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"The Crown in a Democracy" Revisited

Twenty-five years ago, the *Dalhousie Review* published an essay by Professor Frank MacKinnon entitled "The Crown in a Democracy." This essay quickly became something of a classic in Canadian political science. It is now read by many, if not most, students of Canadian government, usually as reprinted in Paul Fox's popular anthology *Politics: Canada*. MacKinnon later developed the ideas presented in his essay into a book-length study of the same topic entitled *The Crown in Canada*. Taken together, these two works constitute a passionate and unabashedly partisan defence of the monarchy as a Canadian political institution.

In 1994, on the twenty-fifth anniversary of the original *Dalhousie Review* essay, political developments have made it necessary to return to Professor MacKinnon's arguments. Australian prime minister Paul Keating favors abolishing his country's ties to the Crown and has promised to put the issue to a vote in a binding referendum by 1995. A recent poll indicates that a majority of Canadians now believe that Canada, too, should "move to abolish its formal constitutional connection with the monarchy" (Usher 20). (This majority appears to include even Canada's Girl Guides, who recently opted to drop their traditional oath of allegiance to the Queen.) If Keating's anti-monarchist forces carry the day in Australia, or if Canada's constitution is once again reopened for negotiation, it is distinctly possible that Canadians will soon be debating the same question as their Australian cousins.¹

Should this come to pass, it is likely that the issue will be debated in predictable, and somewhat superficial, terms: the Crown's defenders will speak of the value of "tradition" and abolitionists will talk about the need to "keep up with the times." Despite its obviously partisan character, MacKinnon's work is of value because he steers the debate toward more useful questions, the questions posed by political science: What institutional role does the monarchy play? What does it contribute to the operation of free self-government in Canada? Are there alternative institutions which might serve the same function? Would they be as effective? Responsible reflection on the future of the monarchy in Canada must come to grips with these questions and, in particular, MacKinnon's answers to them.

In this paper I would like to restate, and then re-examine MacKinnon's case for the monarchy. I would also like to consider the merits and defects of the possible alternatives to that institution. Before turning to either of these tasks, however, it is necessary to begin by correcting a popular misunderstanding about the role of the Crown in our political regime.

I. The Need for a Separate Head of State

The simplest way to describe the role of the monarchy is to say that the Queen is our formal head of state. To many Canadians, this means that she and her representatives, the Governor General and the lieutenant-governors, are mere figureheads whose presence or absence makes no difference to the operation of our political system. This view is simply wrong. In what we Canadians call "responsible government," it is essential to have a formal head of state who is not herself a member of the government but who takes on the ultimate responsibility for ensuring that we have a government. The reasons for this are somewhat complicated, but must be properly understood if the debate about the future of the Crown is to be at all fruitful.

One of the key ideas in the theory of responsible government is that the legislative and executive branches of government should co-operate with each other. In order to ensure such co-operation, we stipulate that the executive must be "responsible" to the legislative branch; that is, it may continue in office only as long as it enjoys the "confidence" of a majority of members of the House of Commons. All of this is in marked

contrast to the American system which seeks to keep the two branches distinct in order that each may compete with, and ultimately serve as a check on, the other.

Because the Americans have opted for a "separation" of legislative and executive powers, they can arrange to elect the officers of each branch directly. Should one branch go to the Republicans while the other goes to the Democrats, it makes no difference, since each operates independently of the other. In responsible government, on the other hand, our insistence on co-operation between the two branches means that only one can be directly elected. This is because institutions designed for co-operative operation will not work if they are staffed by political enemies (for instance, a Conservative government and a Liberal House of Commons). Canadians therefore do not elect their governments. They elect only members of the national legislative body, Parliament. The choice of government is actually left in the hands of the head of state who will summon as prime minister the person who seems most likely to be able to put together a government capable of maintaining the confidence of the House.

In most cases, this choice is an obvious one. After the parliamentary elections of 1984, for example, Prime Minister Turner realized he would no longer have the confidence of the House of Commons and promptly resigned. Governor General Sauvé then named Brian Mulroney prime minister because Mr. Mulroney—whose party now commanded a large majority of the seats in the House of Commons—was obviously the person most likely to have the confidence of the House.

Because Canadian electoral politics have traditionally been dominated by two main parties, every election has produced an equally obvious choice. This is why Canadians might be excused for thinking that they actually elect their prime ministers. Now that there are five major parties on the electoral scene, however, it is possible that future elections may not produce an obvious choice for prime minister. What would happen if each of the five parties obtained around 20 per cent of the seats in the House of Commons? Who would be prime minister? Who would have the right to form a government? In such a situation, the ultimate decision would be in the hands of the Governor General, who on his or her own authority might have to decide whether Canada's government would be

formed by the Liberals, the Conservatives, the NDP, the Bloc Québécois, or the Reform Party.

Such a scenario is not unrealistic. The Republic of Italy, which is also based on the principle of responsible government, underwent just such an experience in the 1980s. In 1987 it became evident that nobody was able to command the confidence of a majority of members of Italy's badly divided parliament. Elections were therefore called, but the new parliament that resulted was not much different from the old one. The two most likely candidates for prime minister were Ciriaco de Mita, leader of the Christian Democratic Party, and Benito Craxi, leader of the Socialists. Each leader made it clear that he would never accept that the other should be prime minister. The Italian head of state, President Francesco Cossiga, resolved the matter by naming as prime minister a relatively junior member of de Mita's party, Giovanni Gorla.

In a regime based on the principle of responsible government, then, it is absolutely essential to have a formal head of state who is not a member of the government but who has the powers to ensure that we have a functioning government.² The debate about the future of the monarchy is therefore not a question of whether we should continue to have a formal head of state, but whether that formal head of state should be the Queen or someone else. This is the question that Professor MacKinnon addresses in his writings on the Crown.

II. MacKinnon's Case for the Crown

MacKinnon advances a number of reasons why it is advantageous to have the Queen as our head of state rather than some other person, but most of those reasons can be tied to a single, central theme: the monarchy protects democratic self-government by serving as a check on those who exercise political power—the Prime Minister and cabinet.

In a system of responsible government, the Prime Minister and cabinet have tremendous political power. As was mentioned above, in an American-style regime executive and legislative power are placed in different hands so that each may check the other. A president will be unable to persuade Congress to adopt legislation that it regards as foolish and a reckless or ambitious congress will find its projects blocked by presidential vetoes. In our system of responsible government, however, we entrust the Prime Minister and cabinet with both executive and

legislative power. This means that once they decide they want to do something, it is virtually impossible to stop them, at least until the next election. It is therefore not surprising if Canadian governments are frequently accused of arrogant or even autocratic behavior.

To be sure, we have a number of institutions which serve to minimize such behavior—question period, the press, opposition days in the House of Commons, and so on. MacKinnon's point is that the Crown constitutes a powerful, and perhaps even indispensable, supplement to these institutions. Having the Queen as our head of state helps keep our politicians in line in two ways.

Firstly, MacKinnon argues that when the head of state is a monarch, the entire constitutional order can be arranged so as to make the Crown the symbolic seat of power. The government is then cast in the role of mere "trustee" of political power that actually belongs to the Crown. This is a useful practice because it serves as a constant reminder to those who run the country that they do not possess political power, but merely wield it on a temporary basis on behalf of others.

The Canadian constitution thus stipulates that executive power belongs not to the Prime Minister and cabinet, but to the Queen (Constitution Act s.9). This means that in legal or constitutional terms, every executive decision taken by the government must ultimately be authorized by the Queen or her representatives. That is why, on formal occasions, the Queen or the Governor General or a lieutenant-governor will speak of "*my* government" rather than "*the* government." In reality, of course, the Crown automatically authorizes whatever decision is recommended to it by the Prime Minister and cabinet. In this sense the Constitution's conferral of executive power on the Queen is something of a charade. Yet according to MacKinnon, such arrangements are of very great value for they serve the purpose of constantly reminding the all-powerful Prime Minister and cabinet that they are servants, not masters, that they do not possess political power but merely exercise it in trust. This, he argues, has the effect of "preventing officials at the summit of government from becoming too powerful, irresponsible, and perhaps immovable" (*Crown in Canada* 16).

MacKinnon makes a similar argument about legislative power. Our constitution stipulates that legislative power is to be exercised by "parliament." Speaking loosely, Canadians have a tendency to equate

"parliament" with the House of Commons, but sticklers for detail will point out that Parliament actually includes the Senate as well. In point of fact, even that definition is inadequate, for the Constitution actually defines Parliament as a three-part institution, consisting of the Senate, the House *and the Queen* (Constitution Act s.17). The inclusion of the Queen in this definition is not a gratuitous gesture, for no legislation becomes law until it has been given royal assent. The Crown is thus a full partner in the exercise of legislative power.

Here too, of course, the Crown's assent is more or less automatic, so that legislative power is in effect completely controlled by the politicians. But the pretence that the Queen proclaims legislation "by and with the advice and consent" of her parliamentarians (rather than at their command) serves to remind individual parliamentarians that they are acting as trustees of a power they do not themselves possess (*The Crown in Canada* 23-26).

The other way in which the Crown serves to keep elected politicians in line, according to MacKinnon, is by serving as a harmless focus for the attention that citizens necessarily confer on a head of state. A head of state is the living symbol of his or her political community and will therefore of necessity command a great deal of loyalty, respect, and even veneration. In an American-style regime, where there is no need for an independent head of state to co-ordinate and guarantee the operation of responsible government, the President himself serves as head of state. This can be something of a problem because it inevitably increases the power of a partisan politician by making him the living symbol of his country; and it is sometimes difficult to be critical of the politician without feeling disloyal to the head of state. By making the Queen our head of state, we avoid such problems. The pomp, ceremony, and good will that of necessity attach themselves to the head of state are conferred upon a non-partisan person who has great expertise in handling such things. This promotes democracy by leaving us free to be as critical of our elected politicians as we like.

III. The Problem in MacKinnon's Argument

MacKinnon's case is very sound in theory, but loses its force when one considers the reality of Canadian political practice. In a sense, what MacKinnon has really done is to have written an excellent defense of the

Crown in Great Britain. His arguments about the monarchy's capacity to keep the elected politicians "in their place" are quite persuasive in the British context. British politicians are indeed overshadowed by the Queen, who commands far more loyalty, respect and perhaps even affection than any politician could ever hope for. The Queen's great prestige gives real meaning to the constitutional charade that politicians are "servants" who wield power without possessing it. And it is easy to see them as temporary "trustees" of political power when they are compared with a Queen who has reigned for decades and who represents a monarchy that ruled for centuries.

The problem with MacKinnon's case is that he argues as though the Queen were our head of state in fact, and not merely in law. In reality, the Queen of Canada is first and foremost the Queen of Great Britain. To all intents and purposes, her role as Canada's head of state is carried out for her by the Governor General. This important fact has the effect of subverting most of MacKinnon's case, for his arguments presuppose that the formal head of state is a person of extraordinary prestige: elected politicians cannot be put "in second place" by just anybody, and a figure who does not already command great public attention and respect will never be able to divert the public's interest from the politicians to herself. In Britain, the Queen enjoys sufficient prestige to accomplish these tasks. In Canada, on the other hand, a governor general does not. This is not because of defects in the characters of those individuals who have served in that capacity. The problem is an institutional one.

To begin with, the term of office for a governor general is a mere six years. The Queen's prestige rests in large part on the fact that she and her family occupy the throne permanently. Prime ministers will come and go, but the House of Windsor will remain. In Canada, on the other hand, governors general will often have less seniority in office than the prime ministers over whom they are supposed to take precedence. This will be especially true of the long-serving prime ministers—Macdonald, Laurier, King, Trudeau, Mulroney—precisely the ones we should be most concerned to keep in their place.

More problematic is the mechanism for naming a governor general. Because the Governor General is the representative of the Queen, our governors general were originally British peers named by the British government. In an age when aristocratic notions and the imperial

connection still meant a great deal to most Canadians, an Earl of Dufferin or a Duke of Devonshire could, in fact, command tremendous prestige. As Canada became more democratic and more independent in its political principles, however, it became necessary both to choose Canadian governors and to put the choice in the hands of the Canadian prime minister.

At first our practice was to appoint people who had distinguished themselves in military or diplomatic endeavors (Vincent Massey and Georges Vanier, for instance). But Canadian traditions of political patronage could not be held in check for long. Mr. Pearson started us on the slippery slope by nominating the first politician: Roland Michener, a former Speaker of the House of Commons. This appointment seemed innocent enough given that Mr. Pearson and Mr. Michener represented different political parties. But the downward slide had now begun, and it was only a matter of time before someone took the next logical step. This occurred when Mr. Trudeau nominated a politician from his own party, Jeanne Sauvé. The appointment of Madame Sauvé in turn facilitated the final step, and the process of decline was completed when Mr. Mulroney nominated a *defeated* politician from his own party, Ramon Hnatyshyn.

There is no reason to suggest that these particular individuals were not qualified for the position of Governor General. In fact, all three served with distinction. The problem, however, is that a precedent has now been established: the office of Governor General, which in MacKinnon's theory is supposed to have enough prestige to outshine the office of Prime Minister, can henceforth be handed out as a patronage plum to the party faithful. This means that our *de facto* head of state now has about as much prestige as our appointed senators.

For these reasons, MacKinnon's case for the Crown is not persuasive. His arguments make a good deal of sense in the British context, and they made some sense in the early years of Canadian political practice. In our contemporary situation, however, they are as formal and hollow as the monarchy itself.

IV. The Presidential Alternative

The weakness of MacKinnon's case does not automatically justify the position of those who would sever our connection to the monarchy. As was pointed out in the first part of this paper, a political regime based on

the principle of responsible government must have a formal head of state who is independent of the government. Advocates of abolition must therefore propose an alternative which will be at least as effective as our current arrangements.

The most common proposal advanced by abolitionists is to replace the Queen with an elected president. This is an option used in a number of regimes based on responsible government, including Germany, India, Italy, and Ireland. It is an appealing option in that it seems more consistent with our underlying democratic principles. Moreover, an elected officer will, *ceteris paribus*, have more authority and prestige than an appointed one.

This alternative is not without its problems, however. The most serious is that our constitution is structured in a manner that presupposes the head of state will be appointed rather than elected. The constitution confers tremendous powers on the Queen and her Governor General including the totality of executive power, a veto over legislation, and the right to appoint senators and judges. The only thing that prevents the Crown from exercising these powers is the well-established principle that in a democracy, power must be in the hands of the elected representatives of the people. The law of the constitution is thus modified by a "convention" (that is, an unwritten rule) that the Crown will exercise those powers only on the "advice" of the Prime Minister and cabinet.

If we were to substitute an elected president for the Crown, there would no longer be any reason to follow that convention. Elected presidents might then refuse to proclaim legislation passed by Parliament or ignore "advice" tendered by the cabinet on the grounds that they have every bit as much democratic legitimacy as parliamentarians or ministers. Our "formal" head of state would thus be exercising the powers of an American-style president, and this might eventually force Canada to discard its system of responsible government in favor of an American-style congressional regime.

There are, of course, different ways of addressing this problem. One would be to arrange the election of presidents so that they would not have the same democratic legitimacy as Members of Parliament—one might, for example, have the president elected by the politicians rather than the people, as is done in Italy and Germany. But this option raises a number of questions. The House of Commons is by definition

completely dominated by the Prime Minister's party. This means that an election by the House of Commons would in practice be no different from a prime ministerial appointment. A president thus elected would therefore have no more prestige than an appointed governor general, and perhaps even less.

The other way of addressing the problem would be to rewrite the constitution in order to strip the president of all powers save those that are appropriate to a formal head of state. For instance, the fiction that the head of state possessed full executive power could be dropped. But this tactic, too, has its drawbacks. To drop the fiction that political power is possessed by the head of state is to deprive us of what MacKinnon has argued is one of the great advantages of the current order: its capacity for reminding politicians that they are mere trustees of power and not its owners.

Moreover, trying to spell out the specific powers to be retained by the president could be problematic. A president would have to possess whatever powers are necessary to guarantee the operation of responsible government—what we now call the Governor General's "reserve powers" (for example, the power to name the Prime Minister and the power to dissolve the House of Commons and call elections). Under current arrangements, the reserve powers exist as conventions rather than as written laws. This has the advantage of giving them a certain flexibility, but it also means that there is no authoritative account of what those powers are, when they can be used, or how far they go. Does a governor general have the right to refuse a request from the Prime Minister for elections? If so, under what circumstances? Can a governor general dismiss a prime minister? If so, for what reasons? Constitutional experts disagree on these important matters, so setting them down in clearly worded laws would not be easy. Moreover, it may not be desirable: as the distinguished political scientist James Mallory points out, because they are meant for use in times of crisis, the reserve powers are one area of the constitution where flexibility is much more important than clarity and precision (Mallory 60).

V. An Appointed Alternative

Because of the problems involved in adapting our constitution to accommodate an elected head of state, it makes sense for those who seek to abolish our ties with the monarchy to consider the alternative of a new appointed head of state. Such an alternative would allow us to break our links with the Crown while minimizing the need for messy revisions of the Constitution.

Appointing our head of state makes good sense for another reason. We have noted that the ultimate reason for having a formal head of state is to ensure the continued operation of responsible government. Yet in practice, almost all of the work actually done by our head of state is of a ceremonial or symbolic nature. The head of state personifies the political regime and thus represents it at an amazingly diverse range of official functions, both at home and abroad.

Looking at the office in terms of its symbolic role, there is a great advantage in having it an appointed, rather than an elected, position. The Canadian political community contains a number of distinct groups whose members have traditionally been under-represented in our political institutions or who feel they have been victims of neglect or mistreatment by the majority. The list of such groups would be a long one, but it would certainly include aboriginal peoples, women, visible minorities, western Canadians, and francophones. Having individuals from these groups serve as head of state is an excellent means of making a symbolic statement that the members of their group are equal partners in the Canadian political community. Obviously this would not in and of itself solve the problems experienced by these groups. But one should not underestimate the importance of symbolic statements. Having a Native Canadian serve as head of state would certainly do much to improve the sensitivity of the non-Native majority to the concerns of our Native peoples. It would also be an important means of striking at prejudice against Native Canadians.

One of the problems with electing our head of state is that it significantly reduces the chances that members of such groups will fill the office. Elections are decided by majority vote, and it is a well-established rule of political life that the majority tends to elect individuals who reflect its own image. It is not impossible that the non-Native majority would elect a Native head of state, but experience suggests that such an

eventuality is highly unlikely. Having the head of state an appointed position would make it much easier to alternate the position between regions, between men and women, or between anglophones and francophones, and it would vastly improve the chances that Canadians will one day have a Native or Sikh or disabled head of state.

Two objections will be made to the idea of an appointed head of state. The first is that such a practice would be contrary to our democratic principles, which make election rather than appointment the preferred mechanism for selecting office-holders. This is not as strong an objection as it might first appear. The democratic principle merely requires us to place ultimate political authority in the hands of the majority or its representatives. Once that has been done, there is no reason why every public office should be elected. Indeed, there are often good reasons why many of them should not be elected. We do not elect judges, police officers, or deputy ministers, and there are few people who argue that we should. Making the position of head of state an appointed one would not in any way compromise the democratic majority's hold on political power. And to the extent that it would help redress the traditional underrepresentation in our political system of particular groups of Canadians, appointment might be seen as a *more* democratic method of choosing our head of state than election.

A more serious objection to appointing our head of state is that this would lead to choices based on patronage which would rob the office of any prestige and authority. Only popular election, it is argued, can confer on a formal head of state sufficient prestige to serve as a check on the Prime Minister and cabinet.

The force of this objection will depend on who does the appointing. If the power of appointment is a prerogative of the Prime Minister, the objection is a very strong one. But there is no reason to insist that this power be exercised by the Prime Minister. Indeed, there is no reason to insist that the appointment be made by elected politicians at all. A better option would be to have the appointment made by a special body created for that purpose. Like the council that advises our Governor General on nominations to the Order of Canada, this body would be composed of a number of high-ranking but non-partisan figures. It might include, for instance, the Chief Justice of the Supreme Court of Canada, the Clerk of the Privy Council, a lieutenant-governor from each of Canada's regions,

and the President of the Canada Council. A head of state chosen by a distinguished and non-partisan group such as this might arguably have more prestige than an elected head of state who had to spend three months kissing babies, dancing polkas and eating barbecued hot dogs in order to get elected.

The prestige of an appointed head of state could be increased by another means: extending the tenure of the office. As was noted above, one of the great advantages that the Queen has as a head of state is the seeming permanence of the monarchy. It is to be expected that a head of state's prestige will increase in direct proportion to the length of time he or she serves. Now elected positions are almost by definition of short tenure, for the point of having elections is to ensure accountability and accountability requires putting one's record to the test on a regular basis. Appointed positions, on the other hand, are often of "life" tenure. Canadian senators and judges are appointed for life, which in our regime means until the retirement age of 75. From the point of view of maximizing institutional prestige, our best option would be to appoint a head of state with life tenure. A head of state appointed for life by a non-partisan body would easily surpass in prestige a president elected to a five-year term, and might more plausibly serve as the kind of symbolic check on the Prime Minister and cabinet that MacKinnon argued was necessary.

VI. Conclusion

Frank MacKinnon's case for the monarchy in Canada may not be entirely persuasive, but his writings do us the great service of drawing to our attention the serious issues that must be addressed by those who seek to abolish Canada's link to the Crown. MacKinnon's arguments will certainly help us to evaluate, in a critical and constructive manner, the alternatives to our current arrangements.

In the final analysis, however, it may be that the most useful aspect of MacKinnon's work is that his writings have the effect of making us more cautious when we talk about reform. During the Meech Lake and Charlottetown constitutional negotiations, Canadians demonstrated emphatically that they prefer the status quo to messy and complex innovations, the effects of which cannot be predicted with certainty. MacKinnon's writings serve to make us aware that the issue of the role

of the monarchy is far more complicated than it first appears. Once Canadians begin to appreciate that fact, they may well decide that severing our relationship with the Crown is either unwise or perhaps simply not worth the trouble.

For those who insist on pursuing the path of reform, the analysis presented here suggests that Canada is better served by an appointed head of state than it would be by an elected one. The real question is not whether our head of state should be appointed, but who should do the appointing, and for what term of office. Both monarchists and abolitionists should give serious consideration to the possibility of having the Governor General (or equivalent officer) nominated by a non-partisan board of the type described in Section V above. They should also consider making the position a life appointment. These simple reforms would serve to strengthen the prestige (and hence the utility) of the office whether we keep our connection to the monarchy or not.

NOTES

1. This question should also be of particular interest to Quebec separatists who, thus far, appear to have given little serious attention to the problem of who or what would replace the Crown in an independent Quebec.
2. On the death of Prime Minister Macdonald in 1891, the Governor General, at his own discretion, appointed Sir John Abbott prime minister. In modern times, it is likely that the Governor General would seek advice from the party in power before naming even a "caretaker" prime minister, as Abbott was. Should the party be unable to arrive at a clear decision, however, the Governor General would have to appoint a new prime minister using his or her own judgment in order to ensure the existence of a functioning government.

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