

# THE CONSTITUTIONAL QUESTION

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ANCESTORS are ignored until the descendants become millionaires or are hanged for crime, whereupon the family history is ransacked for earlier examples of the same peculiar talent. The forbears of political institutions fare no better; historical origins lie forgotten, until some sudden turn of events arouses the curious, and the genealogy is then investigated. Such has been the experience in Canada during the past few months following the refusal by the Governor-General to grant a dissolution to Mr. Mackenzie King. Precedents have ceased to be merely a matter of academic interest, and have become the talk of the street corner, the hustings, the political picnic, and the barber shop.

The facts of the case are briefly these. The Liberal government, owing to certain disclosures in the administration of the Customs, found itself faced with an adverse majority in the House of Commons and a possible vote of censure. Mr. Mackenzie King, failing to obtain a non-partizan Commission, and anticipating the verdict of the House, thereupon asked the Governor-General to dissolve parliament. This was refused. Mr. King perforce resigned; and Mr. Meighen became Prime Minister, only to be defeated in the Commons two and a half days later. He in turn demanded a dissolution, and obtained it.

The Liberals contended that, in thus rejecting the advice tendered by Mr. Mackenzie King, Lord Byng broke a well-established constitutional principle, viz. that the Governor-General has no right to refuse a dissolution when it is advised by his Prime Minister. Conservatives dismissed the whole matter as an issue manufactured for the express purpose of taking the people's minds off the Customs investigation. The advice of Mr. King, they added, was given in order to avoid the vote of censure in parliament, and the refusal of Lord Byng merely precipitated a resignation which would have been forced by the House a day or so later. What makes the dispute of more than passing interest, however, is the fact that it involves the whole question of the relation of the Governor-General to his Cabinet; it affects not only Canada, but the other self-governing Dominions in the Empire.

In order to place the incident in its proper setting, it may be well to glance at the evolution of democratic government in England. Slowly through the centuries England has been working out a formula of democracy; not with deliberate intent, but by the painstaking solution of one problem after another as each arose for decision. The most significant part of this evolution has been the diminution and final disappearance of the sovereign's independent power; he began as an autocrat, accountable to no one; he has become an automaton with no public will of his own. He signs bills of which he disapproves, he reads speeches he does not write, he issues proclamations he has never read. He deserves pity, but not contempt, for he plays an uninspiring but necessary part in the drama of English democracy. His once great prerogatives have shrunk with the passing years to the privilege of advising, cautioning, and warning his Prime Minister. That is one of the outstanding features of English government to-day: a King whose advice may be offered, a Prime Minister whose advice may not be refused.

In Canada and the other Dominions the position of the Governor-General has been gradually approaching that of the King in Britain. The introduction of responsible government began the process by compelling the Governor to use as his advisers a group of men who would be supported in the Assembly. Ever since that time the shifting of power has been going on, until in recent years practically all authorities agreed that the Governor-General's independent action had become a relic of history. The change has been inevitable, and its desirability can scarcely be questioned. If responsible government is not a mockery, it must mean a genuine democratic rule, based in large measure at least upon the English model.

In the light of this evolution, the refusal of Lord Byng to accept the counsel of his principal adviser was reactionary and open to severe condemnation. It is true that there have been several precedents which may be advanced in his defence, viz., similar refusals made in Australia in 1904, 1905 and 1909. On the other hand, Canadian history since Confederation<sup>1</sup> contains no examples of such a refusal, and it has been unknown in England for over one hundred years. Further, a recent Australian case in 1914 is strong evidence that there also the Governor has lost his power of independent action. At that time the Governor-General of Australia, Sir Ronald Ferguson, had excellent justification for refusing a dissolution,<sup>2</sup> but he chose the wiser course and, on the

1. Sir Edmund Head in 1858 and Lord Mulgrave in 1860 refused to grant a dissolution.

2. Cf. Keith, A.B., *Imperial Unity and the Dominions*, pp. 104-12.

advice of his Ministers, dissolved both Houses simultaneously. This "is only susceptible of explanation on the ground that he felt that it was best to adhere to the principles of responsible government as they exist in their purest form in the United Kingdom."<sup>3</sup>

The precedents for the Governor's refusal are therefore conflicting, though they are none the less instructive. Precedents, it must be remembered, should not be examined one by one, but as a whole; they should be pieced together, so that the complete picture may show the development of government and the direction in which it is moving. An isolated precedent is as misleading as a single piece of evidence in a court of law. It is obvious that if precedents were rigidly followed, no change under an unwritten Constitution could ever take place. In England, for example, Queen Anne and her predecessors vetoed bills with great zest and conscientiousness; but had this example been copied by succeeding sovereigns, the king would be vetoing bills to-day. On the same assumption, the unwritten part of the English Constitution would still be much the same as that of 1066, had the nation not had the uncommon foresight to follow its precedents without being bound to them hand and foot. In short, the way of progress in government lies in following those early examples which are most in sympathy with the new conditions, and disregarding those which are out of harmony with the general trend of development and the genius of the people.

Judged in this light, the appeal of Mr. Mackenzie King to the most recent example in Australia bears more weight than that of his opponents to the earlier cases of 1904, 1905 and 1909. Lord Byng's refusal to grant the dissolution was definitely antagonistic to the modern trend of Dominion self-government. The case becomes even more apparent when one pauses to consider what the King in England would have done had he been placed in a similar position.

One factor has, however, not been mentioned—that Mr. King is alleged to have asked for dissolution in order to escape a vote of censure. It is difficult to see how this affects the question. Suppose he had waited until the vote had been passed, would the Governor-General have been justified in refusing the advice? The answer is, he should have complied then, even as he did comply when Mr. Meighen made the same demand three days later, after a vote of censure had been passed on the Conservative government. It would seem fairly reasonable to assume that a Prime Minister's position is no weaker with a vote of censure pending than it is

3. *Ibid.*, p. 109

after such a vote has been passed. When all is said, a dissolution is nothing more than an appeal to the people for a verdict. Few can object to such a logical method in a democratic State for settling a vexed question of domestic politics.

It seems to the present writer that it was indeed bad advice. For as the Premier was at least in difficulties with parliament, the Leader of the Opposition had a right see whether he could carry on an alternative government. In this he might be successful or he might not, but it was proper that he should have an opportunity to try, in order to save the need for another general election. Mr. King indeed declares that when he asked the Governor-General to dissolve the House, he had good ground to believe that no vote of censure was likely to be passed. No side is here taken in the dispute as to whether he either realized or stated his own motives accurately, for this article is concerned not with partisan recriminations but with a constitutional point.

If then, either consciously or unconsciously, it was an impending vote of censure which prompted Mr. King's advice, there can be little doubt that he advised wrongly. As one writer puts it, such a claim by the Premier would have meant nothing less than a claim of immunity from expulsion from office. "When he finds he cannot control parliament, he appeals to the electorate. The electorate rejects his appeal, and back he goes to parliament and furbishes up a temporary majority. Parliament becomes tired of him and is ready to condemn him, and he asks the Governor-General to allow him a second appeal to the voters. Presumably, if Lord Byng had acceded to his demands and he had not improved his position at the election, he would again have claimed the right to meet parliament and made an attempt to conjure up another majority, which would probably have been available until members had earned another sessional indemnity. Then the majority would have crumbled away, and by his doctrine he could have demanded a third dissolution."<sup>4</sup>

The blame must therefore rest in a large degree on Mr. Mackenzie King for offering improper advice: he made a demand which was, to say the least, inexpedient and unwise. The admission of this, however, does not clear the Governor-General from the charge of acting unconstitutionally, though it undoubtedly was a mitigating circumstance. He had the privilege of advising, cautioning and warning Mr. King that his policy was not in the best interests of the country, and of asking him to place the larger good ahead of party advantage. He could have reminded Mr. King that he had had a dissolution less than a year before; he could have drawn attention to the

4. *The New Statesman*, July 31, 1926.

possibility that Mr. Meighen might be able to carry on a government; he could have argued that Mr. King would suffer in the election because he had precipitated it; he could have indicated the harmful effects of another election campaign at that particular time. The Governor-General was justified in pointing out all these objections and many more; but if Mr. King remained adamant, Lord Byng should have shrugged his shoulders and granted the dissolution. The Prime Minister could have been left to the people for punishment; if they were satisfied, the Governor-General could view the result with equanimity. The time had passed when he would be held accountable in London for the actions of his councillors.

The famous Tupper-Aberdeen dispute in 1896 presents a number of points similar to the one of this year. Sir Charles Tupper had been defeated in the election, but continued to hold office pending the meeting of parliament. In the meantime he recommended a number of important appointments to the Bench and to the Senate. These the Governor-General refused to sanction, on the ground that owing to the government's position its acts were "in an unusual degree provisional", and that the Bench and Senate were already crowded with men appointed by a Conservative ministry. Sir Charles adduced both British and Canadian precedents to support his position, but was finally compelled to resign in protest.<sup>5</sup> There can be no doubt that his recommending appointments at that juncture was extremely ill-advised, but this did not excuse Lord Aberdeen for refusing to accede to his request. Sir Charles was still Prime Minister, and as such was entitled by all precedents to make appointments as he chose. If the Governor-General had not had a new Premier available with a strong majority in the Commons, he would have been much more cautious about forcing his old Premier's resignation.

It may be thought that such an attitude is too extreme, but it is difficult to see how responsible government, if it is to be a reality, can work otherwise. Suppose a government should pass a bill to spend five hundred millions in constructing an automobile road to the North Pole, or for any other fantastic project obviously inimical to the country's interest. Would the Governor-General intervene and veto such a bill? He would do nothing of the kind. He would give his formal assent, and be content to observe with interest the subsequent fate of the government at the hands of the electorate.

The conclusion from the King-Byng controversy is this. Mr. Mackenzie King gave bad advice, which under the old régime

5. *Can. Sess. Pap.*, 1896, 2nd Sess., No. 7, pp. 2-7.

would have been justly rejected. But according to the modern interpretation of parliamentary government, and recent precedents in England and the Dominions, the Governor-General was bound to accept and give effect to the advice thus tendered, if the Prime Minister remained steadfast in offering it. The question whether the advice was good or bad should not have influenced its acceptance or refusal. The Prime Minister should be the sole judge of the appropriateness of his policy, and its subsequent rejection or endorsement could safely be left to the people at the polls. If the Governor-General is to persist as a useful part of the Canadian political machinery, he must learn to follow in public whatever advice is offered him, and content himself with playing the same unobtrusive rôle that is so skilfully carried out by the King in England.