

Should the Governor General be Canada's Head of State?

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In a speech in Paris to UNESCO on 5 October 2009, Canada's Governor General, Michaëlle Jean, said that: "I, a francophone from the Americas, born in Haiti, who carries in her the history of the slave trade and the emancipation of blacks, at once Québécoise and Canadian, and today before you, Canada's head of state, proudly represents the promises and possibilities of that ideal of society." This seemingly innocuous statement, which it might be thought would have made Canadians proud that their country could be so open, free, and ready to accept and respect able persons regardless of sex, colour, creed, or origins, instead became a matter of controversy and debate. The issue was Mme. Jean's use of the term "head of state" to describe her position. Former Governor General Adrienne Clarkson had referred to herself as head of state without creating any controversy. Now it was controversial. Prime Minister Harper himself joined in the fray, as did the Monarchist League of Canada, both stating categorically that Queen Elizabeth II of England was Canada's head of state, while the position of Governor General was as the Queen's representative in Canada.

At the time, the Governor General's website included several statements such as: "As representative of the Crown and head of State, the Governor General carries out responsibilities with a view to promoting Canadian sovereignty and representing Canada abroad and at home." Within a few weeks these references had been deleted on the insistence of the government. The website now states that "Her Majesty Queen Elizabeth II is the sovereign and Canada's Head of State," while the Governor General "carries out nearly all the duties of the Head of State" and "represents Canada during State visits abroad." The Governor General had acceded to insistence of the government that Queen Elizabeth is Canada's head of state, and the Governor General merely serves as the Queen's representative in Canada.

This, it could be argued, is a tempest in a teapot and simply a matter of words, not substance, and that, regardless of the title given to the office of Governor General, the functions and job remains the same. But there are some curious and potentially

important issues in the role and powers of the Governor General that make a review of the office and related nomenclature worthwhile. The role of the Governor General is all the more important in times of minority parliaments, when the office faces, from time to time, problems of exercising reserve powers of the Crown that might mean going beyond the normal role of a constitutional monarch in Westminster-style democracies by going against the advice of the Prime Minister. The position and related nomenclature of the position of Governor General needs to be reconsidered.

First, the term “head of state” has no constitutional or legal status or meaning. It does not appear in the *Constitution Act, 1867*, in any subsequent act relating to the Canadian constitution, or in any Canadian statute whatsoever. In both Canada and Britain the title head of state is an honorific, not a legal or constitutional, term. In the world at large “head of state” is the generic term for the individual or office that performs the functions of the chief public representative of a state. The functions include personifying the continuity and legitimacy of the state and exercising the political powers, functions and duties granted to the position the person holds in the country's constitution and laws. In Britain and Canada these functions are few, and head of government, the Prime Minister, is the effective office, while the Queen and Governor General hold a position whose functions are almost entirely ceremonial. In the United States the positions of head of state and head of government are combined in the office of the President. Charles de Gaulle stated that the French head of state should embody *une certaine idée de la France*, "the spirit of the nation" for France and the world. Canadians expect the Governor General similarly to embody a certain sense and spirit of Canada. The “Crown” is a recognized and essential component of Canada’s constitutional and legal structure; the “head of state” is not. The issue of whether or not the Governor General is Canada’s head of state is a question of sentiment, informal recognition, and duties and functions. It is not of constitutional or legal importance.

Second, Elizabeth II, the Queen of England, is quite circumspect in referring to herself as the head of state of Commonwealth countries. While her website describes her as the head of state for the United Kingdom and fifteen Commonwealth countries, for Canada the website simply states that “the Queen acts as Queen of Canada, quite distinctive from her role in the United Kingdom or any of her other realms.” Most of the

references to the Queen as the head of state of Commonwealth countries were removed from the Buckingham Palace after the 1999 dispute in Australia over the role of the British monarch. There is no doubt that Queen Elizabeth is the Queen of Canada, but it does not necessarily follow that she is the Canadian head of state. The Governor-General is the Queen's representative in Canada, and such, she has the same constitutional role in Canada as the Queen does in the United Kingdom.

Third, the Governor General exercises all the powers of the sovereign, with two minor exceptions: first, the Queen of England appoints the Governor General, though this must be on the recommendation of the Prime Minister of Canada; and second, the Queen appoints additional senators under sections 26-28 of the *Constitution Act, 1867*. The power to appoint senators has only been used once, in September 1990, when the additional appointments were requested by then Prime Minister Brian Mulroney to break a deadlock over his Goods and Services Tax (GST) legislation between a House of Commons dominated by his Progressive-Conservatives and a Senate dominated by the Liberals. When Canada's constitution was patriated in 1982, the power of the Queen to appoint the Governor General was retained because the provinces and federal government could not agree on an alternative, patriated, and Canadian process for selection and appointing the Governor General. The power to appoint additional senators was probably overlooked because it had never been used in the previous hundred and fifteen years of Canada's history and appeared to be of no importance.

Apart from these two exceptions, the final step in the transfer of the functions of the monarch to Governor General was taken in 1947, when King George VI authorized the Governor General to exercise all the powers of the Sovereign in Canada, on the advice of the Canadian government. As the Sovereign's personal representative in Canada, the Governor General is accorded the honours and privileges that are due to the Sovereign. Borrowing from Bagehot, the Governor General might best be termed the "effective" head of state, the Queen the "dignified" one.

Fourth, It is not surprising that the difficulties over the name for the position of Governor General arose in the context of her appearance on official visit in a foreign country. How is the Governor General to describe herself to a foreign audience that

knows little about Canada? Should she say that she is Canada's Governor General and leave it at that? The term "Governor General" is not a common one among the nations of the world outside the Commonwealth and the significance of the position, unlike that of the term "head of state," would not be at all obvious. Would it make things clearer if the Governor General explained that the Queen of England is Canada's head of state, and she is the Queen's representative in Canada? Almost certainly not. This would leave the unfortunate impression that Canada is not a self-governing country, and is subservient to the head of state of a foreign country. Should the Governor General explain that she fulfills the same role as head of state in Canada as the Queen does in England, and although her position is described as being the Queen's representative in Canada she is in practice the *de facto* head of state in Canada, and that Canada is really a country unto itself completely independent of Britain? At some point these explanations confuse more than they clarify. No wonder that successive Canadian Governors General have described themselves to foreign audiences as Canada's Head of State. Head of state is the most accurate description, and to suggest otherwise confuses more than it clarifies. UNESCO's website list of the heads of state for its member country identifies the Governor General as Canada's *Chef de l'État*, or head of state. To do otherwise would seriously mislead persons not intimately familiar with Canada's actual structure of government and relationship with Great Britain.

Fifth, though the vast majority of the Governor General's work is routine and non-contentious, from time to time occasions arise when a governor General must exercise independent judgement. Three such issues stand out in Canadian history.

One: in 1873, Prime Minister Sir John A. Macdonald, fearing a non-confidence vote over the Pacific Scandal, asked the Governor General, Lord Dufferin, to prorogue Parliament. Dufferin thought long and hard, and consulted with the British Government. He granted Macdonald the prorogation, but only for ten weeks, which was tacked on to the end of the summer adjournment. Parliament did not meet between May 25 and October 12 that year. When the House met in October Macdonald, still facing a vote of confidence and losing support, resigned. Sir Alexander Mackenzie took over as Prime Minister two days later, on November 7, and Parliament was prorogued that day.

Parliament was dissolved on 2 January 1874, and a general election was held on January 22. This Mackenzie won handily.

Two: In 1926 Prime Minister Mackenzie King requested a dissolution of Parliament while he was facing imminent defeat on a vote of confidence in the House. The then Governor General Lord Byng, refused King's request, whereupon King promptly resigned. Lord Byng was forced to ask the leader of the opposition, Arthur Meighen, to form a government. Meighen was soon defeated on a vote of confidence and Mackenzie King succeeded in making the issue in the subsequent general election (which King won) Lord Byng's behaviour, not his own.

Three: In December 2008 Prime Minister Harper requested a prorogation when he faced imminent defeat on a vote of confidence, and his request was granted by the then Governor General, Michaëlle Jean, even though the three opposition parties had agreed in writing to support a coalition government of the Liberals and NDP. She had the power and right to refuse but chose not to. She exercised her own independent judgement. Scholars do not agree on whether she acted appropriately in making this decision.

There have been many other occasions when the Governor General might have had to make such a decision involving this sort of discretion and judgement. The Governor General must ensure that the position of Prime Minister is never vacant. Normally there is no question of who should become Prime Minister - the person who enjoys the support of a majority in the House of Commons - but on occasion a Governor General must exercise independent judgement. This situation occurred in the Province of Ontario after the 1985 general election, when the governing Progressive Conservative Party under Frank Miller gained more seats than either the Liberals or NDP, but the two opposition parties combined enjoyed a majority, and agreed to work together as government for at least two years. Premier Miller met the legislature only to be defeated on a vote of confidence soon after the session began. He seemed to believe that he was entitled to an immediate election, but was disabused of this notion and the Liberals then proceeded to form the government.

In Australia in 1975, when an unresolvable stalemate arose between the two

houses of Parliament, the Governor General, Sir John Kerr, dismissed the then Prime Minister and appointed the leader of the opposition as Prime Minister on the understanding that he would immediately request a dissolution of Parliament. In the ensuing general election the former leader of the opposition but now Prime Minister won, which, it can be strongly argued, supports the view that Sir John Kerr acted appropriately.

Following the general election of June 2004 Prime Minister Paul Martin's minority government faced a succession of votes of confidence. He managed to avoid defeat by placating at least one of the opposition parties until November 2006. If he had lost one of the early votes of confidence, and if Mr. Harper, the leader of the Conservative Party, had provided written evidence to the Governor General that the other opposition parties had committed themselves to supporting him for an adequate period of time, the Governor General might well have refused a request from Mr. Martin for dissolution of the Parliament. Instead, following the 1985 Ontario precedent, she could have appointed Mr. Harper as Prime Minister. The decision would have demanded an exercise of judgement by the Governor General. Adrienne Clarkson, the then Governor General, consulted thoroughly and carefully in preparation for this event. She concluded that six months was the appropriate time that should elapse before a Governor General would grant a request for dissolution in these circumstances. In the event, Prime Minister Martin managed to survive many close calls until his November 2006 defeat, well beyond six months of precarious survival. He then requested and was granted a dissolution of Parliament. The succeeding January 2006 election again produced a minority Parliament, in which the Conservatives under Stephen Harper replaced the Liberals as government.

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In her memoirs former Governor General Adrienne Clarkson speaks of an "unspoken rivalry "between the Prime Minister's Office and Rideau Hall." This rivalry appears to be built into the structure, if not the constitution, of the Government of Canada. Jeanne Sauvé, who served as Governor General from 1984 to 1990, found herself in media disfavour when she closed the Rideau Hall grounds to the public, even though they were closed for security and safety reasons on the advice of the Royal Canadian Mounted Police and the National Capital Commission. Subsequently Mme. Sauvé requested the

government many times to allow the grounds be re-opened to public access, but the government did not permit this until the tenure of her successor, Ray Hnatyshyn. Adrienne Clarkson, who served as Governor General from 1999 to 2005, was criticized widely for lavish expenditures, in particular on state visits abroad. Even though these trips were asked for, commissioned by and paid for out of the budget of the department of foreign affairs, and even though each took several years to plan, and the planning was done with the full knowledge and support of the government, including the Prime Minister's Office, Adrienne Clarkson herself, not the government, was on the receiving end of the vociferous and extensive criticisms. Neither the Prime Minister nor other government ministers defended the Governor General in the House of Commons. Subsequently Governor General Clarkson refused the request of Prime Minister designate Paul Martin to break with tradition and have his swearing-in ceremony in the Parliament buildings rather than Rideau Hall, where it had been held since 1867. Martin's proposal would have deviated from, if not breached, the rule that the Governor General only enters the Parliament buildings to serve at the ceremonies for the opening and closing of a Parliament, and must never set foot in the House of Commons.

There seems to be a desire on the part of Prime Ministers to minimize the importance and prestige of the role of the Governor General, and to take on the trappings of monarchy for themselves. The imperial Prime Minister appears to want to dominate the constitutional monarch. In December 2009 Prime Minister Harper simply telephoned Governor General Michaëlle Jean to request a prorogation, rather than appearing in person at Rideau Hall as is the custom. Mme Jean was quite entitled to tell Mr. Harper that if he wanted an unexpected, and what proved to be contentious, prorogation he should come to Rideau Hall and request it in person, but she did not. The Monarchist League made no comment on this prime ministerial disrespect of the office of the Queen's representative in Canada.

The position of Governor General needs respect and stature to exercise independent judgement and defy a Prime Minister. Formal recognition that the Governor General is the Canadian head of state would go a long way towards giving the position greater identity and independence. Perhaps fear of this is what motivates Prime Ministers

to insist that the Governor General is not the Canadian head of state and merely represents the Queen of England, who does not have the power to be consulted, advise, warn, or even on occasion reject, the advice of the Canadian Prime Minister.

If the Governor General were designated Canada's Head of State, Queen Elizabeth would still be the Queen of Canada. Nothing in law or the constitution would change. The designation would simply reorient non-legal and non-constitutional titles to make it clear that the Governor General serves Canada and Canadians in his or her own right, and not as a representative of the Queen of England. This might encourage Canadians to take the position of Governor General more seriously. It might even lead them to wonder why the choice of a Governor General who might at some time have to reject the advice of a Prime Minister over an important issue remains solely in the hands of the Prime Minister, an interested party. If this sort of wondering were to occur, Canadians would find that India and Ireland offer useful alternatives to the current Canadian selection process of our head of state that relies solely on prime ministerial discretion and inclination.