Legal Nature of Federal and Provincial Executive Governments: Some Comments on Transactions between Them

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DAVID W. MUNDELL

The purpose of this article is purely explanatory—to explain the legal nature and operation of the so-called "executive" governments, both federal and provincial, with a view to discussing the legal nature of transactions and more particularly agreements between them. By "executive governments" are meant the apparatuses of the federal and of the provincial governments existing apart from Parliament and the legislatures and apart from the courts and their judicial machinery. Section 9 of the British North America Act, 1867, provides:

The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.

This provision clearly placed Her Majesty at the head of the federal government. *Liquidators of the Maritime Bank v. The Queen,*<sup>1</sup> held that Her Majesty was also the head of the provincial governments. The *Bonanza Creek* case<sup>2</sup> indicated that, where no express provision is made in the Act, the distribution of "executive authority" under the B.N.A. Act in substance follows the distribution of legislative powers. An understanding of the legal content of the executive branch of government existing apart from the B.N.A. Act is therefore necessary to apply the B.N.A. Act and the decisions.

Such an understanding is also needed to appreciate the legal nature of transactions between the federal government and provincial governments or between provincial governments. The peculiarity of the legal relations between these governments rests on the so-called doctrine of the "indivisibility of the Crown". From a legal point of view neither the Government of Canada nor of any province has any existence as a legal entity. Each government is merely the practical apparatus through which Her Majesty as the head of both governments and as the owner of all public property, the employer of all public servants and the superior of all executive officers, carries on her business. The simplest illustration of the problems is in the field of contract. Basic legal doctrine prescribes that no person can con-

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<sup>1</sup> [1892] A.C. 437.
<sup>2</sup> [1916] 1 A.C. 566, at 529.

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tract with himself. Her Majesty, acting as head of one government, cannot, according to orthodox legal theory, contract with herself as the head of another government. We are, however, accustomed to agreements of all kinds being made between the so-called governments. Similar questions arise with respect to the transfer of property from one government to another. What is the legal operation of these transactions?

In this discussion the term "Crown" will not be used and reference will be made throughout to Her Majesty or to the sovereign—in the sense of the reigning monarch and not in any Austinian sense. As Maitland pointed out many years ago the use of the term "Crown" leads to confusion. As he says, the Crown does nothing but lie in the Tower of London to be gazed at by sightseers and has no legal existence. The use of the term tends to obscure the fact that the sovereign is a person for legal purposes. For example, continual references to the Crown and not to "Her Majesty" eventually led to an even more obscure creation, namely, the "emanation of the Crown". This term was applied to statutory bodies and corporations that in some way acted in Her Majesty's business. In *International Railway Co. v. Niagara Parks Commission* the Privy Council rejected the expression pointing out that the correct legal description of such a subordinate, whether an individual or a corporation, is the ordinary legal classification of "agent" or "servant" of Her Majesty. If the expression "Her Majesty" had been used throughout instead of the expression "Crown", the terminology of agent or servant with known and defined legal attributes would have been recognized as correct from the outset and no such esoteric fabrication as an "emanation of the Crown" with undefined status leading to uncertainties and misunderstandings would have been developed.

The expression, "indivisibility of the Crown", is a further example. It is merely a statement that Her Majesty is the same legal person at the head of all her governments. Criticism has been directed at this so-called doctrine. This criticism, which seems to be misdirected and to arise from confusion resulting from use of the term "Crown", will be considered later. Too much emphasis cannot be placed on the desirability of recalling that the term "Crown" unvaryingly means the legal person who is the reigning sovereign for the

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4 [1941] 2 All E.R. 436.
5 Another example of possible confusion contributed to by use of the term "Crown" relates to representatives of Her Majesty such as the Governor General or a Lieutenant Governor. It is sometimes said loosely that such a representative "is the Crown". The conclusion to be drawn would be that the officer is a "viceroy" standing in Her Majesty's place. He is strictly only a representative acting with limited authority and remains in other respects merely a subject. His legal position must be appraised on this basis. See *Musgrave v. Pulido* (1879), 5 App. Cas. 102; *Bonanza Creek* case, [1916] 1 A.C. 566.
The best course, where possible, appears to be to avoid its use.

Since barbarisms are so much in fashion in the field of public law it will do no harm to coin two more so long as they are, unlike so many others, defined. The approach in this article may be said to be quasi-historical and quasi-analytical. The legal position of Her Majesty as it stood in general in 1867, apart from the B.N.A. Act, will be described. The term “quasi” is intended to indicate that the historical sketch will not be developed chronologically or in full and that the analytical element will be introduced to an extent only sufficient to try to point up the nature of Her Majesty's legal position. Thereafter, consideration will be given to the effect of the B.N.A. Act on Her Majesty's legal position and to transactions between her governments.

Legal Position of Her Majesty Apart from the B.N.A. Act

The central core of Her Majesty's legal position at common law is that Her Majesty is a legal person subject to the law and having the legal capacities accorded to a legal person by the law. She may be a party to legal relations with her subjects of the same nature as exist between subject and subject. Adopting in part Hohfeld's analysis, Her Majesty can have claim-duty, power-liability and liberty-no claim relations with her subjects of the same nature as those that exist between subjects. It is true that historically, and possibly theoretically, duties owed by Her Majesty rest on a basis different from the basis for duties owed by a subject but they are in fact recognized. Thus we find Her Majesty owning property, receiving and disbursing monies, and entering into contracts with much the same legal position in these respects as a subject. Most significant is that in her multifarious business she has a hierarchy of agents and servants who act on her behalf or in her service in the same general way as agents or servants of other persons.

Although this is the basic legal position of Her Majesty—that she is under the common law—this basic position is subject to an important qualification. The common law applying to Her Majesty

6 The Interpretation Act (R.S.O. 1950, c. 184 as amended Stats. Ont. 1958, c. 43) expressly provides in s. 31(j): “Her Majesty”, “His Majesty”, “The Queen”, “The King”, or “the Crown” means the Sovereign of the United Kingdom, Canada and Her other Realms and Territories and Head of the Commonwealth.” To the same effect see the Interpretation Act, R.S.C. 1952, c. 158, as amended by Stats. Can., 1952-53, c. 9. It will thus be seen that the Royal Title expressly now includes Her Majesty as Queen of Canada. Within Canada the long accepted terminology to distinguish Her Majesty as head of each of Her governments is the use of the terms “Her Majesty in right of Canada” as head of the federal government and “Her Majesty in right of Ontario” as head of the provincial government, substituting the name of the province as required. The word “right” has no technical significance.


8 Fundamental Legal Conceptions, Yale University Press.

9 For an example of Her Majesty held liable in contract under the general law, see Windsor and Annapolis Ry. Co. v. The Queen (1886), 11 App. Cas. 607.
is not identical with the general law applying to subjects. She occupies a special position by reason of the prerogative rules. The prerogative is a body of common law rules that vary or add to the general common law rules insofar as they apply to Her Majesty. The classic definition of the prerogative is given by Blackstone as follows:

By the word prerogative we usually understand that special pre-eminence, which the king hath over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies, in its etymology (from prae and rogo), sometimes that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects: for if once any one prerogative of the Crown could be held in common with the subject it would cease to be prerogative any longer. And therefore Finch lays it down as a maxim, that the prerogative is that law in case of the king, which is law in no case on the subject.10

The term “prerogative” is sometimes used to describe the whole common law position of Her Majesty. This is not an accurate use of the term. The basic position of Her Majesty is that of a person subject to the general law and the prerogative is limited to the body of special common law rules applicable to her varying or adding to the ordinary common law.11 Again the term “prerogative” is also sometimes used to mean all the special law relating to Her Majesty, whether common law or statutory. Dicey appears to use the term in this sense when he refers to it as the residue of discretionary authority at any time exercisable by or on behalf of Her Majesty. Although politically acceptable, this usage is legally inaccurate, as, strictly speaking, the prerogative applies only to common law rules. As will be seen, they do not invariably confer discretionery authority.

Prerogative rules are of widely differing nature. The only book on the subject—"Chitty's Prerogative of the Crown" published in 1820—classifies them under a number of historical headings. This book presents a sort of Eaton's catalogue of legal notions. No attempt will be made in this article to discuss them in detail. Some analysis of their fundamental characteristics is needed, however, to classify them and for a proper understanding of the legal nature of the executive branch of government. The following is an attempt to present a classification of the prerogatives based on the standard analytical classification of the legal relations between individuals derived from Hohfeld, with the addition of certain matters not falling in that analysis.

Prerogative rules fall into two main categories, with one maverick rule.

1. Rules governing legal relations between Her Majesty and her subjects of the same essential nature as those that exist between

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10 Commentaries, Chitty ed. Vol. 1 180, 239 in original paging.
subject and subject. Many of the prerogative rules deal with claim-duty, power-liability and liberty-no claim relations between Her Majesty and subjects of the same analytical nature as those between subject and subject though differing in practical content. These are of two kinds:

(a) Prerogative rules that relieve Her Majesty of duties or liabilities to which she as a person would otherwise be subject under the general common law. The result is an expansion of Her Majesty’s liberty. The prime illustration is the common law prerogative rule that as a matter of substantive law Her Majesty is not liable in tort either personally or vicariously.

(b) Prerogative rules that confer claims or powers on Her Majesty additional to those to which she would be entitled as a person under the general common law. An illustration is the rule entitling Her Majesty to *bona vacantia*. This rule is merely a rule of property law under which Her Majesty in certain events becomes entitled to property that would otherwise be ownerless. The vestitive facts that entitle Her Majesty are unusual but the legal relations of Her Majesty as the owner are of the same character as in any other branch of the law of property. Another illustration is the prerogative rule that Her Majesty is entitled to priority in the payment of her debts over those payable to a subject. This is not dissimilar to the priority of one subject over another subject recognized in certain fields.

2. Rules that confer unusual legal abilities on Her Majesty of a kind quite different from any possessed by a subject. The term “abilities” is used as a neutral term to avoid any attempt to classify their nature at this stage. These are anomalies in the legal system so far as the legal relations of subject and subject go. They do not fall into any accepted category. Before commenting on their possible nature it is suggested that they may be classified into the following categories on the basis of their subject matter.

(a) Parliamentary prerogatives. The legal power of Her Majesty to legislate on the advice and consent of the Houses of Parliament is the fundamental rule. Many subsidiary rules include the power to call, prorogue or dissolve parliament.

(b) Judicial prerogatives. Her Majesty is the head of the judiciary and all court processes are carried on in the name of Her Majesty. Writs are commands from Her Majesty to her subjects. Although it is now settled that Her Majesty has no personal ability to exercise judicial power, which must be exercised through her judges, she still retains the prerogative power to establish courts of common law except where restricted by statute.
(c) Prerogative rules relating to external affairs. Her Majesty is a sovereign legal person for international law and for all international relations. She enters into treaties, declares war and peace and does all other things that may be done between sovereign states.

(d) A large group of miscellaneous prerogative rules. Probably the most familiar illustration is the rule that Her Majesty at common law may incorporate companies. By a simple declaration, evidenced in writing by letters made patent under her Great Seal, Her Majesty could confer legal personality on a group of persons as a corporation. Another illustration is the rule that Her Majesty could confer an exclusive right on individuals to deal in specified commodities, commonly referred to as the granting of monopolies, a modern residue of which is our law of patents. The sovereign formerly claimed authority to suspend or to dispense with laws in individual cases. The modern survivor of this power is the pardoning power—the prerogative of mercy under which punishment is either cancelled or suspended. Numerous other illustrations could be given. The legal abilities of the sovereign in this category, with their wide policy discretions to affect or change rights, are quite different from those in the categories of “rights” vested in subjects as these have been analyzed.

3. Finally we have a prerogative rule that cuts across both categories already mentioned, namely, the rule that Her Majesty is not bound by a statute unless she is named or included by necessary intendment. She is not deprived of any claims, made subject to any new duties, and none of her special abilities are abridged by a statute that does not clearly do so. This rule exempts her from statutory rules that would affect her either in her capacity merely as a legal person or in her special capacities. It is really therefore belongs in part in each of the two first categories.

The legal position of Her Majesty, as so far described apart from statute, is therefore that of a person subject to the general rules of the common law except as varied or added to by the prerogative rules. Her Majesty, of course, never could act personally in all matters affecting her. In the sphere of activities that correspond to the activities of subjects, agents or servants conduct her affairs. The law applicable is the general law of agency or of master and servant subject to some prerogative variations. In addition, in the exercise of many of the special prerogative abilities, representatives may be authorized to act on her behalf. The term “representatives” is used to designate high officers of state exercising under the authority of Her Majesty unusual prerogative abilities to distinguish them from ordinary agents acting on behalf of Her Majesty as an ordinary legal person. Governors of colonies, Ministers or other officers, in addition
to being agents of Her Majesty, may be authorized as her representatives to incorporate companies or to exercise other prerogative abilities, including, in relation specifically to colonies, the broad legislative powers existing under the prerogative.

The common law position of Her Majesty has now been outlined.

Many changes have been made by statute.

Chronologically, statutes applying to Her Majesty and her subordinates fall into two categories. The chronology is, to some extent, not entirely accurate since the periods during which these two categories of statutes were enacted overlap. The general pattern is, however, fairly clear.

First, statutes were passed to control the operations of the sovereign by restricting action without the authority of Parliament. These statutes relate to both aspects of the sovereign's common law position, first the sovereign's position as a person possessing claims, powers and liberties of the same nature as any other person and, second, restricting the special abilities conferred on the sovereign by prerogative rules.

An example of the restriction by statute of the sovereign's claims and powers as a person is the legislation relating to the Consolidated Revenue Fund. Originally, revenues of the sovereign, whether from royal estates or other "royalties" or raised by way of taxation, all went into the sovereign's personal purse and could be disbursed by the sovereign as he saw fit. Legislation established a Fund and, with minor exceptions, required all the sovereign's revenues to be paid into the Consolidated Revenue Fund, as it came to be called. None of the monies could be paid out of the Fund without the authority of Parliament by way of an appropriation designating a specified purpose for which a specified amount might be spent. This was a restriction on the sovereign's legal powers as a person to dispose of his money which is removed by an appropriation.12

Similar restrictions were imposed on the sovereign's power to alienate lands. These restrictions were of great importance in the colonies where most wild lands were, in effect, the property of the sovereign. A further restriction was imposed on the sovereign's common law power to dismiss subordinates in the case of judges.

12 An appropriation by itself does not confer a right on anybody to payment of the money appropriated. It is merely a restoration of Her Majesty's power to dispose of her money. Even where there is an appropriation and even where Her Majesty or her authorized agent has authorized a payment to an individual, that individual has no right to payment. He must establish some right to payment on some other basis either contractual or statutory. *Gidley v. Lord Palmerston* 3 Brad. & B. 275; 129 E.R. 1290; *The Queen v. Lords Commissioners of the Treasury*, Law Rep. 7 Q.B. 387; *Queen v. Secretary of State for War*, [1891] 2 Q.B. 326; *Jacques Cartier Bank v. The Queen*, 25 S.C.R. 84.
Again, however, those restrictions were on the sovereign’s powers as a legal person under the law.

An example of a restriction imposed on a special prerogative ability of the sovereign was a limitation placed on the power claimed by the sovereign to requisition or take over property for defense in time of war without paying compensation. Statutes were passed, the effect of which was to impose conditions on the sovereign's power to take property for these purposes. It was held that whatever the common law prerogative may have been, the statute limited this power so that property could be taken over only in accordance with the conditions established by the statute.\textsuperscript{13}

Second, statutes, coming, in general, somewhat later, conferred additional rights or enabling powers on the sovereign. Taxing statutes, once the amount of tax is fixed, operate merely to confer new claims on the sovereign to receive monies. An enabling statute provides for the making of regulations, for powers of decision in particular cases and deals with other similar matters. A significant feature of this group of statutes is that such statutory powers may be conferred on the sovereign personally, or may be conferred directly on subordinate officers of the sovereign or even on statutory bodies or officers who are quite independent of the sovereign. The result has been that the unity of the so-called executive branch of government is gradually being destroyed. A single hierarchy with the sovereign at the top possessing all powers and authority to exercise them running uniformly down from the sovereign through Ministers, lesser officers and subordinates no longer exists. Public bodies and officers existing outside the hierarchy under the sovereign and independently from it, may exercise powers, including subordinate legislative and judicial powers. The trend towards the atomization of the executive branch was pointed out by Maitland as long ago as 1888.\textsuperscript{14}

The structure and general legal nature of the executive branch of government can now be summarized.

The executive branch consists of the conduct of Her Majesty's business as a person through agents or servants of Her Majesty. The legal elements here are similar to those that exist in the conduct of private persons' business through agents or servants although some of the claims and duties of the sovereign vary from those of the ordinary legal person under the law. Her Majesty personally and through representatives, exercises also common law special prerogative abilities and many special statutory authorities conferred on her. In addition, certain statutory bodies and officers exercise special authorities conferred directly on them by statute. These bodies or officers may be classified as acting on behalf of Her Majesty or as acting independently of the hierarchy of subordinates under

\textsuperscript{13} Attorney General v. de Keyser's Royal Hotel, [1920] A.C. 508.
\textsuperscript{14} op. cit. p. 405.
The precise problems relating to the legal forces to be found in the executive branch of government can now be appreciated. The Aristotelian division of the functions of government into the legislative, judicial and executive functions seems to imply the existence of clear-cut legislative, judicial and executive authorities corresponding to these functions. In theory it may be possible to postulate them in a general way. Assuming that a legal system as a mechanism for controlling human conduct rests ultimately for its control in individual instances on the use of some kind of community force, theoretical definitions of these authorities can be framed. Legislative authority in theory would be the power to decide as a matter of policy and specify in advance the circumstances and conduct when, and the manner in which, the community force will be used. Rules of law are merely these statements of policy and under them the legal claim-duty and power-liability relations arise. Judicial authority, in theory, would be the power to determine whether the specified circumstances have arisen and specified conduct taken place—the facts—and to declare, in accordance with the previously stated policy, the action to be taken by the community forces. Executive authority in theory would be the power to order action by the community force. These authorities plus the ordinary legal relations—claim-duty and power-liability relations—seem to exhaust all the possible theoretical elements in the legal system.

These theoretical definitions of legislative, judicial and executive authority do not, of course, accord with their practical nature and certainly do not describe authorities exercised exclusively in the corresponding branches of government—Parliament, the courts and the executive. Theoretical legislative authority is not far out of line with the authority exercised by Parliament and the legislatures. They can, however, exercise certain judicial authority, as in proceedings for impeachment, and certain executive authority where persons are imprisoned for contempt of the Houses of Parliament. The powers of the courts in practice correspond even less to theoretical judicial authority as they exercise authority ranging from pure judicial authority in the theoretical sense, (on matters which seldom come before them owing to the clarity of the legal position) to legislative authority of greater or less extent in matters of interpretation of statutes and refinement and development of the common law. The courts also exercise executive authority in the sense in which it has been defined when they order enforcement action.

For our purposes the significant point is that the legal elements in the executive branch of government extend far beyond the mere exercise of the type of executive authority defined above—ordering police, sheriffs, prison wardens or soldiers to take action under a judicial declaration. The greater part of the operations of the execu-
tive branch are business operations of Her Majesty corresponding to the business activities of an individual acting through agents or servants. Many statutory subordinate legislative and judicial authorities as defined and many other authorities which, owing to the difficulty of distinguishing legislative and judicial powers in practice, are hard to classify, are exercised by officers in the executive branch. Also it would seem that most of the domestic special abilities of Her Majesty under the prerogative are legislative in character. There is, therefore, no single authority that can be pin-pointed as exclusively “executive authority” in any practical sense.

Moreover Her Majesty is not restricted in her activities to acting solely as part of the so-called executive branch of domestic government. She is an integral part of Parliament and the legislatures in the exercise of legislative authority. She is the formal head of the judiciary. She acts as an international sovereign and an international legal person. The prerogative rules dealing with her legal abilities in the first two of these categories are not generally considered to be executive authorities. Her abilities in the latter category, although from a technical point of view clearly different from any of her domestic legal attributes, have been termed executive.

The discussion so far has been an attempt to isolate or describe the executive branch of government and its special attributes under our monarchial system as it existed apart from the B.N.A. Act. Before turning to that Act a brief reference should be made to the conditions in the pre-existing colonies. Leaving aside questions of legislative authority, Her Majesty had an executive government acting under her in each colony. Her Majesty was represented for the exercise of her common law capacities and prerogative powers by a governor with defined authority to act on her behalf and under him there existed a hierarchy of officials — agents and servants — corresponding to that already described. In addition, in each colony statutes of the kind described, both restrictive and enabling, were frequently passed. With the interposition of the Governor as her general representative and agent, Her Majesty’s executive government in any colony corresponded to that in the unitary state directly under Her Majesty in the United Kingdom.

In the territory of British North America therefore, prior to Confederation three colonies—United Canada, New Brunswick and Nova Scotia—each had separate unitary colonial governments. The purpose of the B.N.A. Act was to weld these separate unitary colonies into a particular type of federation with a single central government and four separate provincial governments under Her Majesty. Prior

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15 It is beyond the scope of this article to attempt a detailed classification of the special prerogative abilities as legislative, judicial, executive or otherwise in their nature, if this can be done. It is submitted however that on reflection they will, in the main, be seen to be legislative. This was clearly true of the power to grant monopolies or to suspend or dispense with laws. In this article we must be content with the unsupported assertion that they are largely legislative in character.
to the union, in each colony Her Majesty exercised her capacities as a person under the common law, general and prerogative and her special prerogative abilities and she was, by statute, restricted in some respects and her powers in other respects were extended. She owned property, had incurred debts and obligations, was authorized to raise money by taxes, employed staffs of agents or servants and carried on all operations necessary to a single government. The legal problems in detail of the union in relation to the executive branches of her governments were therefore to place Her Majesty as a person with her ordinary and extraordinary legal attributes appropriately at the head of each government and to distribute Her Majesty’s assets, debts, employees, and so forth, among the new central and provincial governments.

*Provisions of the B.N.A. Act on Executive Power*

The general provision already referred to is Section 9 providing that

The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen\(^\text{16}\)

The Act then specifically provides for a considerable number of matters affecting Her Majesty’s executive operations.

By section 130 and 131, officers and servants previously employed by the colonial governments in services to be carried on by the federal government become officers or servants of Her Majesty in right of Canada\(^\text{17}\) and provision is made for further appointments. These Sections provide:

130. Until the Parliament of Canada otherwise provides, all Officers of the several Provinces having Duties to discharge in relation to Matters other than those coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces shall be Officers of Canada, and shall continue to discharge the Duties of their respective Offices under the same Liabilities, Responsibilities, and Penalties as if the Union had not been made.

131. Until the Parliament of Canada otherwise provides, the Governor General in Council may from Time to Time appoint such Officers as the Governor General in Council deems necessary or proper for the effectual Execution of this Act.

Special provision is made for the appointment of Senators, Lieutenant Governors and Judges (with a limited power of removal). These powers, may be considered to be executive. Curiously enough the office of the Governor General himself is not provided for by the statute. The office is created and appointments to it made under the

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\(^{16}\) Section 15 provides:

The Command-in-Chief of the Land and Naval Militia and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen.

This provision now seems to have been inserted *ex abundante cautela* since the Command-in-chief of the armed forces would now seem to be included under section 9.

\(^{17}\) On the use of the expression “in right of Canada”, see footnote 6, *supra.*
prerogative authority of Her Majesty to create offices by letters
patent and to make appointments to offices so created.

Her Majesty's revenues from taxation were to constitute two
Consolidated Revenue Funds, preserving pre-existing statutory
restrictions on Her Majesty's powers to spend money, to be appro-
priated by Parliament and the legislatures of the provinces. Section
102, 106 and 126 provide:

102. All Duties and Revenues over which the respective Legislatures
of Canada, Nova Scotia, and New Brunswick before and at the Union
had and have Power of Appropriation, except such Portions thereof as
are by this Act reserved to the respective Legislatures of the Provinces,
or are raised by them in accordance with the special Powers conferred
on them by this Act, shall form One Consolidated Revenue Fund, to be
appropriated for the Public Service of Canada in the Manner and subject
to the Charges in this Act provided.

106. Subject to the several Payments by this Act charged on the
Consolidated Revenue Fund of Canada, the same shall be appropriated
by the Parliament of Canada for the Public Service.

126. Such Portions of the Duties and Revenues over which the
respective Legislatures of Canada, Nova Scotia, and New Brunswick had
before the Union Power of Appropriation as are by this Act reserved
to the respective Governments or Legislatures of the Provinces, and all
Duties and Revenues raised by them in accordance with the special
Powers conferred upon them by this Act, shall in each Province form
One Consolidated Revenue Fund to be appropriated for the Public
Service of the Province.

The public lands of Her Majesty are divided, some of them to be
the property of Canada, the remainder becoming the property of the
provinces. Sections 108-9 and 117 provide:

108. The Public Works and Property of each Province, enumerated
in the Third Schedule to this Act, shall be the Property of Canada.

109. All Lands, Mines, Minerals, and Royalties belonging to the
several Provinces of Canada, Nova Scotia, and New Brunswick at the
Union, and all Sums then due or payable for such Lands, Mines, Minerals,
or Royalties, shall belong to the Several Provinces of Ontario, Quebec,
Nova Scotia, and New Brunswick in which the same are situate or arise,
subject to any Trusts existing in respect thereof, and to any Interest
other than that of the Province in the same.

117. The several Provinces shall retain all their respective Public
Property not otherwise disposed of in this Act, subject to the right of
Canada to assume any lands or Public Property required for Fortifica-
tions or for the Defence of the Country. 18

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18 For the meaning to be given to the expressions "property of" and
"belong to", see the extract from St. Catherine's Milling and Lumber Co. v.
The Queen quoted later in this article showing that the title is always in Her
Majesty. Section 109 has been held to have effect in two ways. First, all
lands and property actually vested in Her Majesty "belong to the province".
Second, the special prerogative claims to acquire property in the future and
which was not yet vested — rights to bona vacantia, escheats and the like —
are included in the term "royalties" and are held by Her Majesty in right of
the provinces. For illustrations (not exhaustive) of the operation of this
section, see: Attorney General of Ontario v. Mercer (1883), 8 App. Cas. 767;
St. Catherine's Milling Company v. The Queen (1889), 14 App. Cas 46;
Attorney-General of British Columbia v. Attorney-General of Canada (1889),
14 App. Cas. 295; Attorney General of Alberta v. Attorney General of Canada,
Certain assets other than lands are also allocated. Sections 107 and 110 provide:

107. All stocks, Cash, Banker's Balances, and Securities for Money belonging to each Province at the Time of the Union, except as in this Act mentioned, shall be the Property of Canada, and shall be taken in Reduction of the Amount of the respective Debts of the Provinces at the Union.

110. All Assets connected with such Portions of the Public Debt of each Province as are assumed by that Province shall belong to that Province.

 Provision is also made for the assumption of pre-confederation colonial debts by Her Majesty in right of Canada subject to certain adjustments (Sections 111, 112, 114, 115, 116).

 Provision is made for the exercise of statutory authorities conferred on Her Majesty's representatives prior to the Union—the Governor General and Lieutenant Governors, in the pre-existing unitary colonial governments. Insofar “... As the same continue in existence and capable of being exercised after the union in relation to the Government of Canada...” they shall be exercisable by the Governor General in the appropriate manner (S. 12). “The constitution of Executive Authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act.” (S. 64) Statutory authorities exercisable by the Governors of Canada before the union “... shall as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec, respectively... be exercised by the Lieutenant Governor of Ontario and Quebec respectively...” in the appropriate manner subject to being altered by the appropriate Legislature.19

Unless Section 9 is treated as disposing of all of Her Majesty's capacities and special attributes not expressly dealt with elsewhere the provisions of the Act are not exhaustive. By its terms this provision relates only to “Canada”, the name of the new union, and it might have been restricted to the federal government. The Maritime Bank case20 settled, however, that Her Majesty as a person was the head of the provincial governments entitled to all her personal claims—under the general common law or the prerogative—as the head of

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19 These sections are limited to statutory powers conferred on Governors and Lieutenant-Governors representing Her Majesty before Confederation. They do not refer to special prerogative abilities or to statutory authorities conferred on other officers. These latter were dealt with by Section 129 of the B.N.A. Act which provides in part:

Except as otherwise provided in this Act, all laws in force in Canada, Nova Scotia or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction and all legal Commissions, Powers and Authorities, and all Officers, Judicial, Administrative and Ministerial existing therein at the Union, shall continue ... as if the Union had not been made.... subject to alteration by proper authority after the Act.

the provincial governments as well as the federal government. There remained only the question of the sovereign’s special prerogative authorities, for example, to incorporate companies or to make treaties. The former was not expressly dealt with and did not fall within any of the specific provisions of the Act. The latter was probably not in contemplation. The Bonanza Creek case established the proposition that these authorities of Her Majesty follow legislative authority. The question, in issue was whether the Lieutenant Governor could exercise the prerogative authority to incorporate companies. Lord Haldane states.

It is to be observed that the British North America Act has made a distribution between the Dominion and the provinces which extends not only to legislative but to executive authority. The executive government and authority over Canada are primarily vested in the Sovereign. But the statute proceeds to enact, by s. 12, that all powers, authorities, and functions which by any Imperial statute or by any statute of the provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick are at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of these provinces shall, “as far as the same continue in existence and capable of being exercised after the Union in relation to the government of Canada,” be vested in and exercisable by the Governor-General. Sect. 65, on the other hand, provides that all such powers, authorities, and functions shall, as far as the same are capable of being exercised after the Union in relation to the government of Ontario and Quebec respectively, be vested in and exercisable by the Lieutenant-Governors of Ontario and Quebec respectively.” By s. 64 the constitution of the executive authority in Nova Scotia and New Brunswick was to continue as it existed at the Union until altered under the authority of the Act.

The effect of these sections of the British North America Act is that, subject to certain express provisions in that Act and to the supreme authority of the Sovereign, who delegates to the Governor-General and through his instrumentality to the Lieutenant-Governors the exercise of the prerogative on terms defined in their commissions, the distribution under the new grant of executive authority in substance follows the distribution under the new grant of legislative powers.21

Lord Haldane goes on to discuss a further argument that full authority to represent Her Majesty in all respects is conferred on her Canadian representatives and concludes that it is unnecessary to decide the question. He indicated that he held some reservations. Since the revision in 1947 of the Letters Patent creating the office of the Governor General which expressly gives authority in these wide terms, presumably this question is answered at least so far as the Governor General is concerned.22

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21 [1916] 1 A.C. 566 at 579.
22 The revised Letters Patent Constituting the Office of the Governor General of Canada, issued by His Majesty George VI, effective Oct. 1, 1947, provide in Article II:

And we do hereby authorize and empower our Governor General, with the advice of Our Privy Council for Canada or of any members thereof or individually, as the case requires, to exercise all powers and authorities lawfully belonging to us in respect of Canada . . .

Under this authority the Governor-General has a general authority as an agent of the Sovereign and represents the Sovereign in the exercise of all prerogatives applying to Canada, R.S.C. 1952, Vol. VI, p. 6429.
It would now appear that, by an application of the principle of the *Bonanza Creek* case, the authority to enter into treaties on behalf of Canada is vested in Her Majesty in right of Canada. Under the revised Letters Patent it would follow that the Governor General could authorize such a treaty.\(^2\)

We are now in a position to interpret fully the effect of Section 9 of the B.N.A. Act. The expression “Executive Government and Authority” in this section covers the whole range of Her Majesty’s legal activities at common law. These include her status as a person having legal relations with Her subjects under the general law with prerogative variations. They include her special prerogative authorities. Also it would seem they include any pre-confederation statutory variation or additions.\(^2\) The term “Executive” in the expression quoted appears to relate to her functions as head of the governments rather than to legal powers or authorities. Although it seems likely that in the *Bonanza Creek* case Lord Haldane was using the term “executive authority” in a restricted sense and thinking only of special prerogative authorities, the *Maritime Bank* case had already made it clear that Her Majesty’s personal status extended to both governments. Broadly speaking the principle appears to be that, where they are not expressly dealt with, Her Majesty’s legal attributes follow her practical functional activities as well as legislative authority in the spheres of the governments set up by the B.N.A. Act.

**Transactions between Federal and Provincial Governments**

The so-called doctrine of the “indivisibility of the Crown” calls for no explanation in the light of the foregoing discussion. Her Majesty is the same person at the head of each of her two types of governments in Canada. She acts through different hierarchies of representatives, agents and servants but they are all acting in Her Majesty’s business.

In an Australian case, Lord Haldane stated:

> The Crown is one and indivisible throughout the Empire, and it acts in self-governing States on the initiative and advice of its own Ministers in these States. The question (in that case) is one not of property or of prerogative in the sense of the word in which it signifies the power of the Crown apart from statutory authority, but is one of Ministerial administration, and this confided to the discretion in the present instance of the same set of Ministers under both Acts.”\(^2\)

Lord Dunedin stated in the case of *In re Silver Bros.:

> It is true that there is only one Crown, but as regards Crown revenues and Crown property by legislation assented to by the Crown there is a distinction made between the revenues and property in the Province and the revenues and property in the Dominion. There are two separate


\(^{24}\) This result would follow from s. 129 of the B.N.A. Act quoted in footnote 19.

statutory purses. In each the ingathering and expending authority is different. The case above referred to is quite on all fours with this doctrine.26

The same view was indicated in the earlier case of St. Catherine’s Milling and Lumber Co. v. The Queen:

The Act of 1867 which created the Federal Government, repealed the Act of 1840, and restored the Upper and Lower Canadas to the condition of separate Provinces, under the titles of Ontario and Quebec, due provision being made (sect. 142) for the division between them of the property and assets of the United Province, with the exception of certain items specified in the fourth schedule, which are still held by them jointly. The Act also contains careful provisions for the distribution of legislative powers and of revenues and assets between the respective Provinces included in the Union on the one hand, and the Dominion on the other. The conflicting claims to the ceded territory maintained by the Dominion and the Province of Ontario are wholly dependent upon these statutory provisions. In construing these enactments, it must always be kept in view that, wherever public land with its incidents is described as ‘the property of’ or as ‘belonging to’ the Dominion or a Province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its legislature, and the land itself being vested in the Crown.27

The doctrine is firmly embedded in our domestic law and has been the foundation of numerous transactions. Any wholesale revision of it, if proposed, would probably create widespread uncertainties. Such a revision does not appear to be necessary and such problems as arise under it can, as will be seen, be readily solved by departures from orthodox views much more minor than complete revision.

Reference will be now made to two types of transactions between governments, first, very briefly, to so-called transfers of land between governments, and, second, to the effect to be given agreements between governments.

The extract quoted from the St. Catherine’s Milling case shows that lands held by the federal and provincial governments are both vested in Her Majesty but that the administration of the lands is carried out on her behalf through different representatives. It follows that no conveyance of title can be made by one government to another. Title remains throughout in Her Majesty. All that need be transferred is the authority and duty to administer the lands on behalf of Her Majesty. It is now well established that such a shifting of administrative responsibility can be effected between governments, in the absence of any statutory restriction, with the consent of the authorized representatives of Her Majesty in both governments. Such a transfer of responsibility was made from Imperial government to the government of Canada by message contained in a despatch accepted by that government.28 It is now normally done by complementary Orders-in-Council by the Governor General and Lieutenant Governor.29

27 (1889), 14 App. Cas. 46.
No further conveyance is necessary nor would it be proper. Presumably if a statute applied to such a transaction, limiting the authority of either representative of Her Majesty, compliance with its terms would be required.

The status of so-called agreements between governments gives rise to different considerations. As indicated at the outset of this article, since a person cannot contract with himself there can be no contract in the strict sense between Her Majesty in one right and Her Majesty in any other right. What then is such an agreement? A second separate problem arises. Whatever may be the nature of such an agreement, has any court or tribunal jurisdiction to entertain claims in relation to it? This latter question will be dealt with first.

In the absence of special statutory provisions no court could entertain any claim under such a so-called agreement since it cannot in law be a contract.

The Exchequer Court Act\(^3\) provides as follows:

1. Where the legislature of any province of Canada has passed an Act agreeing that the Exchequer Court has jurisdiction in cases of controversies,
   a. between Canada and such province,
   b. between such province and any other province or provinces that have passed a like Act,
   the Exchequer Court has jurisdiction to determine such controversies.

2. An appeal lies in such cases from the Exchequer Court to the Supreme Court.

Complementary legislation has been enacted by the Legislature of Ontario. The Dominion Courts Act of Ontario provides:

1. The Supreme Court of Canada and the Exchequer Court of Canada, or the Supreme Court of Canada alone, according to the Supreme Court Act (Canada) and the Exchequer Court Act (Canada) shall have jurisdiction,
   a. in controversies between the Dominion of Canada and Ontario;
   b. in controversies between any other province of Canada in which an Act similar to this Act is in force and Ontario.\(^3\)

The jurisdiction so conferred has been recognized and exercised. Although many procedural problems in the course of such proceedings are unsettled, the proceedings are commenced by filing and serving a statement of the claim and pleadings thereafter follow the normal course. The effect of default by one government or refusal to recognize the proceedings is unsettled.

Such an agreement may as one of its terms provide for arbitration. In such case, subject to a caveat with respect to the case where

\(^{30}\) R.S.C. 1952, c. 98, s. 30.
\(^{31}\) R.S.O. 1950, c. 108, s. 1.
one of the parties refuses to honour the submission, the arbitral tribunal will proceed to determine the issues.33

Assuming that proceedings, either in court or by arbitration, are commenced and the agreement comes before the court or tribunal, on what basis is the adjudication to be made?

The general principles appear to be settled by the Privy Council in the case of *Ontario v. Canada.*34 This case did not involve an agreement between governments but its decision appears to be of a general application. The federal government claimed to recover from the government of Ontario certain sums of money in reimbursement for payments made to Indians under a treaty with them. There was no pre-existing agreement but as a result of a treaty with the Indians under which the Federal government became liable to pay for the surrender of certain lands by the Indians, the provincial government gained the benefit of the administration of large areas of lands owned by Her Majesty. The claim was put forward on the basis that in fairness and equity the federal government should be regarded as an agent of the province and reimbursed. The Privy Council dismissed the claim. Lord Loreburn L.C. states:

> Their Lordships are of opinion that in order to succeed the appellants must bring their claim within some recognized legal principle. The Court of Exchequer, to which, by statutes both of the Dominion and the province, a jurisdiction has been committed over controversies between them, did not thereby acquire authority to determine those controversies only according to its own view of what in the circumstances might be thought fair. It may be that, in questions between a dominion comprising various provinces of which the laws are not in all respects identical on the one hand, and a particular province with laws of its own on the other hand, difficulty will arise as to the legal principle which is to be applied. Such conflicts may always arise in the case of States or provinces within a Union. But the conflict is between one set of legal principles and another. In the present case it does not appear to their Lordships that the claim of the Dominion can be sustained on any principles of law that can be invoked as applicable.

To begin with, this case ought to be regarded as if what was done by the Crown in 1873 had been done by the Dominion Government, as in substance it was in fact done. The Crown acts on the advice of ministers in making treaties, and in owning public lands holds them for the good of the community. When differences arise between the two Governments in regard to what is due to the Crown as maker of treaties from the Crown as owner of public lands they must be adjusted as though the two Governments were separately invested by the Crown with its rights and responsibilities as treaty maker and as owner respectively. . . .

This really is a case in which expenditure independently incurred by one party for good and sufficient reasons of his own has resulted in direct advantage to another. It may be that, as a matter of fair play between the two Governments, as to which their Lordships are not called upon to express and do not express any opinion, the province ought to be liable for some part of this outlay. But in point of law, which alone is here in question, the judgment of the Supreme Court appears unexceptionable.

Similar principles will be applied in arbitration proceedings although, of course, in such case the agreement may expressly provide

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34 [1910] A.C. 637. See also South Australia *v.* Victoria (1911), 12 Commw. L.R. 667.
that the decision of any matter in controversy shall be based on principles of equity and fairness and that it is not required to be made in accordance with strict principles of law. In the absence of such a provision principles of law will be applied.35

The principles of law to be applied require some consideration. Claims between governments may arise under statutes specifically providing for adjustment of her Majesty's rights and authorities between her two “statutory purses”, for example the B.N.A. Act, in which case the statutory provisions govern.36 Where the claims arise apart from statute and no special prerogative rule bears on the controversy the general principles of the body of law proper to the controversy should, it seems, be adopted. In general these principles embody good sense and the knowledge that they will apply imports predictability into transactions between governments. The difficult question arises where the controversy relates to matter in which, if it were between Her Majesty and a subject, Her Majesty would be entitled to a prerogative exemption from liability. Can Her Majesty in one right claim this exemption against herself in another? No general answer can be given. In the one instance where the situation arose, the majority of the arbitrators concluded that the prerogative exemption set-off was founded on the basic position that a subject can claim against Her Majesty only in proceedings by petition of right and cannot therefore claim a set-off which is in the nature of a cross claim. Since there is a statutory remedy between governments that is completely mutual the claim to a set-off was allowed.37 This instance furnishes the key to the question. The particular prerogative exemption has to be examined in each case, its rationale appraised and then the appropriateness of its application determined.

A further question may arise as to how far rules relating to contracts with Her Majesty are to be imported into controversies between Her two governments. It is not possible to do more in this article than to indicate the problem. It arises this way. At common law Her Majesty had full capacity to enter into contracts and petitions of right could be brought for a breach of them. When statutory restrictions were imposed on Her Majesty's power to spend her money, a problem arose in connection with contracts under which Her Majesty agreed to pay money. She could make no payment unless Parliament appropriated money for the payment, that is to say, authorized her to spend it. Did this restriction invalidate and render void a contract with Her Majesty if no money was appropriated by Parliament or did it merely mean that although the contract was valid Her Majesty could not perform it and would commit a breach? The subject was considered in a large number of cases and the final view appears to have been that the contract was valid even though

Her Majesty could not perform it.\textsuperscript{38} Of course if proceedings were brought and a judgment was obtained there could be no enforcement of the judgment without an appropriation by Parliament to pay it. In Canada, under the Exchequer Court Act, there is a standing appropriation to pay judgments.\textsuperscript{39} The Financial Administration Act, however, has in effect made statutory the contested rule that contracts with Her Majesty are void unless monies are appropriated to meet payments under them.\textsuperscript{40} Whether this provision will apply in controversies between the governments will have to be decided. The same question may arise with respect to other statutory provisions. Presumably the same basic test would apply, namely, the particular statute will have to be examined, its rationale appraised and its application determined.

Similar questions may well arise in relation to claims between governments founded in effect, on tort. in Australia such an inter-governmental liability is recognized.\textsuperscript{41}

The unanswered problems of procedure in controversies between the governments can, it is submitted, be settled in the same manner. Once the bold step of establishing that the merits of these controversies must be decided in accordance with appropriate principles of law has been taken, it would seem to be only a minor step to hold that the proceedings should be conducted in accordance with appropriate principles of procedure. Ordinary rules of procedure would apply unless there is a ground for excluding them.

The foregoing brief sketch is intended to indicate the nature of the problems that arise in transactions between governments. Much remains for the courts or arbitral tribunals in developing the field.

\textsuperscript{38} New South Wales v. Bardolph (1934), 52 Commw. L.R. Starke J. at 501-3 and Dixon J. at 508 et seq. citing Kidman v. The King, [1926] Argus L.R. 1, per Lord Haldane.
\textsuperscript{39} Exchequer Court Act, R.S.C. 1952, c. 98, s. 79.
\textsuperscript{40} R.S.C. 1952, c. 116, s. 30 and s. 31.
\textsuperscript{41} Commonwealth of Australia v. New South Wales (1923), 32 Commw. L.R. 200. This decision may have turned on special legislation.