CHAPTER 9

SUBTLE YET SIGNIFICANT INNOVATIONS: THE ADVISORY COMMITTEE ON VICE-REGAL APPOINTMENTS AND THE SECRETARY'S NEW ROYAL POWERS

Christopher McCreery*

The Crown's flexibility and resilience are the principal qualities that have permitted it to remain at the centre of Canada's system of government for more than four hundred years. There are two elements touching upon the Crown's position and function that have undergone muted yet important changes over the past four years: the creation of an Advisory Committee on Vice-Regal Appointments to advise the Prime Minister on the selection of the governor general, lieutenant governors and territorial commissioners, and the secretary to the governor general's expanded role as deputy of the governor general with the authority to undertake certain constitutional duties hitherto reserved for the governor general and justices of the Supreme Court of Canada. Neither of these changes have elicited much commentary or discussion, yet both are of significance as they touch directly upon the Crown and its position within the Canadian state. As they are both very recent changes we have yet to determine their overall influence on the institution writ large.

ADVISORY COMMITTEE ON VICE-REGAL APPOINTMENTS

Since Confederation, section 58 of the *Constitution Act, 1867*[1] has directed that provincial lieutenant governors are to be appointed in the name of the Sovereign by the governor general in council (by convention on the advice of the prime minister). Until 2014 and the

* Private Secretary to the Lieutenant Governor of Nova Scotia.

1. (UK), 30 & 31 Vict, c 3, s 58 reprinted in RSC 1985, App II, No 5 [*Constitution Act*].

establishment of the Advisory Committee on Vice-Regal Appointments (the committee) no formal consultation process existed, and while there are a few rare instances where prime ministers conferred with their provincial colleagues – when they were of the same political stripe and on friendly terms – this was never the norm.[2] Other jurisdictions, notably the Isle of Man, employed a panel for the selection of its lieutenant governor in 2010, however in the Realms, notably Australia and New Zealand, such an approach has yet to be employed.

Lieutenant governors have historically been selected by the prime minister, normally with the assistance of the appointments secretariat within the Prime Minister's Office (PMO).[3] In earlier times it was a purely patronage appointment selected from the bevy of sitting or retired parliamentarians or the senior party faithful. This reflected the post-Confederation idea that the lieutenant governor was simply a delegate of the Dominion Government, a patronage sinecure infrequently employed to enforce the will of Ottawa, frequently coveted by office seekers. The appointment of governors general has been somewhat more complex; initially appointed on the advice of the British government, as Canadian autonomy advanced, so to did Canadian involvement in the process to the point where the incumbent is appointed solely on the advice of the HM's Canadian first minister. Since the Mulroney era, the prime minister's appointments secretariat has been involved in the process. Since the time of Vincent Massey's appointment in 1952, the prime minister has forwarded a single name onto the Sovereign for sanction. While the establishment of the Advisory Committee on Vice-Regal Appointments has not changed the actual method or mode of appointment of the governor general or the lieutenant governors, it has resulted in the development of a short list from which the prime minister may select a candidate for appointment. The prime minister is not bound to select a name from the list; however, of the four vice-regals appointed since 2010, all designates have been selected from the list developed under the new process.

In January 2010, as the tenure of Governor General Michaëlle Jean approached the five-year mark, the PMO created the Governor General Consultation Committee – an informal body initially

2. John T. Saywell, *The Office of Lieutenant Governor* (Toronto: University of Toronto Press, 1957) at 25-7.
3. Andrew Heard, *Canadian Constitutional Conventions – The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991) at 107 [Heard].

designated the Governor General Expert Advisory Committee.[4] The Committee began life as an *ad-hoc* affair separate from the Privy Council Office. A six-member committee, composed of subject area experts was created under the chairmanship of the secretary to the governor general, with advisory involvement from the prime minister's director of appointments. The membership included Ms. Sheila-Marie Cook, secretary to the governor general, a long serving public servant, administrator of several Royal Commissions and former legislative assistant to Prime Minister Trudeau; Mr. Kevin MacLeod, Canadian secretary to the Queen, a long serving expert on state ceremonial and the position of the Crown within the Canadian state; Father Jacque Monet, historian of the Canadian Crown and advisor to governors general dating back to the time of General Vanier; Professor Rainer Knopff of the University of Calgary's department of political science, who has written extensively on public law, policy and political thought; Professor Christopher Manfredi, dean of arts at McGill University, political scientist and expert on the role of the judiciary in Canada and the United States; and lastly Dr. Christopher McCreery, private secretary to the lieutenant governor of Nova Scotia, author and historian.[5]

This *ad hoc* committee was charged with the task of developing a list of candidates for the prime minister to consider prior to selecting a name for submission to the Queen. Each member of the committee was given a mandate letter outlining their task of developing a list of candidates who met a specific set of criteria.[6] The incumbent governor general being a Francophone, by convention the successor had to be an Anglophone thereby maintaining the alternation between Canada's two official languages. The candidates had to possess strong bilingual skills, have an understanding of Canada's system of government and a respect for the Crown's position in the Canadian state/culture/society, and finally, candidates had to have gained "considerable experience through a lifetime of achievement".[7] The candidates also had to have an understanding of the constitutional duties, constraints and opportunities offered by vice-regal service.

4. The designation Governor General Expert Advisory Committee (GGEAC) was abandoned in favour of Governor General Consultation Committee in July 2010 when it was announced that David Johnston had been appointed Governor General by the Queen.
5. Prime Minister's Office, Press Release, "Governor General Consultation Committee" (11 July 2010) [Prime Minister's Office].
6. Stephen Harper to Members of the Governor General Expert Advisor Committee, 8 April 2010.
7. *Ibid.*

Following the appointment of Michaëlle Jean as Governor General in 2005, there was widespread commentary in the press, and from senior officials in Ottawa, to the effect that the appointment was a courageous one, given that she was almost completely unknown outside of Quebec. A number of different proposals had been advanced in the media and within the government, that a more measured process be developed for selecting the Queen's representative. Many of these are familiar, ranging from the *Globe and Mail*'s longstanding (until 2010) recommendation that the governor general be elected by the Companions of the Order of Canada, to more complex plans that called for the Houses of Parliament to elect the governor general, similar to the manner used by Papua New Guinea for the selection of their governor general or India's for the election of the president of the republic. The use of a loose criteria and an *ad hoc* committee to develop a short list for consideration, however, was unprecedented in the selection of a Canadian governor general.

Under the chairmanship of the secretary to the governor general, members of the committee conducted an outreach programme, contacting lieutenant governors, premiers, retired politicians, state officials, and public figures from a wide variety of fields. Each person contacted was apprised of the committee's work, and the overall criteria being used to develop the shortlist for governor general.[8] From this several hundred names were compiled and vetted against the criteria. Over the course of meetings, one in April and two in May, the list of suitable candidates was discussed and distilled – all based on the criteria outlined in the prime minister's letter, along with that of non-partisanship. While candidates could have had a political career, those who were still active in politics were disqualified. From these deliberations came a list that was submitted to the prime minister for consideration and shortly after the end of the 2010 Royal Tour of the Queen, came the announcement that David Johnston was to be appointed as the 28th governor general since Confederation.

It was the first time that such broad consultation had been used to develop a short list for vice-regal office. The appointments secretariat in the PMO had a long tradition, dating back to the Mulroney era, of developing a draft list for the prime minister's consideration – although anecdotal evidence suggests that Paul Martin's nomination of Mme. Jean came from a list with only one name. Previously lists

8. Prime Minister's Office, *supra* note 5 (the work of the committee was treated as confidential until after the announcement of the Governor General-designate).

of two, three or four names were drawn up and then vetted. This practice dated as far back as the appointment of Jules Léger, while the appointments of Massey, Vanier and Michener were all devised before the PMO appointments secretariat existed in a formal sense. As per tradition and since 1952 a single name was sent forward to the Sovereign for approbation.

In 2012 a similar process was devised for the appointment of lieutenant governors and territorial commissioners. At this point the Privy Council Office became directly involved – along with the Prime Minister's Office appointments secretariat. On 4 November the terms of reference for the Advisory Committee on Vice-Regal Appointments was announced. The non-partisan committee was being formally established to "provide the Prime Minister with non-binding recommendations on the selection of Governors General, Lieutenant Governors and Territorial Commissioners".[9] The Advisory Committee consists of;

- The Canadian Secretary to The Queen (ex officio chair)
- Two permanent members (one Anglophone and one Francophone)
- Two temporary members (in the case of lieutenant governor and territorial commissioner appointments, drawn from the jurisdiction requiring a new officeholder)
- A representative of the Prime Minister's Office as a non-voting observer

The three permanent members of the advisory committee are appointed for a term of not more than six years, with eligibility for reappointment, while temporary members are appointed for a term of not more than six months. All members of the advisory committee are appointed by the Governor-in-Council.[10] The recommendation process has three stages:

1. When a vacancy is anticipated, the Prime Minister launches a recommendation process by sending letters to members of the Advisory Committee, together with guidance on the process to be followed.

9. Prime Minister's Office, Press Release, "Terms of Reference; Advisory Committee on Vice-Regal Appointments" (4 November 2012).
10. Members of the advisory committee are appointed as "special advisor to the Prime Minister… as a member of the Advisory Committee on Vice-Regal Appointments," under the Public Service Employment Act. See the appointment of Robert Watt, LVO, Order in Council 2012-1482, 2 November 2012.

2. The Advisory Committee begins deliberations on candidates, and consults with key stakeholders. If required, the Advisory Committee meets twice per appointment. The Advisory Committee reports to the Prime Minister on the process of its deliberations as appropriate.
3. The Advisory Committee presents a report to the Prime Minister with a shortlist of proposed candidates for consideration.[11]

The permanent membership of the committee includes two members of the original governor general advisory committee, Kevin MacLeod and Jacques Monet. To this group has been added Robert Watt, formerly chief herald of Canada and a part-time citizenship judge. The regional members are required to have an intimate knowledge of the jurisdiction and are appointed to serve as the proverbial 'eyes and ears on the ground' in the province or territory in question.

Nominations are solicited much as they were in the selection process for the governor general, however unlike the governor general nomination process, the general public is also encouraged to submit formal nominations consisting of a cover letter and curriculum vitae, they are also, rather awkwardly, asked to contact the individual to ensure that they would be willing to let their name stand and would be willing to accept the position – this must undoubtedly result in some amount of lobbying on the part of those who are keen office seekers.

To date three lieutenant governors have been appointed since the establishment of the Advisory Committee: Newfoundland and Labrador, the Honourable Frank Fagan (2013); Ontario, the Honourable Elizabeth Dowdswell (2014); and New Brunswick, the Honourable Jocelyn-Roy Vinneau (2014). With lieutenant governors in Quebec, Manitoba and Alberta approaching or having surpassed the traditional period of five years in office, there will be additional appointments in the coming year. In 2015-2016 we will also likely have the appointment of a new governor general.

A review of major print media focussing on the various vice-regal appointments made since 2005 has shown that, other than the appointment of the governor general, where there was some attempt to draw an odd connection between David Johnston and Brian Mulroney, there has been an absence of discussion or revelations of the partisan backgrounds of various lieutenant governors, whereas prior

11. *Supra* note 10.

to 2005 this was the norm and unquestionably had the effect of adding a partisan hue to many appointments – this of course was enhanced on occasions when lieutenant governors would subsequently accept partisan appointments, notably the Senate.

The new process has not been without criticism. Following a gushy editorial written by Ontario committee member, John Fraser, in the *Globe and Mail*,[12] the *Toronto Star's* Christina Blizzard complained that an advisory committee made up of "dry academics" will inevitably result in the Crown being "viewed as an elitist, out-of touch institution".[13] Blizzard is a self-professed supporter of the Crown and the role discharged by the office and person of the lieutenant governor. Her main concern seems to not be in relation to the process, but rather the possibility that the committee is predisposed to selecting elitist functionaries as a method of "rewarding end-of-career bureaucrats with a limo, a plus suite at Queen's Park and a free trip to Buckingham Palace".[14] Such views are not unique, and illustrate the great delicacy with which members of the Advisory Committee and those who are selected to serve in vice-regal office must be selected.

The non-partisan nature of almost all vice-regal appointments made since 2006 is likely to continue under the Advisory Committee on Vice-Regal Appointments model. From 1988-2005, 72 percent of appointments were given to former politicians or senior party officials, while such appointments made in the succeeding period have dropped to a mere 7%.[15] The cohort is small and the period elapsed is not yet a decade so it may be premature to proclaim an end to partisan appointments; however, it does signal a significant change – in the nature of the individuals filling vice-regal office. This dovetails nicely with the somewhat expanded role that the lieutenant governors have carved out over the past forty years. The role, having expanded from unic like federal officers to that of "promoter-in-chief" of each province has helped to raise the profile of the Crown in each jurisdiction well beyond the simple discharge of constitutional duties.[16]

12. John Fraser, "How Elizabeth Dowdswell became Ontario's lieutenant-governor", *Globe and Mail* (23 September 2014).
13. Christina Blizzard, "Dowdswell's selection process spells doom for monarchy in Canada", *Toronto Star* (24 September 2014).
14. *Ibid.*
15. Christopher McCreery, "The Provincial Crown: The Lieutenant Governor's Expanding Role", in D Michael Jackson and Philippe Lagassé, eds, *Canada and the Crown: Essays on Constitutional Monarchy* (Montreal: McGill-Queen's University Press, 2013)[McCreery].
16. *Ibid*.

Involvement in presenting honours, awards, swearing-in new citizens and fostering voluntary service while reaching out to both traditional constituents and marginalized communities has transformed the various offices. The increased level of accessibility and openness has played a significant role in changing the way the various vice-regal offices function and are viewed.

Although it is too early to declare the permanence of this process, it does demonstrate that a level of flexibility can be added to the method by which individuals are considered for vice-regal office. Given that this author was involved in the first iteration of this new method, in the selection of a governor general, an overall assessment of the process and the calibre of officeholders is far more suited to a more distant scholarly examination following a more lengthy passage of time.

As significant an achievement as the Advisory Committee on Vice-Regal Appointments is, the true innovation has come in the non-partisan selection of lieutenant governors. The long held, and largely accurate view of the position of vice-regals as little more than patronage sinecure holders – dating from Confederation into the 1970s – is being further eroded, thereby enhancing the position of the lieutenant governor and indeed also the governor general.

SECRETARY TO THE GOVERNOR GENERAL

The secretary to the governor general may seem a peripheral topic in relation to the Crown's place in the Constitution; however, the secretary's role has undergone a recent elevation – well beyond even the wildest imagination of any Victorian constitutional framer. The position and office of the secretary to the governor is one of the oldest in the land. It is one of the first public service posts, dating back to 1604 and the arrival of the first governor of Acadia, Pierre du Gua du Monts.[17] This first Governor brought with him a private secretary, Jean Ralluau, and for the past four centuries successive governors have been served by a person in this position.[18]

There have been ebbs and flows to the authority of the secretary that rose significantly as the centralization of colonial government took place in British North America, and then declined rapidly with

17. George MacBeath, *Dictionary of Canadian Biography*, Volume I: 1000 to 1700 (Toronto: University of Toronto Press, 1966), *sub verbo* "Jean Ralluau".
18. McCreery, *supra* note 15.

the achievement of Responsible Government.[19] Following Confederation the role of the secretary was limited largely to administering the vice-regal household and ensuring that the governor general was well informed of the political and social goings on in Ottawa and the provincial capitals.[20] Over the past five decades the role has grown to include responsibility for administration of the Canadian honours system (1972) and more recently responsibility for the Canadian Heraldic Authority (1988). While these functions encompass important symbolic elements of the Canadian state they are just that – symbolic – and the secretary's role is to support the governor general who is ultimately responsible for the honours system and the heraldic authority. Certainly these functions relate to the royal prerogative; however they are not of the kind that are likely to bring the secretary into conflict with ministers or require serious consideration of the application of unwritten constitutional conventions governing the exercise of executive authority. In 2011 the secretary's role, as deputy of the governor general, was broadened in an unprecedented manner to include:

> all the powers authorities and functions vested in and of right exercisable by me as Governor General, saving and excepting the powers of dissolving, recalling or proroguing the Parliament of Canada, or appointing members of the Ministry and of signifying Royal Assent in Parliament assembled.[21]

This much expanded commission as a deputy of the governor general (deputy) permits the secretary to grant Royal Assent by written declaration, authorize orders-in-council, and other statutory and non-statutory instruments, in addition to the previous longstanding authorization to sign warrants, letters patent and commissions. It also permits the secretary to sign a declaration of war, authorize the use of military force or to issue proclamations, including of the *Emergency Act* (formerly the *War Measures Act*).[22] Of all the Queen's realms,

19. J E Hodgetts, *Pioneer Public Service: An Administrative History of the United Canadas, 1841-1867* (Toronto: University of Toronto Press, 1955) at 78.
20. Sir A F Lascelles, *Government House Green Book* (Ottawa: King's Printer, 1934) at 17-18.
21. See commission constituting Stephen Wallace, Secretary to the Governor General and Herald Chancellor, Deputy of the Governor General, to do in His Excellency's name all acts on his part necessary to be done during His Excellency's pleasure; *Debates of the Senate*, 41st Parl, 1st Sess, Vol 148 (15 December 2011) (Hon Noël A Kinsella), (the authority of the secretary to the governor general as deputy of the governor general to grant Royal Assent was first exercised on 15 March 2011, when Wallace granted assent to Bill C-33, *An Act to provide for the resumption of air service operations*, http://publications.gc.ca/site/eng/396875/publication.html.
22. *Emergency Management Act*, SC 2007, c 15; *The War Measures Act, 1914*, (5 Geo), c 2.

Canada at the federal level is the only jurisdiction where such extensive authority is now vested in the chief administrator responsible for the governor's household and programme. In no other realm or subjurisdiction appertaining – the Canadian provinces or the Australian states – has the role of the secretary been so significantly enhanced.

To understand the secretary's increased role we must first examine the position of the deputies of the governor general and that of the administrator. The *Constitution Act, 1867* empowers the Queen to authorize the governor general to appoint a "deputy or deputies…, and in that capacity to exercise during the pleasure of the governor general such of the powers, authorities, and functions of the governor general as the governor general deems it necessary or expedient to assign to him or them, subject to any limitations or directions expressed or given".[23] Article VII of the *Letters Patent Constituting the Office of the Governor General, 1947* grants the governor general the ability to appoint deputies. Prior to Confederation, senior officials in the Executive Council Offices and Provincial Secretary's Offices, what would later be partly transformed into the Privy Council Office (PCO), were appointed as deputies for signing money warrants, this practice was continued with the same officials reappointed as deputies following the establishment of the PCO in the post-Confederation period.[24] Provincial Lieutenant Governors were similarly appointed as deputies for the purpose of authorizing marriage licenses and administering oaths.

It is worth recounting the difference between the administrator of the government of Canada and a deputy of the governor general. The administrator is endowed with all the powers and authority of the governor general and is only on duty during periods when the governor general is out of the country for more than 30 days, or in the event of the governor general's death, incapacity or removal.[25] Unlike the deputies of the governor general, the administrator is sworn in each time they commence acting in the governor general's stead, and they are entitled to all the privileges and honours of the governor general. Deputies of the governor general exercise a narrower scope of authority than the administrator or the governor general and are not required to be sworn in on each occasion when they commence

23. *Constitution Act, supra* note 1 at s 14.
24. See *Canada Gazette* entries for 7 October 1865, 15 December 1866.
25. Henry F Davis & André Millar, *Manual of Official Procedure of the Government of Canada*, Vol 1 Administrator (Ottawa: Government of Canada, 1968) at 213 [Davis & Millar].

acting as a deputy of the governor general. Justices of the Supreme Court may act variously as administrators (in the event of the death or incapacity of the chief justice), or as deputies of the governor general.

Following the establishment of the Supreme Court of Canada in 1875, the Chief Justice, W.B. Richards, was appointed as a deputy[26] with the specific purpose of fulfilling the governor general's duties during brief periods of absence or illness, rather than defaulting to the administrator as had been the practice prior to 1875 and in the pre-Confederation period. This was quite different role from that of the other deputies as they served as signatories for minor classes of documents, whereas the Chief Justice's role as deputy was much wider in scope. The role of the administrator up to 1905 was discharged by the General-Officer-Commanding the regular British Army stationed in Canada, a British general.[27] By the time Sir John Young (Lord Lisgar) was appointed as governor general, the Royal Instructions that constituted his appointment were amended to allow for the governor general, rather than the Queen, to make the appointment of deputies.[28] In Australia, New Zealand and later the Union of South Africa and other jurisdictions, this model was emulated and the governor general had the power to appoint deputies who were used for "minor or ceremonial duties".[29]

---

26. *Canada Gazette*, 5 August 1876, also see *Canada Gazette*, 14 February 1879, appointment of the Honourable William Johnston Ritche, Chief Justice of the Supreme Court of Canada, to be deputy of the governor general.
27. It is noteworthy that the Governor General designate, if *in situ*, was commissioned as the administrator of the government of Canada in advance of his installation as governor general. This was the case for Sir John Young in the period preceding the departure of Viscount Monck in 1868.
28. Commission Appointing Sir John Young to be Governor General, 29 December 1868, section VIII "it is amongst other things Enacted, that it shall be lawful for Us, if We think fit, to authorize the Governor General of Canada to Appoint Any Persons jointly or severally to be his Deputy or Deputies within any Part of Parts of Canada, and in that capacity to Exercise, during Pleasure of the Governor-General, such of the Powers, Authorities, and Functions of the Governor-General as he may deem it necessary or expedient to assign to him or them, subject to any Limitations or Directions from time to time expressed or given by Us. Now We do hereby Authorize and Empower You, Subject to such Limitations and Directions as aforesaid, to appoint any Person or Persons, jointly or severally, to be your Deputy or Deputies within any Part or Parts of Our Dominion of Canada, and in that capacity, to Exercise, during Your Pleasures, such of Your Powers, Functions and Authorities as you may deem it necessary or expedient to assign to him or them. Provided always, that the Appointment of such a Deputy or Deputies shall not affect the Exercise of any Such Power Authority of Function by you, the Said Sir John Young in Person."
29. Arthur Berridale Keith, *Responsible Government in the Dominions*, (Oxford: Clarendon Press, 1928) at 74.

The reason behind this delegation of authority was twofold; firstly to alleviate the administrative burden placed on the governor general in having to sign a copious number of documents, most of marginal importance. Thousands of land grants, minor commissions and tens of thousands of marriages did not warrant the personal review of the Sovereign's representative.[30] The second reason was to provide for an officer to act in the place of the governor general when he was ill, incapacitated or absent for brief periods of time. Dealing with the inability of the governor general to act over short periods of time, rather than periods of more than thirty days of absence when an administrator would assume the responsibilities, was a regular requirement, especially when the governor general was travelling throughout the country and communication with Ottawa was not always guaranteed.

In 1878, when Lord Dufferin was in the midst of challenging negotiation with the Colonial Secretary Lord Carnarvon over the development of standardized *Letters Patent Constituting the Office of the Governor General* and *Royal Instructions*, an early version of the new document failed to include reference to the governor general's ability to appoint deputies. This concerned Dufferin, who requested of his superior in London that the authority be retained in the new set of *Royal Instructions* to allow for the appointment of deputies. Dufferin noted that, "in practice the Governor-General has for years past appointed, on assuming office, deputies, who act in certain matters with which it would be inconvenient for the Governor to deal personally, for example, the signing of money warrants".[31] Having made the case for retaining the provision in the Royal Instructions, provision for the governor general to appoint various deputies remained an integral part of the governor general's authority.

The next significant amendment to the *Letters Patent* and *Royal Instruction* came in 1905 and brought about a number of signal changes, notably the removal of the role of the General-Officer-Commanding the British military in Canada as Commander-in-Chief and default administrator of the government of Canada. The result was the governor general becoming commander-in-chief and the chief justice of the Supreme Court becoming the default administrator of the govern-

30. Statistics Canada, *Vital Statistics: Number of marriages and rate, average age at marriage of brides and bridegrooms, number of divorces, net family formation, Canada, 1921-1974*, vol 1 (Ottawa: Statscan, 1974) at B75 (to get a general idea of the enormity of the documents requiring attention, in 1921, the first year national statistics were retained on the number of marriages undertaken, there were 71,254 marriages).

31. Confidential Memorandum from Lord Dufferin to Lord Carnarvon (21 April 1876) in *Correspondence on the subject of the revision of the Royal Instructions to the Governor General of Canada*, Colonial Office (5 May 1879).

ment – to act as governor general in the absence of the person holding that office.[32] Along with this change came the appointment of an official in the office of the governor general to serve as a deputy. The chief clerk in the office of the governor general, and no longer a senior official in the PCO, was appointed as a deputy, with authority to sign "warrants of election, proclamations, writs for the election of members of the House of Commons, and Letters Patent of Dominion and other lands".[33]

With the delegation of authority to a civil servant on the governor general's permanent staff, a differentiation began to be made between the designations Deputy Governor General/Deputy of the Governor General and the Governor General's Deputy. The latter phrase has historically been used to describe the Chief Justice and puisne judges of the Supreme Court who were commissioned to act, with broad scope of authority, in the stead of the governor general; while the former described those who were authorized only to sign certain classes of documents. While the differentiation is noted as being "without legal foundation",[34] it reveals that the judges appointed as deputies were treated as much more surrogates of the governor general than the civil servant appointed as a deputy.

Beginning in 1905, various civil servants in the office of the secretary to the governor general have served as deputies of the governor general for the purpose of signing various documents and commissions of the narrow scope previously referenced. In this capacity the role was in essence an extension of the vice-regal signature for documents of minor or modest importance. This changed in 2011 when the secretary to the governor general was entrusted with "all the powers, authorities and functions" except the ability to grant royal assent to bills in Parliament, dissolve, recall or prorogue Parliament or appointing members of the Ministry. It is interesting to note that the wording of the commission issued to the secretary to the governor general to serve as a deputy differs slightly temperately from the commissions granted to justices of the Supreme Court of Canada, in that the justices are only limited from "the power of dissolving the Parliament of Canada".[35] In their role as deputies of the governor general, justices

32. The provision in the Instructions given to Governors General since 1868 allowing for the appointment of a *Lieutenant Governor of the Dominion of Canada*, were never acted upon.
33. *Canada Gazette*, 7 January 1905. Appointment of Charles J. Jones, Chief Clerk in the Governor General's Office to be the Deputy of His Excellency.
34. Davis & Millar, *supra* note 32 at 210.
35. *Debates of the Senate*, 36th Parl, 2nd Sess, No 84 (20 October 2000) (Hon Gildas L Molgat).

of the Supreme Court are able to recall or prorogue Parliament and appoint members of the Ministry. The secretary is able to grant Royal Assent through written declaration; however, unlike the justices of the Supreme Court, the secretary cannot preside over a Royal Assent ceremony before Parliament assembled, recall or prorogue Parliament.[36] This newly granted authority was first exercised on 15 March 2011, when the secretary, Mr. Stephen Wallace, granted assent to *An Act to Provide for the Resumption of Air Service Operations*.[37]

The reason for this change is not yet clear, however it seems closely linked to the discomfort that a number of justices of the Supreme Court, who are all commissioned to act as deputies of the governor general, have had over the past decade in relation to their exercise of executive authority on behalf of the Crown's representative. A fear has been intimated, despite the perfunctory nature of granting Royal Assent, that by granting assent, their impartiality and independence as members of the highest court of the land could be impugned by litigants appearing before the Supreme Court – especially in the event a case arises in relation to a bill to which a justice has granted Royal Assent or a regulation they have authorized in their capacity as a deputy. As far back as the First World War, justices have expressed concern about the expectation that they would simply sanction approbate every state document placed before them in their capacity as deputy of the governor general, without a proper briefing.[38]

This concern has also been raised in other comparable jurisdictions, notably Australia during the tenure of Murray Gleeson as Chief Justice of the High Court of Australia. Gleeson's fear of polluting judicial impartiality with the exercise of executive function resulted in his refusal to serve as chair of the advisory council of the Order of Australia, which advises the executive on who should receive Australia's highest honour for lifetime achievement.[39] Gleeson had

36. *Royal Assent Act*, SC 2002, c 15 (allows for assent to be granted via written declaration, as opposed to the previous format whereby it could only be signified "in Parliament assembled." Assent granted by written declaration must be done in the presence of more than one member of each House of Parliament. There is a further requirement that assent be granted in Parliament assembled at least twice a calendar year.)
37. Bill C-33, *An Act to Provide for the Resumption of Air Service Operations*, 1st Sess, 41st Parl, 2011 (first reading 12 March 2012).
38. Sir Joseph Pope, *Public Servant: The Memoir of Sir Joseph Pope* (Toronto: Oxford University Press, 1960) at 249 [Pope].
39. It is worth noting that when the Order of Australia was established in 1975 the constitution, overall structure and advisory council were based entirely on the Order of Canada, which had been established in 1967.

no fundamental disagreement with honours – he was already a Companion of the Order of Australia – however, he was gravely concerned that his involvement in the Advisory Council could be perceived as compromising the independence of the High Court from the executive. Gleeson, a passionate defender of judicial independence, noted:

> What is at stake is not some personal or corporate privilege of judicial officers; it is the rights of citizens to have their potential criminal liability, or their civil disputes, judged by an independent tribunal. The distinction is vital. Independence is not a prerequisite of judicial office; the independence of judicial officers is a right of the citizens over whom they exercise control.[40]

As a result of Gleeson's objections, the *Constitution of the Order of Australia* was amended in 1996, removing the chief justice of the High Court as chair of the advisory council and from the advisory council of the Order of Australia altogether.

The role of judges as *ersatz* governors dates back to the period preceding Responsible Government, when chief justices would often sit as members of the Executive Council and fill in for governors when they were travelling back to Britain, or when they had come to an untimely end and there was a vacuum of executive authority. As the independence of the judiciary, and the necessity for the courts to be seen as functionally separate from the executive has grown, especially since the advent of the *Canadian Charter of Rights and Freedoms*, the need has grown to insulate members of the judiciary from the potential – even if incorrect – perception that they are somehow responsible for the creation of laws.

Details outlining how often the Secretary acts as the governor general's deputy in signing orders-in-council and other instruments are not publicly known, nor would it be an easy dataset to compile. Nevertheless, given the public nature of Royal Assent, we have an exact knowledge of how often the secretary has been exercising the newly expanded powers held as a deputy of the governor general.[41] If we examine the method by which Royal Assent has been granted since the promulgation of the *Royal Assent Act*, 2002, which requires that "Royal Assent be signified in Parliament assembled at least twice in each calendar year",[42] and allows for the granting of Royal Assent

40. Murray Gleeson, *Embracing Independence*, (Paper, delivered at the Local Courts of New South Wales Annual Conference, Sydney, 2 July 2008).
41. All grants of Royal Assent and the individual granting assent have been recorded in the *Journals of the Senate* since 1867.
42. *Supra* note 36 at s 3(1).

by written declaration, a pattern is revealed that sees the role of the deputy once fulfilled by the justices of the Supreme Court, has been by and large transferred to the secretary to the governor general – at least as it relates to the granting of Royal Assent. We have only conjecture to offer evidence that this transformation has also extended the frequency with which justices of the Supreme Court and the secretary are called upon to act as deputy of the governor general in relation to signing orders-in-council and other significant instruments of advice or appointment.

Since the secretary to the governor general was given the authority to grant Royal Assent in 2011, he has granted assent 22% of the occasions in the period 2011-2014. Over this same period, the frequency with which justices of the Supreme Court have granted assent by written declaration has declined by 50% over the previous 48 month period, 2007-2010. The governor general's granting of Royal Assent by written declaration has declined by a modest 11%. These figures reveal that the secretary is not being used as a stopgap for when the governor general or justices of the Supreme Court are unavailable, but rather that the secretary has begun to supplant the role of the justices of the Supreme Court as the principal deputy.

Table 1.1 Royal Assent, 2003-2014[43]

Method and person granting Royal Assent	**2003-2006** *(n=34)*	**2007-2010** *(n=42)*	**2011-2014**† *(n=22)*
In Senate chamber by the governor general	5 (15%)	9 (21%)	6 (27%)
In Senate chamber by a justice of the Supreme Court	2 (6%)	3 (7%)	1 (5%)
Written declaration by the governor general	15 (44%)	18 (43%)	7 (32%)
Written declaration by a justice of the Supreme Court	12 (35%)	12 (29%)	3 (14%)
Written declaration by the secretary	–	–	5 (22%)
TOTAL by written declaration	**79%**	**72%**	**68%**

† It was only in 2011 that the secretary to the governor general was granted authorization to grant Royal assent.

43. *Journals of the Senate of Canada*, 2003-2014.

The fact that the secretary is only able to grant Royal Assent by written declaration and not in front of Parliament seems to be an attempt to preserve some of the theatre surrounding the actual Royal Assent ceremony which takes place in the Senate – as if to save parliamentarians the spectacle of a deputy minister *cum* viceroy transforming bills into the law of the land. This is especially true given that the actual Royal Assent ceremony in Canada – both federally and provincially – is unique to Canada. Such ceremonies and symbols "reflect the whole government, culture and tradition".[44]

So why does it matter what official, other than the governor general, grants Royal Assent? The granting of Royal Assent is something that in Canada's post-Confederation constitutional history has only been refused in the provinces[45] – however there remain hypothetical reasons why a governor general might be called upon to refuse assent to a bill on the advice of the Cabinet.[46] One example would be were there some serious legal flaw with legislation passed through both houses. Although rare, significant legal problems have been found in legislation that has made its way through both houses. The recent example of Bill C-479, *An Act to amend the Corrections and Conditional Release Act (fairness for victims)*,[47] is one such instance. Had the bill made it through third reading in the Senate before the problems had been identified refusal of Royal Assent by the governor general would have been a tool for preventing a flawed piece of legislation from becoming law.[48] In the case of the aforementioned Bill the legal error was spotted following second reading in the Senate at the committee stage. Eugene Forsey devised another hypothetical scenario where assent could be refused, however it no longer applies.[49]

---

44. Frank MacKinnon, *The Crown in Canada* (Calgary: McClelland and Stewart West, 1977) at 116.
45. McCreery, *supra* note 15 at 115 (Royal Assent was refused on 38 occasions in the provinces between 1870 and 1945).
46. Heard, *supra* note 3 at 37.
47. Bill C-479, *An Act to amend the Corrections and Conditional Release Act (fairness for victims)*, 2nd Sess, 41st Parl, 2013, (Reinstated from previous session 16 October 2013); see also Sean Fine "Serious Error Found in Second Tory Crime Bill", *The Globe and Mail* (5 September 2014).
48. Senate, *Journals of the Senate*, 41st Parl, 2nd Sess, No 80, (25 September 2014) (on 25 September 2014 the Senate adopted the following motion, "That Bill C-479, *An Act to amend the Corrections and Conditional Release Act (fairness for victims)*, be withdrawn from the Standing Senate Committee on Legal and Constitutional Affairs and that all proceedings on the bill to date be declared null and void").
49. In 1973 Eugene Forsey speculated that Royal Assent could be rightly refused "if the Assembly passed a bill prolonging its own life for more than a comparatively short time, in the teeth of furious opposition protests." Of course this theoretical situation was created in the context of a province and not at the federal level. In

Such circumstances are extraordinary but not impossible. The granting of Royal Assent and approbating orders-in-council require a governor general, or designate, who can evaluate whether or not an exceptional circumstance requires a different outcome, and furthermore requires a vice-regal who feels he or she can encourage, warn and seek additional information. There is also the additional tool of delay, which could be used in the face of dramatically shifting events or a rapidly changing dynamic in Parliament. What is of greater concern is not that the secretary is granting Royal Assent – which is almost entirely perfunctory – but that the secretary is approbating orders-in-council and other statutory and non-statutory instruments where, from time to time the careful eye of a governor general has requested reconsideration of a matter.[50] This aspect of the vice-regal role cannot effectively be discharged by an official who does not have the security of tenure of the governor general or the justices of the Supreme Court.

The symbolic issue is the more semantic, yet it is of importance in the context of the spectacle of the state's authority and the Crown as the locus of authority. To reduce the granting of assent to nothing more than an obligatory signature placed onto the paper by a civil servant in the privacy of his office is not befitting the solemnity and significance of the act of law-making. The more symbolic elements aside, who grants Royal Assent, is the more minor element of the secretary's empowerment to act with such sweeping authority – it is, however, at present the only quantifiable indication of how frequently the secretary is acting on the governor general's behalf in other matters of State. The most problematic aspect of this new arrangement is the secretary's ability to authorize orders-in-council, statutory and non-statutory instruments of all type, without the independence, and job security of a governor general or a justice of the Supreme Court. Smith notes the importance of the real and perceived neutrality displayed by a governor general and the justices of the Supreme Court,[51] this is not a cloak that can be adopted by someone who is a career public servant in anywhere near the same manner as the senior most actors in the Canadian state. As noted there are occasions when governors have asked their ministers to reconsider or redraft orders-in-council

any case both jurisdictions are now protected from such an occurrence by section 4 of the *Constitution Act, 1982*. See, Eugene Forsey, *Notes on the Constitutional Position and Powers of the Lieutenant Governor*, 1973, 7.

50. D Michael Jackson, *The Crown and Canadian Federalism* (Toronto: Dundurn Press, 2013) at 59.
51. David E Smith, *The Invisible Crown: The First Principles of Canadian Government* (Toronto: University of Toronto Press, 1995) at 129.

and other instruments. Equally there are occasions when governors have requested a briefing on contentious orders-in-council and other decisions that are requested of the Governor-in-Council. This was the case in 1970 when Governor General Roland Michener was requested to sign an order-in-council authorizing the proclamation of the *War Measures Act*. The secretary to the Governor General, Esmond Butler informed the Clerk of the Privy Council, Gordon Robertson, that in the event of an emergency, Michener would expect a briefing.[52] It was a day later, very early in the morning that Michener was asked to sign the order.[53] Here we have an example of the Crown's representative exercising their right to be consulted, to encourage and to warn. It also serves as a reminder that the governor general's authority to request additional information and background on an issue he or she is asked to deliberate on has been a constant throughout our constitutional history.[54] The station and person of the governor general or a justice of the Supreme Court naturally place them in a position to be able to make such demands – placing such an onerous responsibility onto the shoulders of a civil servant, in the person of the secretary to the governor general, deprives the Crown of an effective and independent conduit through which to offer consideration of the government's decisions. We should not forget that the secretary is a civil servant and deputy minister – void of independence or security of tenure, subject to the same influences and pressures of any senior bureaucrat.[55] Unlike a governor general or a justice of the Supreme Court, the secretary to the governor general can be removed, promoted or replaced with alacrity and little public notice; the position has hitherto been that of an administrator and not senior state officeholder.

If we re-examine the most likely reason for the secretary being granted such extensive authority to act as a deputy of the governor general – to mitigate the fear of some justices of the Supreme Court that their judicial independence could potentially be perceived to be impugned by their participation in various executive acts in their role

52. LAC, MG-31 E80, Vol 15, file 17, Papers of Esmond Butler
53. Gordon Robertson, *Memoirs of a Very Civil Servant: Mackenzie King to Pierre Trudeau* (Toronto: University of Toronto Press, 2000), at 263. Peter Stursberg, *Roland Michener: The Last Viceroy* (Toronto: McGraw-Hill Ryerson, 1989) at 198.
54. Pope, *supra* note 38 at 272 (*reference* to Aberdeen declining to "approve a minute of Privy Council until he had seen some correspondence relating thereto".)
55. The Secretary to the Governor General is a Governor-in-Council appointment, made at pleasure on agreement between the governor general and prime minister. Most office holders have emanated from the deputy minister rank, some have come to the office with little understanding of the constitution or legal role of the governor general.

as deputies of the governor general – then certainly a more constitutionally sound, independent, if slightly more complicated alternative should be considered. Be it the appointment of a retired justice of the Supreme Court or Federal Courts, or senior "statesman" Privy Councillor who is resident in Ottawa as a deputy or the resurrection of the original Confederation period plan to appoint a *Lieutenant Governor of the Dominion of Canada*, as exists in the Australian States and other jurisdictions throughout the Commonwealth. The appointment of a federal lieutenant governor could supplant the need for justices of the Supreme Court or the secretary to the governor general having to act as deputies. Restoring the position of lieutenant governor in the federal sphere would require an amendment to the *Letters Patent Constituting the Office of the Governor General*, however appointing persons other than members of the Supreme Court of Canada or staff of the office of the secretary to the governor general would require no such change as there are no limitations on who may be appointed as a deputy of the governor general. If having orders-in-council, statutory and non-statutory instruments signed in a timely manner is also an element of the perceived problem, there are an abundance of remedies. British Columbia has devised a unique electronic method to cope with the absence of the lieutenant governor from the capital – they allow the lieutenant governor to sign documents in an encrypted and secure format while away from Victoria, with safeguards in place to ensure that such a system cannot be misused. This has been used for countless orders-in-council. The Queen's red dispatch boxes are transported around the world and the Canadian Armed Forces has secure communications capable of deployment anywhere on earth – the capability certainly exists to reach the governor general wherever he or she is. While touring the far reaches of the Dominion, Lord Aberdeen managed to have orders-in-council delivered to him while in British Columbia, and this was more than a century ago in an era nearly devoid of electronic communication beyond the telegraph.[56] One has to question why it is possible for the governor general to personally sign 60,000 of the Queen Elizabeth II Diamond Jubilee Medal certificates in one year, yet not be capable of signing a much smaller number of orders-in-council. The governor general certainly has the ability and willingness to fulfil his role. It could hardly be claimed that it is inconvenient to trespass upon the governor's time. In Canada officials in the Privy Council Office have historically been quick to extoll what is best described as the "theory of delay and

56. Pope, *supra* note 38 at 271.

inconvenience"[57] and speak for the governor's time without actually consulting the person in question – invariably to streamline their workload, even if such economies are achieved at the expense of the Crown's representative.[58] Given the principal role of the governor general is to ensure the discharge of his constitutional duties; it is highly unlikely that the desire to delegate down the chain, the duties of the governor general, has emanated from the officeholder himself.

The empowerment of the secretary to act as viceroy is unique in the Commonwealth. Even in colonial times secretaries to governors were not endowed with such authority – at the best they could read the riot act or proclamations before angry crowds. This very recent change is not required in order to address the problems to which it ostensibly responds. It does, however, undermine the exercise of the prerogative powers and therefore requires reconsideration.

57. Christopher McCreery, "Myth and Misunderstanding: The Origins and Meaning of the Letters Patent Constituting the Office of the Governor General" in Jennifer Smith and D Michael Jackson, eds, *The Evolving Canadian Crown* (Montreal: McGill-Queen's University Press, 2012) at 45 (the "theory of delay and inconvenience" is that the submission of matters to the Sovereign or her representative will invariably result in a delay and cause inconvenience to not only the government of Canada, but also to the Queen or the governor general).
58. *Ibid*.