# CHAPTER 2

# PARLIAMENT AND THE CROWN: A CANADIAN PERSPECTIVE

**David E. Smith***

In my living room I have a picture by Canadian artist Charles Pachter—he of the Queen-confronting-a-moose fame. This particular picture is in two parts: on the viewer's right is a photograph of William Lyon Mackenzie King, garbed in a Ruritanian-like uniform, standing next to the present Queen's mother, when she and George VI visited Canada in 1939. Framed by the arch of the Peace Tower, the PM and HM are gazing to their right. The object of their attention, at the top left side of the Pachter picture, is a colour photograph of Benjamin West's painting of 'The Death of General Wolfe.' Below that iconic depiction of Canada's passage from French to British regimes on the Plains of Abraham three solitary words visually vibrate: "Kill,' Conquer,' 'Rule". It is an affecting picture on several levels of understanding, in this instance not least that it hangs in a home in Niagara-on-the-Lake, a community that makes a living out of promoting its loyalty to the British cause.

From the moment I saw this piece of art with its striking amalgam of historical record, political message, and graphic propaganda, I wanted to own it. In analyzing my response to the work, I have concluded that it duplicates the sense of the Crown that I held when I set out in 1992 to write *The Invisible Crown: The First Principle of Canadian Government*. Despite the jewels and braid associated with monarchy, there is more to the institution than meets the eye. Pachter visually (and I would say, uniquely) conveys the truth at the core of constitutional monarchy—its duality. Note, for instance, that in this depiction the King's consort and his Canadian prime minister stand side-by-side (John Buchan, Lord Tweedsmuir, is nowhere to be seen,

* Distinguished Visiting Professor, Department of Politics and Public Administration, Ryerson University.

as governors general typically remain invisible when the Sovereign is close at hand. Otherwise, the artist would have to create a triptych, and that really would make a puzzle of what already is an enigma). It is this fact – that constitutional monarchy has both an obverse and reverse side (and here I am speaking of more than coins) – that complicates its meaning for a large portion of its subjects. Lack of understanding of the Crown in Canada is undoubtedly its persistent and unalterable feature. Why this should be so is a serious matter for study, because surprising as it may be for many Canadians, the Crown is the centrepiece of the working constitution.

Wherein the surprise? On this side of the Atlantic, the Crown is equated with monarchy—a pastiche of celebrities and ceremony. Monarchy is what happens on the other side of the ocean, and is treated as of little practical importance to Canada. Every visit of a member of the royal family is preceded by a poll asking Canadian subjects what they think of the institution. The equation of royal personages and monarchy is the assumption implicit in the query. No one asks this question on other occasions, although constitutional monarchy, in the persons of the governor general and lieutenant governors, chugs along in Ottawa and ten provincial capitals every hour of every day of every year.

How can this be? Simply stated, Canadians do not think of themselves as subjects. The constitutional narrative that received bi-partisan support from a majority of prime ministers after 1867 focused on Canada's emergence as an autonomous sovereign entity in no way subordinate to the United Kingdom. The signal event of our political history – once but no longer a core subject of the high school history curriculum – was the struggle for and achievement of responsible government. Canada began as a colony but in modest, self-referential fashion sought and gained autonomy – not independence – from the mother country. As a result, by the mid-nineteenth century appointed governors from Great Britain were made subject to the advice of elected legislators in British North America. That evolution culminated in the *Statute of Westminster* (1931), which made Canada and the other Dominions constitutional equals of the United Kingdom, although the "reluctant" dominion of Newfoundland asked to be relieved from the Statute's provisions for sovereign jurisdiction in the absence of its own "specific request".[1]

1. (UK), 22 & 23 Geo V, c 4, s 2; Sean Cadigan, *Death on Two Fronts: National Tragedies and the Fate of Democracy in NewfoundlandI* (Toronto; Allen Lane, 2013) at 295.

After 1931, common allegiance to the Crown and not statutory pre-eminence of the imperial Parliament served as the bond of the new British Commonwealth of Nations. At the same time, however, the Crown underwent division, with the effect that the Sovereign who resided at Buckingham Palace became the Sovereign of other realms: Canada, Australia, and New Zealand, for example. In a book with the sub-title *Model Governor General*, John Buchan's most recent biographer, J. William Galbraith, has written that the royal tour of 1939 (and, by inference, subsequent tours) "breathed life into the Statute of Westminster".[2] Turning that observation around, it might then be said that absent the royal presence the constitutional position of the Crown in the Sovereign's realms other than the United Kingdom is evanescent. This does not mean that the Sovereign's representative is invariably lifeless but that the vigour of the position depends on the individual holder's own actions more than it does on regal association. In Canada, that reputation has been founded on an amalgam of charitable work, geographic exploration (the North, especially), association with Quebec (residence at the Citadel, most notably) and "repository of responsibility toward aboriginal peoples", as well as the establishment and conferral of honours.[3] All of these activities are important yet, significantly, none may be said to touch upon the topic of this session: the relationship of the Crown and Parliament.

The analysis that follows will look at this relationship using the traditional 'tripartite' lens, which in Canadian terms means from the perspective of the Crown, Senate, and Commons.

## CROWN

There was something of a constitutional finesse in the *Statute of Westminster*'s reconciliation of dominion and Commonwealth ambitions, one whose success depended upon its not being submitted to close scrutiny. The Sovereign lives, and has always lived, in what was once the imperial centre. That makes all the difference when it comes to interpreting the meaning of the Crown, for the British situation – established church, landed aristocracy, a hereditary (until recently) upper chamber of Parliament, and a line of succession (until even more recently) based on primogeniture – is foreign, in fact and understanding, to the Canadian context.

2. J. William Galbraith, *John Buchan: Model Governor General* (Toronto: Dundurn Press, 2013) at 161.
3. *Guerin v The Queen*, [1984] 2 SCR 335 at 376, 1984 CanlII 25 (SCC) [Guerin].

It is necessary to be clear about what is meant by the adjective 'foreign'. In the United Kingdom, Parliament's three parts (King, Lords, and Commons) have been viewed since medieval times (until a century ago) as embodying estates or social orders. The effect was to see the power of the state (kingdom) divided, and thus protected from usurpation by a single body.[4] A neglected aspect in commentary on the 1910 constitutional crisis – when the Asquith government sought to pack the Lords by creating new peers in order to secure passage of financial bills with heavy social consequences – was the reason George V objected to the scheme: the Lords, he believed, was being "destroyed" and he "manipulated", in a procedure that accorded him "neither the confidence nor consideration to which he was entitled".[5] There is more to the contrast between the United Kingdom and Canada than this, although it would require a second paper to elaborate the details. Still, if forced and while acknowledging the following comment to be a generalization, one might say that politics in the first country has been aristocratic, personal, and oral in conduct (consider the importance of conventions and understandings), while in the second, it has been overwhelmingly middle class (with a predominance of lawyers), impersonal (as befitting a frontier, democratic society with a permeable class structure), and disposed to written rather than face-to-face communication, a feature that dualism in language and law, as well as the complexities of federalism have encouraged.

One question the hypothetical second paper might ask is to what extent the contrasting oral and print traditions affect the relationship of the respective Crowns and Parliaments. Consider, for instance, the contrasting tenor of political debate in the two countries: metaphorical, witty, and rapid in the one, didactic, laboured, and slow in the other. Or examine the qualitatively different character of the intercourse between Sovereign and adviser, on the one hand, and Sovereign's representative and adviser, on the other hand. This contrast in what might be called the social provenance of politics in the two countries was demonstrated, from the Canadian position, by the appointment until 1952 of British nobles and aristocrats as governors general. A crucial aspect of the King-Byng affair in 1926—which saw the governor general, Viscount Byng, exercise the Crown's

4. Mark Sproule-Jones, 'The Enduring Colony?: Political Institutions and Political Science in Canada"(1984) 14 Publius: The Journal of Federalism 93 at 93-108.
5. Harold Nicolson, *King George V* (London: Constable, 1953) at 138, cited in Roy Jenkins, *Mr. Balfour's Poodle: An Account of the Struggle between the House of Lords and the Government of Mr. Asquith* (London: William Heinemann, 1954) at 124.

prerogative right to refuse advice from the Prime Minister of the day, William Lyon Mackenzie King, to dissolve Parliament only to accept the same advice days later from Arthur Meighen, who had formed a government following Mackenzie King's resignation—was the defeat it represented for the practice of Great Britain's appointing Canadian governors general. Mackenzie King's barb—that royalty and peers could avoid political controversy if "they kept out of politics", that is, were not appointed as governors general—possessed an element of self-serving logic.[6] It is no exaggeration to compare the events of 1926 in Canada to those of 1909-10 in the United Kingdom in the sense that each marked for its respective country a permanent change in its constitutional equilibrium.

So many other factors account for the difference in the relationship between the Crown and first ministers in London and Ottawa that it is surprising more has not been written on the subject. For a Canadian viewer the National Theatre production, *The Audience*, in which the Queen (played by Helen Mirren) receives eight of the twelve prime ministers who have served her since 1952, makes an important if unacknowledged point. While the Sovereign had twelve prime ministers in London, in Ottawa over the same period there were eleven governors general and eleven prime ministers. The dramatic tension in the two-character play lies in the continuity of one protagonist but serial change of the other. *The Audience* could not have been written about the occupant of Rideau Hall, for the continuity it portrays does not exist on the part of the Sovereign's representative. If continuity exists in the Canadian system at all, it lies with long-lived politicians.

There are other dimensions to the feature of continuity that deserve mention: the Queen has reigned for over sixty years, but she had another sixteen years preparation as heiress presumptive; more than that she was, in Ben Pimlot's words, "her father's daughter" and "he remained her model."[7] The familial tie is pervasive and of long-standing: when in 1910 George V was resisting Asquith's request to appoint additional peers to the Lords, he asked one of his personal advisers (Lord Knollys), who sided with Asquith and who himself had been an adviser to Edward VII, when the parliamentary crisis first began: "Is this the advice you would have given my father?" Knollys

6. Galbraith, *supra* note 2 at 52.
7. Ben Pimlot, *The Queen: Elizabeth II and the Monarchy* (London: HarperCollins, 2002) at 240.

replied: "Yes, and he would have taken it".[8] In the United Kingdom, the Crown is its own referent.

Memory lies almost as heavy on the wearer of the crown as the crown itself. Indeed, Pimlot argues that the abdication of Edward VIII in 1936 was probably the most determinative event of the Queen's reign, if only for what it meant to her father: "Under George VI, royal interventions, even minor ones, diminished. The acceptance of a cypher-monarchy, almost devoid of political independence, began in 1936".[9] He concludes: "The most striking personal feature of the succession (in 1952) was the sense of continuity from one reign to the next."[10] In these comments the contrasts with Canada (or Australia or New Zealand) are so stark as to defy comparison. Memory is a paramount feature of accounts of monarchy in the United Kingdom; but in Canada, whose memory would that be-not familial, not that of advisers? (On the subject of advisers, an autobiography that should be required reading for those interested in the subject of the modern Crown is *King's Counsellor*, by Sir Alan Lascelles, assistant private secretary to four monarchs.)[11] Of course, Canadians, like everyone else, are possessed of memory; but in the matter of the Crown and its relationship to Parliament, how to access this memory? The Sovereign's representative in Canada is an individual, with a term of appointment, which by any standard is short. What associations, if any, are there among former governors general, and even if there are, of what significance is it to the conduct of constitutional monarchy in Canada? Adrienne Clarkson stands alone in writing a memoir that includes a discussion of her period as governor general.[12] Is there need for her gubernatorial counterparts to do the same? Is there a need for their combined experience to be made available to the public?

## SENATE

'Parliament,' as used in the topic for this book, that is, as distinct from the Crown, refers to the two legislative chambers: Senate and House of Commons. That meaning seems straight-forward enough, although it is anything but simple. There are several reasons for

8. Jenkins, *supra* note 5 at 180
9. Pimlot, *supra* note 7 at 39.
10. *Ibid* at 240.
11. Duff Hart-Davis, *King's Counsellor: Abdication and War: The Diaries of Sir Alan Lascelles* (London: Weidenfeld and Nicholson, 2006).
12. Adrienne Clarkson, *Heart Matters* (Toronto: Viking Canada, 2006) at 183-211.

complexity, the most important of which is the recourse – and the disposition always – to seek parallels between Canada's Crown and Parliament and their British namesakes. They seem so similar, and the opening words of the preamble to the *Constitution Act, 1867* appear to confirm that response. Canada, they say, should have "a Constitution similar in Principle to that of the United Kingdom".[13] None the less the constitutions are different and in ways that affect the relationship of Crown and Parliament. To begin with, Canada's Parliament is bicameral because the United Kingdom *was* bicameral in 1867. There was no alternative. Confederation marked the progress to nationhood and no nation of any worth in the eyes of the Fathers of Confederation possessed a legislature that was unicameral. The unicameral legislatures of the day were to be found in the Central American and Balkan states. Nor among bicameral legislatures were there any upper chambers that were not appointed or hereditary. The United States introduced popular election for the US Senate only in 1913. Suggestions that the new upper chamber be elected did not find favour in light of the experience of United Canada. More than that, an appointed upper chamber seemed logical because the Senate would not be a representative body in the sense the Commons was a representative body. On the contrary, the Senate's role was to compensate those areas of the new federation (Quebec and the Maritime provinces) whose voice would be lessened in a chamber based on rep-by-pop. The foregoing is ancient history, but it bears repeating when any contrast between Senate and Lords is made.

The Senate was not a representative body for the reason that its members were appointed from senatorial divisions of equal size. Even more important, the numbers of senators per division was fixed. There could never be a swamping or packing of the upper chamber, as was threatened later in the United Kingdom in 1910 (or as had occurred earlier in the Legislative Council of United Canada at the time of the Rebellion Losses Bill)—a few extra senators under strict provisions, yes; swamping, never. From the perspective of the present discussion, the consequence of moment therefore was that the Crown had almost no role to play in respect of the upper house: the numerical limit on membership kept the parts of Parliament separate. This separation is an important part of the story (or conundrum) of Senate reform or its absence. No role, and virtually no personal, or social, or religious, or class association, beginning with the fact that the governor then and for another century was British and represented the interests of the

13. (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

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British government. None of the Lords' primary features was echoed in the Senate. The alignment of King and Lords in consequence of the dominance of shared Conservative values made George V a reluctant agent of his ministers. A relationship of this nature never arose in Canada because the conditions did not exist to nurture it.

It is possible that Bill C-7, *An Act Respecting the Selection of Senators and Amending the Constitution Act, 1867* in respect of Term Limits, had it been found constitutionally sound might have the unintended consequence of altering the existing relationship.[14] In the matter of proposing a nominee for appointment as a senator, the bill spoke of the prime minister's being "required to consider names from a list of nominees … determined by an election." The integrity of the office of Governor General would be impugned were the Governor General, who is the protector of Canada's constitutional democracy, advised to appoint an individual other than the winner of a senatorial election held in conformity with the terms set out in Bill C-7. Moreover, there is the matter of gubernatorial consistency. Bill C-7 was not directed to a particular circumstance—that is, to a single senatorial contest—but to contests in multiple provinces and territories for the foreseeable future. In its results if not its declared purpose, Bill C-7 recalls an earlier trespass on Crown prerogative, Manitoba's *Initiative and Referendum Act*, found in 1919 by the Judicial Committee of the Privy Council to be *ultra vires* that province's legislature. Particularly memorable is the following passage from that opinion:

> The analogy of the British Constitution is that on which the entire scheme is founded, and that analogy points to the impropriety, in the absence of clear and unmistakable language, of … permitting [or in the case of Bill C-7, encouraging the perception of] the abrogation of any power which the Crown possesses through a person who directly represents it.[15]

The noteworthy feature of the achievement of responsible government in the 1840s lay in its being a triumph for elected assemblies, and not for bicameralism. In the eyes of reformers, upper chambers were on the wrong side of history. The parlous condition of bicameralism in Canada today—no provincial upper chambers and a Senate whose fate appears to be an unending existential quest—has its roots in the unpopular reputations of the original compacts and cliques that

14. Bill C-7, *An Act Respecting the Selection of Senators and Amending the Constitution Act, 1867 in respect of Senate Term Limits*, 1st Sess, 41st Parl, 2011, (first reading 21 June 2011).
15. *Re: Initiative and Referendum Act* [1919] AC 935 at 943.

bound governors and legislative councils. Among federations, Canada is unique in having such anaemic bicameralism. One might go so far as to say that—federalism aside—Canadians are a unicameral people. It is worth noting that there is minimal institutional expression of federalism in the Senate. Normally there are few (none at present) ministers in the upper chamber—and ministers are the conventional expression of federalism at the centre. From the vantage point of many Canadians outside of the Laurentian heartland, Ottawa is less a national capital than it is a meeting place of the federation.

## HOUSE OF COMMONS

The relationship between Crown and Commons has always been sharper than between Crown and Senate. Responsible government's achievement was the work of elected assemblies *versus* governors. The success of the struggle lay in the Crown's acceptance that it must in future take direction on domestic (and eventually external) matters from those who controlled the popularly elected assembly. In other words, responsible government was a triumph of government—not of government and opposition. From the time of the Canadian rebellions, the Crown—submissive to government—was the central political reality, one that did not change after Confederation. In Canada, the concern was never about shielding or protecting the Crown but rather about restraining it. This is the legacy of colonialism. Whether it is conflicts, controversies, crises, or a simple difference of opinion between the Crown and its political advisers, the latter invariably prevail; and for reasons in addition to the absence of the Sovereign's personal prestige.

There are multiple reasons for the predominance of the political executive in parliamentary systems, many of which apply with equal force in the United Kingdom as they do in Canada. The size and complexity of government are experienced everywhere; so too are the flattening and decentralizing effects of mass and social media. But there are differences between the two countries that have exerted long-term effects on the relationship of Crown to Commons. One is the practice, now almost a century old, of selecting leaders of political parties by means of delegate conventions. The Liberals introduced this method of selection in 1919, and the Conservatives followed in 1927. It is hardly original to note, because academics and party leaders themselves, beginning with Mackenzie King, have frequently done so, that selection by delegates sets leaders apart from, and above, their parliamentary caucus. In so doing, it contributes to a very

un-Westminster-like perception, which sees the executive and legislature independent of one another, as in a presidential-congressional system, rather than fused, as they are in the British parliamentary system.[16] In 2013-14, Michael Chong's Private Member's bill to limit the power of party leaders in Parliament may be said to stem in part from the consequences of this century-long practice, unique in its longevity among countries possessing parliamentary origins at Westminster. The older alternative to convention was selection by caucus, a procedure that produced leaders already familiar to, and with, the Crown and its representative.[17] Parliamentary experience has almost been a disqualifying factor when party conventions come to choose their leaders. To that extent, it further distances the Crown from the party leaders in the Commons, those persons primarily responsible for seeing that constitutional monarchy runs smoothly.

On the subject of selection methods (and their change), it is worth speculating about but probably too soon to assess what effect the new mechanism to select a governor general, introduced by Prime Minister Stephen Harper prior to the David Johnston's succeeding Michaëlle Jean, will have on relations between the Crown and Parliament. On that occasion, it was reported that potential candidates for consideration would be required to "possess constitutional knowledge and be non-partisan."[18] While many observers would be inclined to say that these characteristics fit the Queen, to what extent – if any – have previous governors general failed to meet these standards?

A second difference in the political histories of Canada and the United Kingdom lies in the matter of extending the franchise. While there were notable exceptions to the following generalization – women and First Nations are two of them – still compared to the United Kingdom, it may be said that the franchise for males was conferred *en masse* in Canada at the outset of Confederation. In the United Kingdom, the male franchise was conferred in stages. In other words, there was a gradual broadening – out of those on whom the vote was conferred. From the position of the Crown and Parliament, the significance of the contrasting process of enfranchisement was

16. David E. Smith, "The Westminster Model in Ottawa: A Study in the Absence of Influence" (2002) 15: 1-2 British Journal of Canadian Studies 54 at 54-64.
17. See John C. Courtney, *The Selection of National Party Leaders in Canada* (Toronto: Macmillan of Canada, 1973; Andrew Coyne, "Bill Would Forever Change Parliament", *National Post* (30 November 2013) A5; Doug Saunders, "Party Mustn't Trump Country", *Globe and Mail* (14 December 2012) F2.
18. Bill Curry, "Secret Committee, Seeking Non-Partisans: How Harper Found New G-G", *Globe and Mail* (12 July 2011) 1 and 4.

that in the United Kingdom delay in this regard contributed to delay in recognizing the transformation of the Lords, that is, its political diminishment, which had begun with the *Reform Act* of 1832. Another contrast related to the franchise was that modern disciplined parties based on constituency organization emerged in Canada before they did in the United Kingdom. Ramifications flowing from that development include an early boost to prime ministerial power in Canada, as well as the emergence of a partisan-based public service in the same decades as a non-partisan administration appeared in the United Kingdom.[19] In Canada, there was no delay in acknowledging the fact that the elected Commons, and the Commons alone, was the locus of political power. Never was there, as in the United Kingdom, a sharing of power, or a sense that power should or might be shared with the upper chamber. Certainly, there is no evidence that a Canadian representative of the Sovereign held such an opinion.

## CONCLUSION

A few months ago my wife and I were on a visit to India. One day in a bookstore I saw a legal text with the title *The Constitution of India.* In its introduction, the author said the object of his study was 'to put the constitution in a nutshell.' If only it were so easy! Still, if such an attempt were made in Canada, the nutshell would necessarily encase, more than anything else, the Crown. It is the Crown that makes whole the actions of government, for it is part of every order-in-council as well as of all – but fewer – statutes. In respect of the former, the Crown is more immediate and central than the Commons or even cabinet. More than history or politics explains this prominence, for neither of these sources of authority account for the Crown's increasing relevance to the practice of government in Canada. That pre-eminence has another source. In the 2009 *Conacher* case, the Federal Court of Canada stated that "Canada has a system of *constitutional supremacy* that lays out the boundaries of Parliament's power".[20] In the *Khadr* decision in 2010, the Supreme Court of Canada found that "the courts clearly have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the *Charter*".[21]

19. David E. Smith, "Patronage in Britain and Canada: An Historical Perspective" (1987) XXII Journal of Canadian Studies 34.
20. *Conacher v Canada (Prime Minister)*, 2009 FC 920 at para 53, [2010] 3 FCR 411 [emphasis added].
21. *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 36, [2010] 1 RCS 44.

Today, and unlike the first one hundred and fifteen years of Confederation, Canada has a 'higher law,' which sets out not only rights and freedoms but also a formula for amending the constitution. Again, in *McAteer* (2013), the Superior Court of Justice of Ontario stated that "Her Majesty's role as sovereign has been *reinforced* in section 41(a) of the *Constitution Act, 1982*, which requires unanimity of the federal and all provincial legislatures in order to enact an amendment to the constitutional status of 'the office of the Queen, the Governor General and the Lieutenant Governor of a province'".[22]

The point of this brief foray into constitutional law is to underline the importance of the judiciary to the subject at hand. While it has always been the case that Parliament may make law and the Crown's courts adjudicate disputes that invariably arise over statutory interpretation, today the courts do more: they may limit Parliament (and provincial legislatures) (*Conacher*), and they may restrain the political executive (*Khadr*). It is a different constitutional world than Canadians have traditionally known and one that presents a tangible difference from that of the United Kingdom.

Speaking in the early 1960s of the first century of Canada's political development, political scientist Alexander Brady concluded that "amid all the intervening political changes, Canada's adherence to the essential model of Westminster has endured".[23] As evidence for that statement, he cited *inter alia* the legislature, the Crown, the civil service, and the independent judiciary. It would be hard to advance that thesis with confidence now. As in art, in politics the present can never faithfully imitate the past. The same is true of scholarly interpretation—each attempt is of its own time and each betrays the concerns of its era. Where in the 1960s, interpretations of British and Canadian political institutions saw sameness, now they emphasize difference; where half a century ago, there was a United Kingdom 'model,' there is none today.

22. *McAteer v Attorney General of Canada*, 2013 ONSC 5895 at para 17, 117 OR (d) 353 [emphasis added].
23. Alexander Brady, "Canada and the Model of Westminster" in William B. Hamilton, ed, *The Transfer of Institutions* (Durham, N.C.: Duke University Press, 1964), 59 at 80.