*, which did not mean what nowadays we take to be the instrumental or calculating reason of a rational economic actor; nor the demonstrative or logical reason of an objective scientific actor; nor the constructive reason of a subjective psychological actor. No, reason, in the Common Law tradition, refers rather to *the discernment of a moral actor* – a reason capable of seeing through empirical data, of apprehending the order that is right or just in a given set of circumstances,

and of unifying a situation by calling on all the moral actors involved to do their duty and help restore or advance that order.¹⁰

- 4) As a further check on any of the three derivative or rationalizing forms of reason just mentioned¹¹, the decision-maker had also to be informed by *a sense of equity* (what Aristotle referred to as *epieikia*¹²), which required sufficient imagination and sympathy to put oneself in the place of those actually involved and to ensure that the decision one was coming to was not only just or correct in the abstract, but that it was also fair or good in the concrete.
- 5) Once the norm expressing the law in a given situation had been found, how was the decision confirmed as legitimate? Just as the nature of the issue to be resolved determined the appropriate degree of consultation *before* the decision was taken, so did it determine the *appropriate degree of consent* to be obtained *afterwards*. It is this element of consent and the various forms it could take that largely accounts for the physical differences we find in Westminster decision-making: everything from the consent of Privy Councillors (and possible dissent in the form of a resignation from office) to the consent of both Chambers of Parliament, to the consent of the citizenry in a general election, to the tacit consent in social practices that are generally accepted.

10. Sir Edward Coke highlighted (*supra* note 1 in the Preface to Vol IX of his *Reports*) the effects of a discerning reason, as captured in well rendered judgments:

“A substantial and a compendious Report of a case rightly adjudged doth produce three notable effects: 1. It openeth the Understanding of the Reader and Hearer; 2. It breaketh through difficulties, and thirdly, It bringeth home to the hand of the studious, variety of pleasure and profit; I say it does set open the Windows of the Law to let in that gladsom Light whereby the right reason of the rule (the Beauty of the Law) may be clearly discerned; it breaketh the thick and hard Shell, whereby with pleasure and ease the sweetness of the kernel may be sensibly tasted...” (*Selected Writings* at 307.)

11. Each of these three other ways for decision-makers to use their ‘reason’ can be associated with a modern theorist who sought to undermine the Aristotelian ‘right reason’ that was at the core of the English Common Law: Hobbes, who would found civil society on the psychology of fear; Locke, who would found it on the protection of private property; and Bentham, who would found it on the calculation of utility. Each of these thinkers would have a huge impact, not just in Common Law countries but throughout the world.
12. See Aristotle, *supra* note 6 at 1137a-b (Book V, ch 10).

PREROGATIVE AS PRIVILEGE AND DUTY

With this sketch of the Westminster system and its formal elements of official decision-making as background, we are now in a better position to turn to our designated topic: *Consulting Parliament before Exercising a Prerogative*. To begin with, there are a couple of things wrong with the wording of this topic.

First, it may seem like a small matter, but the title of our session should read “the prerogative”, not “a prerogative”. The only way the phrase makes sense now is to read ‘prerogative’ as an adjective and to supply, as understood, the noun ‘power’. But that is to rob ‘prerogative’ of its substance. The prerogative is not the expression of political power, the result of some tug-of-war. Contrary to Dicey’s teaching, the prerogative is not anything that can be diminished whenever legislation is passed by Parliament in the same subject-area, as if we were involved in some political zero-sum game: the more statute law, the less prerogative.¹³ The prerogative is not a power that one possesses and that can be lost to one with a stronger will; quite the contrary, one is possessed *by* the prerogative, as we have now to explain.

Although for the purposes of our topic, the adjective ‘royal’ is understood to qualify the noun ‘prerogative’, the concept of prerogative can arise in other social contexts. Generally speaking, prerogative refers to the privilege of being the first to decide, a privilege accompanied however by the responsibility or duty of exercising that privilege for the purpose of enhancing the common good. It is this duty that takes hold or possesses the individual who appears to be privileged. At a fundamental level, the Common Law recognizes that all human beings, in so far as they stand out from other creatures of the animal kingdom and from their own brutish nature, are entitled or privileged to exercise their judgment. Even when they are severely restricted externally, human beings retain an inner freedom to choose. What makes for the prerogative is that special kind of reason identified above as forming the crux of the Common Law: the capacity that

13. A V Dicey, *supra* note 9, defined prerogative – “a term which has caused more perplexity to students than any other expression referring to the constitution” – in his typically reductionist manner:

“The ‘prerogative’ appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown. The King was originally in truth what he still is in name, ‘the sovereign’, or, if not strictly the ‘sovereign’ in the sense in which jurists use that word, at any rate by far the most powerful part of that sovereign power.” (*Introduction* at 348)

human beings have to pause during the course of their daily lives, to reflect on issues confronting them, to become informed, and to try to discern the right course of action to pursue.

While potentially all members of society, as human beings, are equally worthy of exercising the prerogative, in practice, the issues facing different members of society vary in complexity: some decisions require more knowledge, experience, and insight than others. Thus, there developed, under the Common Law, a highly differentiated realm of official decision-making, with levels determined by the nature of the subject matter being treated and falling within the three broad categories outlined above. The result is a system of governance where different responsibilities have been apportioned to different moral persons and different institutions – councils and courts of one sort or another, each with their own set of appropriate procedures.

Let us look briefly at how the double-edged concept of prerogative (privilege/duty) can be found at work throughout the Westminster system.

To begin at the base of civil society, all members have not only a duty to obey the laws of the land, but they also have the privilege to question the laws and to point out where, morally, they feel there may be an injustice. That is the fundamental privilege to seek redress before a court or to petition the monarch. As citizens with the privilege and duty to vote, they can decide who they want to represent them to bring forward their public grievances. As members of a jury, citizens also have the privilege and duty to decide the facts in certain cases brought before the courts. As elected Members of Parliament, a smaller number of citizens have the further privilege and duty to debate in public and to express their consent or dissent with regard to domestic legislation. As appointed public office holders, a sizeable number of citizens have the privilege and duty to serve the government of the day and help maintain the well-being of the State. Finally, at the apex of civil society, as members of the Queen's Privy Council, a few select citizens have the great privilege and duty to steer the government and direct the affairs of State. It is in this last capacity that we speak of the royal prerogative, of that privilege and duty to act for the good of the whole realm, the prerogative that takes possession not only of the Sovereign or the viceroy representing her, but all the members of her Council.

The solemnity of this official decision-making is marked by the fact that before engaging in the decision-making process, the subject,

at all levels under the common law – from king or queen to new citizen, through a multitude of public office-holders, has taken an appropriately worded oath. The oath highlights the transcendent dimension of official decision-making: i.e., that it is to be undertaken not on the basis of some calculation or in fulfilment of some contract, but as a duty, freely taken on by oneself, to act for the good of the whole. The ethical nature of the duty, the fact that it is not simply a matter of externally complying with some set of rules or procedures, is emphasized by the fact that the duty is taken on publicly, in the presence of God and of others who witness it.

From our consideration of prerogative and its two facets (privilege/duty), we see that all decision-making under the Westminster system of governance must result in synthetic judgments, that is, judgments that incorporate two orders of being: the empirical and the ideal. Decision-makers in the Westminster system need to consider, on the one hand, all the facts that capture the properties of things and persons involved in a given act; and on the other, the concepts that inform the given act and make sense of it. Among the concepts to be determined, one of the most important is the purpose or the end of the drama as a whole; or to be more precise, it is the direction that the drama as a whole is heading in.

It follows that one can arrive at a synthetic judgment – one can discover the norm expressing the rule of law in a given set of circumstances – either deductively, from the general law of nature through specific maxims, or inductively, from the particular facts of the case, through specific precedents. In other words, one can illuminate a given situation either by bringing light from outside into a cave or by enlarging the opening of the cave from within.¹⁴ What matters is that, by the end of the process, the judgment be synthetic and that the two kinds of data – the empirical and the transcendental – be adequately taken into consideration. Without both elements informing the decision-making – the detection of invisible patterns as well as the detection of visible points – the judgment arrived at will be one-dimensional: it may be correct; it may be legal and require external compliance, but it will not be normative or inwardly compelling.

14. It could be argued that, until the time of Francis Bacon, the preference for commentators on English law was to argue deductively; but with fuller reporting on cases, more printed reference books, and the growing influence of the natural sciences, the inductive method came to be favored.

THE ROYAL PREROGATIVE

It is time now to focus on the prerogative that belongs to the Queen (in the sense of being appropriate to her, not in the sense of being a possession of hers).

There are matters of State, matters involving the peace, order, and good government of society as a whole, that transcend the agenda of whatever Government happens to be in power. In the Westminster system, the privilege and duty of dealing with these issues of State fall on the Sovereign and the members of Her Privy Council.

What then are these matters of State that come under the rubric of the royal prerogative?¹⁵ The subject-areas covered can be grouped

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15. Sir William Blackstone, in his *Commentaries on the Laws of England* (Toronto: University of Toronto Press, 1973), has a chapter on the royal prerogative that opens with a reassuring comment: “that the powers, which are vested in the crown by the laws of England, are necessary for the support of society; and do not entrench any farther on our *natural* liberties, than is expedient for the maintenance of our *civil*”. (90) He goes on to make a very important distinction that is usually ignored nowadays: i.e., that the royal prerogative can either be *direct* or *incidental*:

“The *direct* are such positive substantial parts of the royal character and authority as are rooted in and spring from the king’s political person, considered merely by itself, without reference to any other extrinsic circumstance; as, the right of sending ambassadors, of creating peers, and of making war or peace. But such prerogatives as are *incidental* bear always a relation to something else, distinct from the king’s person; and are indeed only exceptions, in favor of the crown, to those general rules that are established for the rest of the community”. (92)

Thus, when we hear complaints about the expansion of executive authority, the kind of prerogative usually referred to is of an *incidental* nature: they are cases where authority has been delegated from Parliament back to the Crown for the sake of expediency or for ease of minute regulation.

In examining *direct* royal prerogative, Blackstone finds that it can come under three headings: it can pertain to (i) the dignity or character of the royal person (understood as the body politic and not as a natural body); (ii) to the royal authority (obedience to his commands); and (iii) to the royal income. With regard to the royal dignity, Blackstone finds that there are three qualities “of a great and transcendent nature” that have been attributed to the body politic of the king (what today we would refer to as the Crown or the embodiment of the State) and which make him a superior being: one that is sovereign, infallible, and immortal. With regard to the royal authority, Blackstone points out how it is:

“wisely placed in a single hand by the British constitution, for the sake of unanimity, strength, and dispatch... the king of England is therefore not only the chief, but properly the sole magistrate of the nation... For otherwise the power of the crown would indeed be but a name and a shadow, insufficient for the ends of government, if, where its jurisdiction is clearly established and allowed,

under several headings: the power to summon, prorogue and dissolve Parliament; the granting of honours and decorations; the granting of mercy; the proclamation of an emergency; and the two areas that interest us more particularly: appointments, which includes the appointment of ministers, Senators, judges, chief officers of the military and civil services, ambassadors and high commissioners, senior executives and directors of Crown Corporations, officers of Parliament and officials reporting to Parliament, and members of regulatory boards, tribunals and agencies; and international affairs, which includes the full spectrum of collective security, defense, diplomacy, trade and development, which can cover everything from the declaration of war and peace, the deployment of armed forces, the making of treaties, the acquiring or ceding of territory, and the issuing, refusing, and revoking of passports. With globalization and the movement of capital, people and ideas, this spectrum of international relations has become more complex and weightier than ever before. For this reason alone, the royal prerogative has never been as crucial as it is today for the good governance of a country.

For the purposes of this discussion, we need not enter into a debate about which of these subjects reserved for the Crown are today recognized as belonging to the Sovereign acting on her own judgment, which on the *recommendation* of her Chief Councillor, which on the *advice* of her chief Councillor, and which on the *advice and consent* of her Council. The point here is that the subjects enumerated above do not require the consent of Parliament or even that Parliament be consulted.

In keeping with the Westminster form of decision-making – the greater the privilege, the greater the duty – matters of State affecting the well-being of society as a whole are subject to the strictest of formal procedures. Extra precautions are taken regarding the classification of information, the preparation of Memoranda to Cabinet, the deliberation in Committees of Cabinet, etc. The following ele-

any man or body of men were permitted to disobey it, in the ordinary course of law.”(100-1)

Blackstone concludes his chapter on the royal prerogative by returning to the independent role of the courts; he reminds us how the abolition of the Star Chamber under Charles I was a crucial step in checking royal absolutism: “...effectual care is taken to remove all judicial power out of the hands of the king’s privy council; who, as then was evident from recent instances, might soon be inclined to pronounce that for law, which was most agreeable to the prince or his officers. Nothing therefore is more to be avoided in a free constitution, than uniting the provinces of a judge and a minister of state”. (103)

ments highlight the very privileged nature of the decision-making involved:

- privileged access to secret and confidential information;
- privileged access to intelligence reports;
- the need for urgent or precisely timed action;
- the discussion of persons as potential appointees;
- the need for a strategic approach in complex negotiations (linkages, single undertakings);
- privileged personal relations among the parties involved in negotiations;
- the asymmetry among those involved in negotiations or among those potentially impacted by negotiations.

These *raisons d'état* make for a decision-making of a different order than that involved in the drafting of legislation for Parliament or the drafting of Orders-in-Council pursuant to a statute.

Yet, for some time now, Canada appears determined to abandon its Common Law understanding of the royal prerogative. In two of the prerogative's most important areas – appointments and treaties – Canada is gradually abandoning the Westminster system and trying to take up the US model, where “advice and consent” has been displaced from an executive council to a legislative chamber – from Councillors to Assemblymen – before an appointment can be confirmed or a treaty can be ratified.

At a time when Canada seems increasingly attracted to the US model, the UK itself appears to be giving up on the Westminster system. Typically, the UK has remained true to one aspect of the Westminster system, however, in not wishing to effect any changes by revolution or by a radical break but rather through dozens of small gradual cuts and ‘reforms’. A clear and startling indication of this intention to abandon its centuries-long tradition was manifest in 2007 when Gordon Brown took over the government of the UK for the Labour Party. In a document grandly entitled “The Governance of Britain”, Brown announced sweeping changes to the constitution.

Building on the changes introduced since 1997 by his predecessor, Tony Blair, Brown promised to go further and “to forge a new relationship between government and citizen, and begin the journey

towards a new constitutional settlement – a settlement that entrusts Parliament and the people with more power”.¹⁶ He then went on to declare war on the royal prerogative, listing all the matters of State where the Government would turn over decision-making to Parliament and the people. While the Labour government failed to achieve much of what it sought, it did manage, just before its defeat in May 2010, to pass the *Constitutional Reform and Governance Act*. In addition to the ratification of treaties, which will be discussed below, other parts of the *Act* dealt with the appointment and conduct of civil servants, Parliamentary standards, and the transparency of government financial reporting to Parliament.

We could go on, in more detail, to examine the oddities and contradictions of this British statute as an example of the road Canada should never take, but let us turn now to Canadian practice.

APPOINTMENTS

In December 1984, a Special Committee on the Reform of the House of Commons was struck, which produced six months later, in June 1985, what would become known as the McGrath Report. In the preface to that Report, the Committee members declared their ambition in the following terms: “The recommendations of this Committee are the most ambitious attempt to pursue major and comprehensive reform in the more than one hundred-year history of the Canadian House of Commons”.¹⁷ Indeed, up until 1968 when Standing Committees were made more prominent, the Standing Orders governing the procedures of the House had hardly changed. Now, Committee members felt, it was time for a second wave of modernization. Although the scrutiny of Order-in-Council appointments was not on the long list of matters to be examined in the Committee’s Order of Reference, Committee members nevertheless decided to devote a whole chapter to the subject.

Chapter V of the McGrath report opens with a short two sentence paragraph stating that:

“One of the turning points in parliamentary democracy was the victory secured by the Commons over the Monarch in the choice of ministers

16. UK, Ministry of Justice, “The Governance of Britain”, (July 2007) 5.

17. House of Commons, Special Committee on the Reform of the House of Commons, *Report* (June 1985) XI.

to advise the Crown. Most aspects of the Crown's prerogative are now exercised on ministerial advice for which the ministers and the cabinet as a whole are answerable to Parliament".¹⁸

Apart from distorting English constitutional history and reducing the notion of responsible government to the notion of accountability to Parliament, the authors of the Report made no attempt to define the royal prerogative or its *raison d'être*.

Having set off on the wrong foot, they then, at some length, go into what can be learned from the American experience. They conclude that:

"...the potential benefits of the confirmation process would outweigh the problems. It should result in greater prior consultation by governments to avoid embarrassment. This type of informal mechanism is the hallmark and strength of responsible government. Parliament's traditional relationship with the executive comes not only through approval, rejection or alteration but also through the deterrent effect of bad publicity".¹⁹

The Committee went on to recommend:

"...that the name of the person appointed to the position of deputy minister of a department be laid upon the table of the House of Commons immediately upon the appointment being made. The appropriate standing committee may call the appointee for questioning on matters relating to the appointment within thirty days of tabling".²⁰

The Report then explained that this would be "sufficient authority" for the Committee to conduct an inquiry as to the appropriateness of the appointment. The Committee would have 10 sitting days from the commencement of its inquiry in which to complete its work and report to the House. The Committee recommended that the same procedure be adopted for the directors and chief executives of Crown Corporations.

While boldly advancing their recommendation, Committee members acknowledged nevertheless that "we are heading into uncharted waters" and concluded that:

"Of all the subjects the Committee considered this was by far the most difficult. But it is also the one that holds the most potential for the

18. *Ibid* at 29.

19. *Ibid* at 31.

20. *Ibid* at 32.

kind of change we believe members of all parties desire. We have heard repeatedly about the need for new attitudes towards Parliament. However, unless imaginative new procedures are put in place, little progress can be made in developing new attitudes”.²¹

Following the McGrath Report’s recommendation, the House of Commons instituted Standing Orders 110 and 111, which call on the Government to table Order-in-Council appointments or nominations for appointment so that the appropriate Standing Committee may take these appointments or nominations up for consideration within a 30-day period.

The McGrath report did acknowledge that it was not necessary to scrutinize all Order-in-Council appointments. To begin with, there were just too many of them: some minor positions could be ignored; as well, Committee members felt that “there are good reasons for excluding certain appointments from any political scrutiny process at this time”.²²

Twenty years later, such scruples had vanished among parliamentarians. In May 2004, the House of Commons Justice Committee reported that it had:

... reached a consensus that, whatever the quality of judgements produced by the Supreme Court, the process by which Justices are appointed to that body is secretive or, at the very least, unknown to Canadians. This could lead to the perception that appointments may be based upon improper criteria. The Committee agreed that more credibility in the appointments process would be beneficial to the Supreme Court and lend it more legitimacy in the eyes of Canadians.²³

The process for appointing individuals to the most important offices in the land had to be broken wide open in order that it may appear more credible and legitimate in the eyes of Canadians. But, we may ask, what Canadians did the Members of the Committee have specifically in mind? How were the ignorant among them to be satisfied?

Following up on the Committee report, the Martin government, later in the year, struck an Ad Hoc Committee of House of Commons

21. *Ibid* at 34.

22. *Ibid* at 31.

23. House of Commons, Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, “Improving the Supreme Court of Canada Appointments Process” in *Report* (May 2004).

Members to review the nominations of two Supreme Court Justices before the appointments were to be made.

Dimly aware that it had strayed well beyond the pale of the Westminster system, the Ad Hoc Committee constituted itself not as a parliamentary committee but rather as a committee of parliamentarians. It would no longer be bound by the Standing Orders but be free to make up its own rules of procedure; strangely, it would also include two non-parliamentarians (what, in the UK, are referred to as ‘lay persons’) as Members. Finally, recognizing that the authority to make such appointments is constitutionally vested in the Governor in Council, the Committee would cleverly make the point that it was only *advising* the Government, not *consenting* to the nominations.

The Government of Stephen Harper was happy to carry on with this Paul Martin abomination and to take it still one step further by causing the nominees to be scrutinized in person by parliamentarians of the Ad Hoc Committee. On February 23rd 2006, the PM announced that: “Marshall Rothstein’s candidacy was scrutinized by a comprehensive process initiated by the previous Government that included members from all the political parties”; four days later, Justice Rothstein appeared before the Ad Hoc Committee and on March 1st he was appointed to the Supreme Court.²⁴

This same process was followed for the appointments of Justices Andromache Karakatsanis and Michael Moldaver in 2011, Justice Richard Wagner in 2012, and for the controversial (and ultimately unsuccessful) appointment of Justice Marc Nadon in October 2013.²⁵ As the Minister of Justice explained before the Committee of Parliamentarians on October 2nd, “The goal of today’s hearing is of course to inform the Prime Minister’s eventual final decision with respect to the next appointment to the Supreme Court of Canada”.²⁶

24. “Prime Minister Announces Appointment of Mr. Justice Marshall Rothstein to the Supreme Court” *Prime Minister of Canada: Stephen Harper*, online: Prime Minister of Canada <<http://www.pm.gc.ca/eng/news/2006/03/01/pm-announces-appointment-mr-justice-marshall-rothstein-supreme-court>>.

25. “Prime Minister Announces Appointment of Justice Marc Nadon to the Supreme Court of Canada” *Prime Minister of Canada: Stephen Harper*, online: Prime Minister of Canada <<http://www.pm.gc.ca/eng/news/2013/10/03/pm-announces-appointment-justice-marc-nadon-supreme-court>>; for more on the selection process, see Backgrounder of 2013/09/30/supreme-court-canada-appointments-selection-process.

26. *Department of Justice* online: Government of Canada <http://www.justice.gc.ca/eng/news/judicialappointments/2013/doc_32972.html>

By 2014, the Government appears to have come to its senses, as the practice of having a hybrid selection panel and a hybrid committee of parliamentarians was not used in the most recent appointments to the Supreme Court of Clément Gascon in June and of Suzanne Côté in November. This return to normalcy was deplored by Michele Hollins, president of the Canadian Bar Association, who was quoted as saying: “We’re moving in the wrong direction in terms of making that process more transparent and understandable, a process that would build confidence in the system”; and by Irwin Cotler, the former Liberal minister of justice, who wrote that these last two appointments represent “an utter regression to the kind of closed, unaccountable, unrepresentative and enigmatic approach that, 10 years ago, all parties agreed must change”.²⁷

In reality, the involvement of parliamentarians during the last thirty years in matters of appointments has no constitutional basis in the Westminster system. As explained, under the Common Law, it is the nature of the subject-matter that determines the degree of appropriate consultation before a decision is to be made and the degree of appropriate consent to be obtained after a decision is made. Thus, under the Westminster system, parliamentarians have a right to be consulted and to give their consent to appointments having a direct bearing on the operation of their organization: in other words, the officers and officials of Parliament. For these appointments, the appropriate way to proceed would be to have the leader of Her Majesty’s Official Opposition, who should, *ex officio*, be sworn in as a member of the Privy Council, take part in the deliberations of a Special Committee of Council struck for that purpose.

But for all the rest, the scrutiny of appointments, in general, is of a very different nature than the review of draft legislation or delegated legislation, two topics that were quite legitimately covered in the McGrath Report.

Appointments to the highest offices of State are systemic in their effect; they set the tone for an entire organization, which is much more important than the sum of any number of individual administrative decisions taken within the legislative scope of the organization. Decision-making at the level of the State or even at the level of Government demands intelligence (in every sense of the word) and discernment of a different order than at the level of Parliament. MPs do not have the knowledge or the experience on which to base their

27. Both quotes are taken from *The Globe and Mail* (28 November 2014).

scrutiny. Nor is it reasonable that they can be educated overnight on the subject. Nor is there any parent statute that MPs can turn to in order to ensure that regulatory decisions have not strayed beyond the purpose of the original Act. As a result, MPs find themselves in an embarrassing position they were never meant to occupy: unable to appreciate the requirements of the office in question, they are reduced to commenting in the abstract on a candidate's official curriculum vitae.

Without any constitutional *raison d'être*, practices such as those entailed in Standing Orders 110 and 111 and Ad Hoc Committees of Parliamentarians are bound to have deleterious effects. At a superficial level, they appear to be a weak imitation of the US confirmation process and a yearning for fifteen minutes of media attention. At a more serious level, the whole appointment process is reduced to an exercise in political correctness, during which a 'zoological balance', in terms of sex, physical traits, and habitat, is sought after for the Bench. Not wishing to demean themselves by submitting to such a process, qualified candidates are deterred from considering high office. Though carried out in the name of transparency and accountability, such practices effectively debase the nature and quality of our public service. Canada as a State cannot afford this kind of political self-indulgence. As a small step in bringing about a return to our Westminster system, the Standing Orders in question should be repealed and there should be no more Ad Hoc Committees of Parliamentarians.

TREATIES

With regard to treaties, the Harper Government announced in April 2006 that, once a treaty has been signed but before it is ratified, it would be tabled in Parliament for assessment and a possible vote.²⁸ In this case, the new Government was aping not only American constitutional practice but British practice as well. Indeed, it was adopting the Ponsonby Rule, a practice first introduced in 1924 by Arthur Ponsonby, the Parliamentary Undersecretary of State in the first Labor government of the UK. Enactment of the Ponsonby Rule in Part Two, sections 20 to 25 of the *Constitutional Reform and Governance Act* became one of the highlights of Gordon Brown's new 'settlement'.

28. Canada, Department of Foreign Affairs, Trade and Development, *Policy on Tabling of Treaties in Parliament*.

Like the Ponsonby Rule, the Canadian government policy states that, while allowing for certain exceptions, all treaties would be placed before Parliament for 21 sitting days; only after a positive vote or the expiry of the allotted period of time would the treaty then be ratified.

The first point to be made about this practice is the significant difference among the three countries in how far consent has been shifted to legislative assemblies. In the US, under Article II of the Constitution, consent is to come exclusively from the Senate, which until the 17th Amendment in 1913, was not a popularly elected chamber. In the UK, treaties are to be tabled in both Chambers. In Canada, the policy states that treaties are to be tabled exclusively in the House of Commons. But common sense would seem to dictate that, if either Chamber were in a position to scrutinize a complex treaty, it should be the more leisurely and experienced Upper Chamber. The only explanation for this radical innovation is that Canada would appear to be more revolutionary in this case than the US and the UK – more determined to shift the locus of sovereignty from the Queen and her Councillors to the Chamber closer to the people.

This apparently minor point of referring treaties only to the House of Commons in fact reveals a fundamental shift in how many Canadians understand sovereignty. Sovereignty, for many Canadians, now resides in the popular will, a will that is manifest directly and constantly in surveys of all sorts and periodically in general elections. It is that same popular will that many Canadians now believe should be expressed indirectly or re-presented by the members they have elected to Parliament.

But this shift rests on a confusion between power and authority. The popular will is an expression of power, of the free exchange of consent or agreement between or among free individuals to embark on a shared or common project, as when a political party in opposition tries to marshal as much support as possible among the electors. Political power has nothing to do with the moral authority required for the enactment of laws, let alone for the founding of States or the interaction of one State with another. In these cases, the judgment arrived at by decision-makers, as explained above, must be synthetic and incorporate the norm uncovered by human inquiry and expressing the rule of law in a given set of circumstances.

Although it has been greatly misunderstood, Rousseau's concept of the general will can shed light on the true locus of sovereignty and on the distinction between power and authority. In his

Social Contract, Rousseau has sketched out a dialectical process of reasoning that is very similar to that followed by jurists in the Common Law tradition: beginning with what is given as fact – for example, conflicting social practices – the decision-maker works his way through different interpretations or perspectives regarding those practices; to discover, finally, the norm or general will that holds the situation together, renders it intelligible, and assigns purposive duties to the actors involved.²⁹ For both Rousseau and

29. It is remarkable how Rousseau's concept of the general will can be understood to refer to the same centripetal ethical force as that found in the writings of traditional English jurists, who thought of this force as right reason embodied in tacitly agreed-upon custom. Let us see how the neo-classical Rousseau can shed light on the classical liberalism of English jurisprudence:

Rousseau introduces his concept of the general will while making the following fundamental distinction about liberty: "... we must distinguish natural liberty, which knows no bounds but the power of the individual, from civil liberty, which is limited by the general will;" *The Social Contract* (New York: Hafner Publishing, 1947)19. He then goes on to explain:

"...that the general will alone can direct the forces of the State agreeably to the end of its institution, which is the common good; for if the clashing of private interests has rendered the establishing of societies necessary, the agreement of the same interests has made such establishments possible. It is what is common in these different interests that forms the social bond; and if there was not some point in which they all unanimously centered, no society could exist. It is on the basis of this common interest alone that society must be governed."(23)

Rousseau goes on to emphasize the wholeness of the general will: "for the will is general or it is not; it is either the will of the whole body of the people, or only of a part. In the first case, this declared will is an act of sovereignty and constitutes law; in the second, it is but a private will or an act of magistracy, and is at most but a decree."(24); and how the general will can be distinguished from the popular will:

"It follows from what has been said that the general will is always right and tends always to the public advantage; but it does not follow that the deliberations of the people have always the same rectitude. Our will always seeks our own good, but we do not always perceive what it is. The people are never corrupted, but they are often deceived, and only then do they seem to will what is bad. There is frequently much difference between the *will of all* and the *general will*. The latter regards only the common interest; the former regards private interests, and is indeed but a sum of private wills; but remove from these same wills the pluses and minuses that cancel each other, and then the general will remains as the sum of the differences".(26)

Towards the end of his work, in a chapter entitled "That the General Will Cannot be Destroyed", Rousseau emphasizes again how the ethical dimension is always present, whether we recognize it or not:

"Finally, when a state upon the brink of ruin supports only a vain illusory form and the social bond no longer unites the hearts of the people, and when the sacred name of public good is made use of to cover the basest interest, then the general will is silenced... But does it follow that the general will is annihilated or corrupted? No: it will remain always constant, unalterable, and pure; but

Common Law jurists, there is a transcendent element of a binding, ethical nature that can illuminate a mass of partial, uninformed and conflicting opinions.

The second point to be made about the Government's policy with regard to treaties has to do with the significance being accorded to their *signing*.

The signing of a treaty should not be confused with the agreement-in-principle arrived at between the parties to the negotiations. There is still much work to be done to the text before it is ready for signature: the text must undergo a close legal review ('scrub') whereupon issues may arise that need to be negotiated and that had not been foreseen by the subject-matter specialists; translations have to be carefully prepared, which often give rise to questions of assumptions and interpretation that may have been taken for granted by the negotiators; and administrative matters covering the signature, entry into force, amendment procedures, termination clause, etc, have to be worked out to the satisfaction of both parties. In complex treaties, this period between agreement-in-principle and official signing may take years of work.

Once the final text of the treaty has been signed, consequential amendments may have to be made to domestic legislation. Thus we read at section 132 of the *Constitution Act, 1867* that "The Parliament and Government of Canada shall have all Powers necessary or proper for *performing the Obligations of Canada or of any Province thereof...arising under Treaties...*" (my italics).³⁰ For example, international trade treaties usually require amendments to the *Customs Tariff Act*.³¹ In such cases, prudence dictates that the government, not wanting to risk a conflict between two orders of law, may well want to have those domestic changes in place before taking on obligations under international law. This makes even more sense in the case of a federation like Canada where, despite the express wording of section 132 just cited, it may be prudent to have the implementing

it is rendered subordinate to other wills, which domineer are over it...Even by selling his vote for money he does not destroy his own general will, he only eludes it. The fault which such a man commits is that of changing the state of the question, and answering something else than what he was asked: instead of saying by his vote, "it is advantageous to the State," he says, "It is advantageous to such a man, or to such a party, that such a motion should pass". (93)

30. (UK), 30 & 31 Vict, c 3, s 132, reprinted in RSC 1985, App II, No 5 [*Constitution Act*].

31. SC 1997, c 36.

legislation carried out at the provincial level.³² It also makes sense that, in such cases, parliamentarians be provided with enough information in the form of explanatory notes to have some context for the bill placed before them; the signed treaty may even be in the public domain by this time. In any event, given that treaties are matters of State, passage of any consequential amendments should be treated as a motion of confidence in the government.

But throughout this technical implementation process, the text of the treaty itself can never be subject to parliamentary scrutiny. Thus it is disingenuous and misleading of the Government to have inserted the following clause into the Bill implementing the Canada-Colombia Free Trade Agreement: “The Agreement and the related agreements [on the environment and on labour cooperation] are approved”.³³ Apart from infringing on the Crown’s jurisdiction, this legislative provision defies any notion of prudence: why would any government put at risk years of hard work and delicately worked out compromises by submitting the treaty to the whims of party politics? Why subject to arbitrary deconstruction a text that has just been painfully constructed? This is the situation that Canada needlessly put itself in for over two years, between the signing of the *Foreign Investment Promotion and Protection Agreement* with China in September 2012 and its ratification in September 2014.³⁴

Although ratification, under the government’s new tabling of treaties policy, is still technically done by the Governor-in-Council, practically, the consent has been shifted to Parliament. We recall that the same gambit was attempted in the case of appointments. To its great credit, the Supreme Court of Canada has made it very clear what it thinks of such legal tactics. In its recent decision on the Reference regarding Senate Reform, we read:

In our view, the argument that introducing consultative elections does not constitute an amendment to the Constitution privileges form over substance. It reduces the notion of constitutional amendment to a

32. As treaties penetrate more deeply beyond borders, they begin to tread on areas of provincial jurisdiction, such as labour conditions; for a brief discussion of why provincial jurisdictional rights should be kept in mind, see D Michael Jackson, “Did the Judicial Committee of the Privy Council Subvert the Fathers of Confederation?” in *The Crown and Canadian Federalism* (Toronto: Dundurn, 2013) at 104-112.

33. *Canada-Colombia Free Trade Agreement Implementation Act*, SC 2010, c 4, s 9 (Assented to 2010-06-29).

34. *Foreign Investment Promotion and Protection Agreement*, Canada and China, 12 September 2014, (entered into force 1 October 2014).

matter of whether or not the letter of the constitutional text is modified. This narrow approach is inconsistent with the broad and purposive manner in which the Constitution is understood and interpreted, as discussed above. While the provisions regarding the appointment of Senators would remain textually untouched, the Senate's fundamental nature and role as a complementary legislative body of sober second thought would be significantly altered.³⁵

In this case, the Court has rightly picked up on how government lawyers have made use of the innocent-sounding term 'consultative' in their attempt to reform the Senate. The Court has explained how a consultative election would not simply be a formality, it would have an impact on the substance of the decision to be made. Allowing this practice would do nothing less than change the Constitution. In light of section 24 of the *Constitution Act 1867*,³⁶ which in turn rests on the formal elements of Westminster decision-making described above (regarding the scope of consultations and of obtaining consent), the general electorate should have no role to play in the appointment of Senators. Analogously, there is no role for private members of Parliament to play in the signing of treaties. By the nature of the decision to be made, what pertinent information could they possibly bring forward that would not already be available to Privy Councillors?

This abuse of language by Government lawyers brings me to my second objection to the wording of the theme under discussion, which reads, we recall, "*Consulting Parliament before Exercising a Prerogative*". Here, as in the reference case to the Senate, the term 'consulting' has been used to cloak an attempted alteration to the Constitution. There are many ways of characterizing the relation between Parliament and Government, but consulting is not one of them. At one level of jurisdiction, Parliament may have its own form of consultations (as in the case, for example, of the House of Commons' Finance Committee's annual pre-budget consultations) whereupon it will then offer advice to Government in the form of policy recommendations before the Government proceeds to craft its budget. At another jurisdictional level, in a different manner, and for different purposes, Government may also consult with interest groups, organizations or experts from civil society as part of its internal policy development work. But in neither case, does one level of jurisdiction 'consult' with the other. Nor does the term 'consulting' make any sense when we consider the sequence in the decision-

35. *Reference re Senate Reform*, 2014 SCC 32, at para 52, [2014] 1 SCR 704.

36. *Supra* note 30 at s 24.

making process. A lesser authority cannot second-guess a decision already taken by a higher authority.

We have seen how the Government's policy on the tabling of treaties is unconstitutional, both in terms of the formal elements of Westminster decision-making and the particular wording of section 132 of the *Constitution Act 1867*.³⁷ Moreover, we have seen how practically imprudent it is of the Government, in terms of organizing their work and achieving their goals. But the policy is also morally offensive. What makes it so objectionable is the following statement: "Once a treaty and its Explanatory Memorandum have been tabled in the House of Commons and the waiting period has passed: the Government will consider any concerns raised by the Opposition Parties during the tabling process...The Government will then decide whether to ratify the treaty..."³⁸

This statement reveals a misunderstanding of the nature and purpose of the royal prerogative and sends exactly the wrong signal to one's own citizens and to the world about the Government of Canada's attitude in matters of State. Far from "...lending greater legitimacy to decisions of the executive", to use the language of our theme for discussion, it does precisely the opposite: it calls into question the good faith of Canada in entering into negotiations. Who can have confidence that the signing of the final legal text represented the culmination of everyone's best efforts? The seriousness of Canada's original intent is undermined as the whole exercise is freely subjected, after-the-fact, to second-guessing by some other party or parties pursuing unrelated goals. Apart from exposing the Government's lack of respect for the State it is negotiating with, this tabling policy also exposes just how insecure the Government is in understanding its own interests and its potential contribution to international law.

When Canadians act on the world stage they have to do so with one voice; in other words, they have to try to be statesmen, acting as a single moral person. As much as possible, they have to transcend the divisions of domestic politics. The rest of the world does not care whether Canada's government of the day has 'consulted' with Parliament or whether or not it reflects popular opinion. In today's world, a country's sovereignty is really measured by its degree of moral authority, which does not mean a mantra-like incantation of abstract

37. *Ibid* at s 132.

38. *Policy on Tabling of Treaties in Parliament*, section 6.6 (a) and (b), *supra* note 28.

principles, but by its freedom of mind, by its ability to shed original light on a given situation and to point the way forward.

The Senate is well-equipped to conduct medium-term policy studies that could provide some context to ongoing or possible treaty negotiations. Such studies would also be of an educational nature: for example in the trade area, they could serve to make businesses more aware of possible new market opportunities. And parliamentarians in both Chambers can continue to ask questions, either orally or in writing, of the appropriate ministers. Politicians can make the conduct of international relations a campaign issue during a general election campaign. But at the end of the day, it does not behoove Parliament and especially the House of Commons, to concern itself with matters coming under the royal prerogative. Elected politicians have all the work they can handle in trying to carry out their own constitutional duty of keeping tabs on Canadian tax-payers' dollars.

For at least a century now, the rest of the world has had to put up with the US practice of requiring that treaties be approved by two thirds of the US Senate: from, most notably, the US Senate's failure to ratify the treaty creating the League of Nations to today's prolonged failure to bring the IMF governance structure in line with current economic reality. At a time when technology is making for closer ties and better understanding among countries, why would any civilized country want to follow the American example and subject any framework for global rapprochement to local party politics?

CONCLUSION

We have touched upon two recent practices pursued by the Government of Canada that betray an abandonment of the Westminster system of governance we have inherited.

Canada has an important choice to make: it can continue down the path that it has been following for decades, a path expressly advocated by the Reform Party and Preston Manning; the path of gradually putting aside or marginalizing Canada's own constitutional history and becoming more of a US-style liberal democracy.³⁹ Another possi-

39. Preston Manning's *A New Vision for a Canada Strong and Free* (Vancouver, Fraser Institute, 2007) captures his twin obsession with a "more assertive application of market-oriented thinking" in different areas of public policy and a "more responsive democracy" in our institutions of governance; see, in particular, chapter 10

ble option for Canada is to do as little as possible, while keeping an eye out for current UK practices that can be copied here, as if nothing has changed in Canada's relation to the UK since the Statute of Westminster, the loss of India, the period of decolonization, the Suez crisis, and the UK's decision to join the EU.

I would argue that to follow either of these paths would be provincial and colonial-minded. Canada can be proud of its constitutional legacy, of its tradition going back to the end of the 18th century of having repeatedly understood and appreciated the wisdom of British institutions, and of how that wisdom can be perpetuated independently in North America. If we are to remain loyal to that tradition, two great constitutional tasks lie before us: on the written side, the work of understanding how our two basic documents, the *Constitution Acts* of 1867 and 1982 build upon one another in the spirit of the Common Law;⁴⁰ and on the unwritten side, the work of uncovering in a rapidly changing society the ethical norms that make for best

for his treatment of public officials and Chapter 11 for his menu of democratic reforms.

40. With regard to the *written* part of our constitution, we need to return to the 2nd edition of Elmer Driedger's *Construction of Statutes*, (Toronto: Butterworths, 1983) where he explains how an equilibrium should be attained between the spirit of the law and the letter of the law. At a macro level, this equilibrium is the achievement of a centuries-long historical synthesis: "First, it was the spirit and not the letter, then the letter and not the spirit and now the spirit and the letter."⁽⁸³⁾ Given this historical achievement, there was now only one approach or principle for interpreting statutes:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. (87)

The equilibrium sought after is a harmony between the ordinary meaning of words and all the elements making up their context as a whole. Further on, in Chapter 6, Driedger expands his concise definition of the one approach to interpreting statutes into a method or a set of procedures, which should be taken to heart by everyone involved in legislation in Canada:

The decisions examined thus far indicate that the provisions of an enactment relevant to a particular case are to be read in the following way:

1. *The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).*

2. *The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament embodied in the Act as a whole, the object of the Act and the scheme of the Act, and if they are clear and unam-*

practices in all of the Westminster system's different institutional fields of operation.⁴¹

Canada may be the only country in the world that needs to hold on to the Westminster system: for it is what has differentiated us from the US for nearly two and a half centuries. But if we are to continue down this path of loyalty, it behooves us, as a first step, to explain,

biguous and in harmony with that intention, object and scheme and with the general body of the law, that is the end.

3. If the words are apparently obscure or ambiguous, then a meaning that best accords with the intention of Parliament, the object of the Act and the scheme of the Act, but one that the words are reasonably capable of bearing, is to be given them.

4. If, notwithstanding that the words are clear and unambiguous when read in their grammatical and ordinary sense, there is disharmony within the statute, statutes in pari materia, or the general law, then an un-ordinary meaning that will produce harmony is to be given the words, if they are reasonably capable of bearing that meaning.

5. If obscurity, ambiguity or disharmony cannot be resolved objectively by reference to the intention of Parliament, the object of the Act or the scheme of the Act, then the meaning that appears to be the most reasonable may be selected. (105)

41. With regard to the *conventional* part of our constitution, we should be resuming the heroic efforts of Henry Davis who put together, in true Common Law spirit, a guide book for the Privy Council to assist senior officials in their decision-making: Privy Council Office, *Manual of Official Procedure of the Government of Canada*, (Ottawa: Government of Canada, 1968). Constructed like an encyclopedia with subjects covering all the major elements of governance ranging from Ambassadors to Visits of Foreign Dignitaries, each subject is then divided into its different aspects. Most remarkably, each aspect of a subject is then treated at five different levels. As we learn in the instructions to users:

1. The Position describes the situation calling for a decision to be taken or discretion to be exercised in a given set of circumstances.

2. The Background outlines the pertinent background which has led to the present position.

3. The Procedure prescribes the administrative action necessary to implement a decision and identifies those responsible for such action.

4. The Ceremonial deals with those situations calling for the organisation of a public event.

5. The Documentary provides examples or suggested texts for implementing decisions as well as background papers.

As Lester Pearson, then Prime Minister, wrote at the time in the Introduction, "I do not believe that a guide to procedure of this nature has been produced elsewhere". The unique structure of the manual allows officials to focus quickly on the kind and level of information that they require; it also allows for easy maintenance and the addition of new subjects and new aspects of a subject. For more on the Davis manual, see James W J Bowden and Nicholas A MacDonald, "Cabinet Manuals and the Crown" in D Michael Jackson and Philippe Lagassé, ed, *Canada and the Crown; Essays on Constitutional Monarchy* (Montreal and Kingston: McGill-Queen's University Press, 2013) at 183-186.

to ourselves and to the rest of the world, the difference between *Pax Britannica* and *Pax Americana*. The rest of the world does not understand that the modern liberal democratic tradition, as propagated by the US, is based on a break away from the Westminster system and the latter's classical liberal humanism. As a second step, we should be making it clear that, in a pluri-centric world, it is neither possible nor desirable to have only one system of governance accepted as legitimate. In the spirit of the Common Law, one can be proud of one's constitutional heritage without trying to impose it on others.