

CONTENTS

AUTHOR'S FOREWORD

The Expanded “Constitutional Company” of Today 7

INTRODUCTION

A Singular Office — Titular Head-of-State 15

CHAPTER 1

Legacy of Empire: Head-of-State (Governor General) and
Head-of-Government (Prime Minister) 21

CHAPTER 2

The Imperial Era: British Governors General 27

CHAPTER 3

Contemporary Trials and Tribulations
of the Queen’s Representative 37

CHAPTER 4

Constitutional Conventions on the Prerogative
Powers of the Governor General 53

CHAPTER 5	
New Conventions Developed by	
New Commonwealth Countries	71

CHAPTER 6	
The Contemporary Era of	
Canadian Governors General	93

CHAPTER 7	
Constitutional Options for the Crown	
and Governor General	123

EPILOGUE	
Constitutional Lessons from the 2004–5	
Minority Government Crisis	157

APPENDIX	
Rules of Constitutional Prudence for a	
Contemporary Governor General	169

<i>Notes</i>	173
--------------	-----

INTRODUCTION

A Singular Office — Titular Head-of-State

THE LAST PRESIDENT of the Third French Republic, Albert Lebrun, once humorously described his main function as titular head-of-state to be attending the official opening ceremonies for flower shows and similar public celebrations. A recent Australian governor general, Sir William Deane, commented wryly that his principal official occupation seemed to be to represent his prime minister at state funerals held abroad. This has normally been part of the lot of Canadian governors general in modern times, except that even here, with the development of global television and easy air travel by executive jet, a governor general may find himself or herself preempted, in the ceremonial representative role at the more important state funerals, by a prime minister who recognizes the high-level diplomatic advantages of these occasions and the media coverage resulting from them.¹

For more than three-quarters of a century, the office of governor

general of Canada has been pleasantly free from public controversy, and from involvement in complex and difficult constitutional decisions that too often end up in partisan political conflict. The passage from the Imperially appointed British governors general to Canadians chosen and effectively appointed by the Canadian prime minister had been achieved, easily and gracefully, on a step-by-step basis over the years, and for the last fifty years and more the governor general has been a Canadian citizen. Absence, during all that time, of any real difference or disagreement between the governor general and the prime minister has left the governor general free to concentrate on the quieter and gentler, essentially honorific aspects of the office as titular head-of-state in Canada. At the same time, the vestigial role of the Queen in relation to Canada has been allowed to diminish, by polite acquiescence and mutual consent, to that of "Head of the Commonwealth," a purely symbolic post in the continuing informal association of sovereign states that were once part of the old British Empire and the British Commonwealth that succeeded it. With the decline of Empire, the paraphernalia of power that once went with it has been allowed to fade away, and the office of governor general has become more consciously low-key, deliberately unostentatious, and accessible to the general public.

In the last several years, however, events in the federal political arena have meant that differences that in the past were once easily resolved politically through the ordinary political processes and general elections, have threatened to be transferred to the governor general's office for constitutional-legal arbitrament under the reserve, prerogative powers of the Crown. These events have resulted in part from schisms within the long-reigning federal Liberal party, spilling over into a protracted, often bitter internal battle over the party leadership, as well as from a manifest shift in traditional voter support between the older political parties. Because Canada has for many years had no political confrontations involving recourse to these inherent, discretionary powers of the governor general as titular head-of-state, the exact constitutional

parameters of these powers and the range of alternative options under them remain open to debate and to public questioning. They are not written down in the text of the Constitution Act of 1867. They are the stuff of long-time constitutional practice, studied and then acted upon because they were judged as reasonable and fair by subsequent generations — what is known, in distinction from the *law* of the constitution, as the *conventions* of the constitution. There is only one purely Canadian precedent, and it goes back to 1926 during the Imperial era when the governor general was still a British official, appointed by the British government of the day. That has raised the basic question of its relevance as claimed precedent for contemporary Canadian problems to be resolved by a contemporary Canadian governor general. Should the 1926 Canadian example not be deemed inapplicable on these grounds?

Fortunately, there is a larger body of precedents to be found in the constitutional practice of other states that were, like Canada, once part of the British Empire or the successor British Commonwealth. After becoming independent republics, they have sometimes either received, or chosen to retain, the Westminster-style system of a titular head-of-state (governor general or president) and a head-of-government (prime minister). In some of these other states, there have been considerable innovations in the developing constitutional practice that may commend themselves to our Canadian constitutional decision-makers today. There is, in fact, a very considerable body of what may be called Commonwealth common law bearing on the constitutional discretionary powers of the head-of-state and their sensible limits today. The corpus of such Commonwealth common law certainly includes the Canadian precedent of 1926, which is an inevitable starting point for legal analysis, but it also ranges widely over constitutional practice in countries as diverse as Australia, India and Ireland, and includes some instances of judicial review by the highest national courts. In attempting to submit general constitutional principles or ground rules to guide or control a governor general's decisions

today on the exercise of the discretionary powers in situations such as we have encountered after the June 2004 general elections, our concern in the present study is this: whom to commission to form a government after a no-clear-majority result in the general elections, and on the basis of what assurances of ability to command a working majority of seats in the House? A further question to address is, if a prime minister, not having a majority of seats in the House after the elections, should be defeated in a House vote, is he/she entitled to receive on request the dissolution of Parliament and fresh elections? Alternatively, is the governor general entitled to explore the possibility of granting the mandate to form a government to the leader of some other party in the House, and if so, on the basis of what assurances?

It remains to examine one other interesting side feature to the contemporary public debate on the constitutional role of the governor general today. The office itself, and its incumbents personally, are being subjected to unprecedented public attacks in the media and in political arenas, often of a highly abusive, personal character. By long-standing convention, an incumbent head-of-state, whether the Crown in person or in its various forms in the Commonwealth countries, does not respond publicly to such intemperate criticisms. That may have compounded the political problem since charges and innuendo, capable of rebuttal on the empirical facts, have remained effectively unanswered. The phenomenon is to be found in a number of widely dispersed Commonwealth countries today.² A good part of the explanation for the current systematic denigration of the office of titular head-of-state and its incumbent, however, would seem traceable to the public's marked disaffection with political processes and disrespect for political leaders today. This disaffection is manifest in the sharp decline in voter turnout at general elections and the political disengagement among young voters. The head-of-state is an easier target to aim at than ministers and parliamentarians and unlikely, at least up to the present, to strike back in kind at the accusers.

The present study, with its primary emphasis on defining contemporary ground rules for the exercise of the reserve, discretionary constitutional powers of the office, also looks at ways of changing the definition of the office itself, of doing away with it if necessary, but also of bringing it more into line with contemporary principles of democratic constitutionalism.