Crown Prerogative

The Crown Prerogative as applied to Military Operations

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THE CROWN PREROGATIVE IN CANADA AND ITS USE IN THE CONTEXT OF INTERNATIONAL MILITARY DEPLOYMENTS

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PREFACE

The purpose of the Strategic Legal Paper Series is to promote consideration and discussion among CF legal officers on selected topics of strategic legal importance.

The complex security environment of the 21st Century, including the threat of transnational terrorism, presents unique and challenging legal issues for military commanders and their legal advisors. Therefore, topics addressed in this series should also be of professional interest to military commanders and their staffs.

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1. INTRODUCTION

The Crown prerogative is a source of executive power and privilege. It is a well-established part of Canada's constitution, and fits comfortably into Canada's system of responsible government. The Crown prerogative plays a vital role in Canada's system of government, enabling the executive to perform its important duties in furtherance of Canadian political interests. The powers and privileges found in the Crown prerogative give the government the necessary flexibility to react quickly to complex situations. The purpose of this paper is to outline the law of the Crown prerogative as it applies to the activities of the Department of National Defence and the Canadian Forces (CF). It addresses two separate but related topics. First, the paper sets out, in a general fashion, the Canadian law of the Crown prerogative. Given the overall purpose of the paper, the emphasis is on the federal, as opposed to provincial, Crown prerogative. The examples given to illustrate points are taken from the military context where possible. Second, the paper discusses the application of the general law of the Crown prerogative to the deployment of the CF on military operations outside of Canada.

2. THE LAW OF THE CROWN PREROGATIVE

2.1 Crown Prerogative: "The Powers and Privileges Accorded by the Common Law to the Crown"

There is no widely accepted single definition for the term "Crown prerogative." [1] In *Black* v. *Chrétien et al.*,[2] the Ontario Court of Appeal accepted Professor Peter Hogg's definition of "Crown prerogative" as:

> the powers and privileges accorded by the common law to the Crown.[3]

It is this definition of Crown prerogative that is used in this paper.

Another commonly used definition for the term "Crown prerogative" is provided by Professor Dicey, who states that the term refers to:

> the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown.[4]

In addition to citing Professor Hogg's definition as noted above, the Court in the *Black* case[5] adopted Professor Dicey's definition.[6] Academics, however, have criticized the Dicey definition on the ground that it is too narrow:

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1 While the terms "Crown prerogative" and "Royal prerogative" are synonymous, the term "Crown prerogative" is used in the title of this paper, and throughout. Use of the term "Crown" leaves no doubt that the entity referred to is the monarch in Her public capacity, who in a monarchical system is a member of the executive or central government: see O. Hood Phillips & Paul Jackson, *O. Hood Phillips' Constitutional and Administrative Law*, 7th ed. (London: Sweet & Maxwell, 1987) at 267.

2 (2001), 54 O.R. (3d) 215 (C.A.).

3 Peter W. Hogg, *Constitutional Law of Canada*, Looseleaf ed. (Scarborough: Thomson Carswell, 1997) at 1.9, cited at *Black*, *supra* note 2 at 224. This definition was also accepted by a majority of the S.C.C. in *Ross River Dena Council Band* v. *Canada* (2002), 213 D.L.R. (4th) 193 at 217, LeBel J., in the following words: "Generally speaking, in my view, the Royal prerogative means [Professor Hogg's definition]." The minority differed on another point and did not offer a definition for Crown prerogative.

4 Dicey, Introduction to the Study of the Law of the Constitution, 10th ed. (London: Macmillan, 1959) at 424.

5 *Supra* note 2.

6 *Ibid.* at 224.

while the definition captures the idea that the Crown has a certain *authority* ahead of other entities, it makes no mention of the Crown's special *privileges* and *immunities* that are properly classed with that authority.[7]
It can be argued that Professor Hogg's definition of Crown prerogative is preferable to that of Professor Dicey since it captures those special privileges and immunities discussed above.

As is made clear in Professor Hogg's definition, it is the common law, or judge-made law, that determines the extent of the Crown prerogative. As will be discussed below, the courts may find a basis for a particular power or privilege in legislation, and such a finding may have the effect of limiting or displacing the Crown prerogative in that area. Ultimately, and importantly, the content of the Crown prerogative is not static, nor absolutely defined.

2.2 History of the Crown Prerogative in Canada

As noted, the law of the Crown prerogative is judge-made. A brief review of the history of the Crown prerogative in Canada is helpful in understanding the Crown prerogative law's starting point in this country and its early development. Such a review helps situate later developments of the law of the Crown prerogative and can assist in the identification of the initial applicable principles.

Canada inherited its legal systems from its former imperial powers, namely the United Kingdom, and, to a certain extent, France.[8] As the English King acquired territory in what is now Canada, he acquired the right to use the Crown prerogative in respect of that territory. At that time, the British common law had already begun to define and shape the Crown prerogative. Due to the *Prohibition del Roy*[9]case of 1607, the King lost the right to administer justice, this power being reserved by the courts to themselves. The Bill of Rights of 1688 resulted in the King losing his right to *suspend* or *dispense with* a law, and to tax.[10] According to Professor Hogg, these developments and others "confined the prerogative to executive governmental powers."[11] Finally, "the prerogative was further limited by the doctrine that most executive action which infringed the liberty of the subject required the authority of a statute."[12]

The laws of the United Kingdom allowed for a conquered colony to be subject to legislation adopted by the imperial Parliament. It was also subject to the prerogative right of the King to legislate until such time as the colony was granted its own legislative assembly.[13] This broad prerogative power was used several times in what would become Canada. For example, Great Britain obtained New France (now Ontario and Quebec) by conquest

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7 Hogg, *supra* note 3 at 1.9 note 76, directly criticizes Professor Dicey's definition: "as well as prerogative powers, there are a number of prerogative privileges or immunities, which give to the Crown immunities from some kinds of legal proceedings, priority in the payment of debts, etc. This miscellaneous class of prerogatives, which is ignored in Dicey's definition ("…") has also been reduced by statute, but some of it lingers on." See also Phillips & Jackson, *supra* note 1 at 267, who say that prerogatives may be powers, rights, privileges, and immunities; and see Paul Lordon, *Crown Law* (Toronto: Butterworths, 1991) at 65, who says that "the royal prerogatives are comprised of a collection of powers, rights, privileges, immunities, and duties derived from the common law."

8 Hogg, *supra* note 3 at 2.1.

9 77 E.R. 1342.

10 Hogg, *supra* note 3 at 1.9. Legislation was required for taxation. As is discussed below, in the case of a conquered territory without a legislative assembly, the King had a prerogative right to legislate, and through this mechanism, to tax.

11 Hogg, *supra* note 3 at 1.9.

12 Hogg, *supra* note 3 at 1.9 citing *Entick* v. *Carrington* (1765), 95 E.R. 807 (K.B.) This judgment postdates the early colonization of what is now Canada, and was issued after the Crown prerogative had been used in what would later become Canada.

13 Hogg, *supra* note 3 at 2.3(a).

in the Seven Years' War.[14] By the *Royal Proclamation of 1763*,[15] a prerogative act, the King, amongst other things, established an assembly in Quebec.[16] Further, the constitutions of Nova Scotia, New Brunswick and Prince Edward Island are creatures of prerogative instruments, as is the office of the Governor General.[17]

With the *British North America Act, 1867*, now the *Constitution Act, 1867*,[18] and the union of Canada (after confederation, the provinces of Ontario and Quebec), Nova Scotia, and New Brunswick as the Dominion of Canada, the constitution was born.[19] The *British North America Act, 1867* did not displace the Crown prerogative. Section 9 of the *Constitution Act, 1867*, reads:

> The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.[20]

The Crown prerogative thus survived Confederation but the entity with the power to exercise or take advantage of the Crown prerogative has changed. At the time of Confederation, the Crown prerogative was exercised from England. As a result of Canada's evolution to statehood,[21] the Crown prerogative now rests with the Canadian government.[22]

2.3 Determination of the Contents of the Crown Prerogative in Common Law

The courts actually determine the contents of the Crown prerogative through decisions in cases interpreting legislation. The issues of when a statute acts to bind the Crown, and the effect of a statute on the Crown's authority, are the subjects of common law and legislative rules.

The Crown is, generally speaking, subject to the laws of Parliament and the legislatures: the Crown is a legal person, and benefits from no constitutional rule that would provide a shield to the application of valid statute law.[23] This rule applies to the Crown in right of Canada, as well as in right of a province. Furthermore, and of direct interest to the subject matter of this paper, a Crown prerogative can, in certain circumstances, be limited or even displaced by legislation.[24]

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[14] The pivotal British victory on the Plains of Abraham took place in September of 1759, and France formally ceded the area to Great Britain by the Treaty of Paris, signed 10 February 1763.

[15] (U.K.), R.S.C. 1985, Appendix II, No. 1.

[16] Hogg, *supra* note 3 at 2.3(b). The assembly never met and was abolished by imperial statute (*i.e.* statute from the imperial Parliament) in 1774. Quebec and Ontario would be granted elected assemblies by imperial statute in 1791.

[17] *Ibid.* at 1.9.

[18] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

[19] The other territories and provinces were admitted into Confederation over time, or were created from other entities which joined Confederation over time.

[20] *Supra* note 18, s. 9.

[21] This process was completed following the passing of the *Statute of Westminster 1931*, (U.K.), 22 & 23 Geo. 5, c.4.

[22] The issues of what jurisdiction of Canadian government, *i.e.* federal or provincial, and of exactly what entity may exercise the Crown prerogative are discussed below.

[23] Hogg, *supra* note 3 at 10.8(a).

[24] Lordon, *supra* note 7 at 65-66; *Black*, *supra* note 2 at 225: "despite its broad reach, the Crown prerogative can be limited or displaced by statute." It is interesting to note that the court in *Black* cited section 4 of the *Parliament of Canada Act*, R.S.C. 1985, c. P-1, in support of this statement. Section 4 confirms for the Canadian Houses of Parliament those powers and privileges enjoyed by the Commons House in the United Kingdom in 1867. Obviously this basis for the rule applies only in respect of the federal Crown prerogative.

In a given inquiry into whether or not a particular Crown prerogative has been limited or displaced by a particular statute, the court will engage in a two-step process. First, an investigation will be made into whether or not the statute at issue in fact binds the Crown. This investigation yields a "yes" or "no" answer: either the statute is binding on the relevant authority of the Crown, or it isn't. Second, if the statute is binding on the Crown, an inquiry will be made into whether the statute acts to limit or displace the Crown prerogative at issue.[25]

With respect to the first step, *i.e.* whether a statute binds the Crown, the Crown benefits from an associated immunity, the effect of which is to create a presumption against applicability of the statute to the Crown.[26] The *Interpretation Act*[27] confirms this immunity federally.[28] It reads:

> No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.[29]

While there is an exception to this immunity, it is limited. In the federal *Interpretation Act*, cited above, the exception is phrased "except as mentioned or referred to in the enactment." The common law provides guidance on the scope of the immunity. It is clear that express words in the statute will compromise the immunity.[30] What is less clear is whether the doctrine of *necessary implication* is law in Canada. Briefly put, this doctrine states that if a statute does not expressly bind the Crown, but as a matter of fact such intention to bind the Crown is necessarily implied, the statute will be held binding on the Crown. Lordon has the following to say on the status of the doctrine:

> Whether the prerogative may be affected by a statute by necessary implication is not clear, since judicial pronouncements on the applicability of the necessary implication doctrine are inconsistent.[31]

In summary, the Crown benefits from a prerogative immunity against the application of legislation. This immunity is subject to exception. It is clear that the scope of the exception includes statutes that expressly bind the Crown on their terms. What is less clear is whether the courts will apply the doctrine of necessary implication to an analysis of whether or not a statute binds the Crown.

There are two other matters related to the issue of whether a statute binds the Crown. First, the finding of a mere express reference in the statute to the Crown may not end the inquiry: it may be the case that the reference was meant to include the Crown in right of the legislating government only. For example, it may be possible for the federal Crown to argue that an express reference to the Crown in an Ontario statute includes only the Crown in

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25 See, *e.g.*, *Ross River*, *supra* note 3.

26 This immunity is, in fact, a prerogative. There is an issue as to whether this immunity extends past the Crown in right of the legislating government. The "weight of modern authority is firmly on the side of" the wide view that the Crown in all its capacities benefits from this immunity prerogative: see Hogg, *supra* note 3 at 10.9(a).

27 R.S.C. 1985, c. I-21.

28 As discussed at Hogg, *supra* note 3 at 10.8(b), all but two (2) provinces have interpretation acts confirming this immunity. In British Columbia and Prince Edward Island, the two exceptions, the interpretation acts reverse the presumption and provide that provincial legislation will bind the Crown unless the statute "otherwise specifically provides."

29 *Supra* note 27, s. 17. It is this section that Lordon cites when he states "a royal prerogative may be altered or abolished by legislation": Lordon, *supra* note 7 at 66. A statute may bind the Crown without displacing a prerogative power or privilege.

30 See *e.g. Ross River*, *supra* note 3 at 199, Bastarache J. (with McLachlin C.J.C. and L'Heureux-Dubé J.); Hogg, *supra* note 7 at 10.8(a); *Canadian Encyclopedic Digest*, vol. 8, 3rd ed. (Carswell: Scarborough, looseleaf) "Crown," para. 69.

31 Lordon, *supra* note 7 at 66. See also the minority judgment of Bastarache J. in *Ross River*, *supra* note 3 at 199: "It is less certain whether in Canada the prerogative may be abolished or limited by necessary implication." *Cf.* Hogg, *supra* note 3 at 10.8(a); *C.E.D.*, vol. 8, *supra* note 30 "Crown," para. 69: "expressly or by necessary intendment;" *Ross River*, *ibid.* at 217, LeBel J. (who, interestingly, cites among other authorities Lordon, *supra* note 7 at 66, quoted in the text, *supra*).

right of Ontario.[32] Second, this inquiry necessarily involves federalism concerns. In addition to the often difficult issue of whether the statute deals with matters in the class of subjects properly within the legislating body's powers, there is some general uncertainty in the law as to whether a provincial legislature can bind the federal Crown; whether Parliament can bind the Crown in right of a province; and whether the legislature of one province can bind the Crown in right of another.[33] For example, it is by no means certain that the province of Alberta can bind the federal Crown by statute, even if the statute concerns a matter in the class of subjects listed at section 92 of the *Constitution Act, 1867*.[34]

Only in the event that a statute is held to bind the Crown will it be necessary to inquire as to whether that statute has the effect of limiting or displacing a Crown prerogative. This issue concerns what has been referred to as the "interplay of royal prerogative and statute."[35]

A statute can *limit* a prerogative. As was stated in *Attorney-General* v. *De Keyser's Royal Hotel, Ltd.*:[36]

> …when the Act deals with something which before the Act would be effected by the prerogative and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed.[37]

De Keyser's Hotel concerned a situation in which, during the First World War, the Army Council commandeered a hotel as a location for the Royal Flying Corps headquarters. The authority for seizing the hotel was based in a statute and in the Crown prerogative to take property in times of danger for defence of the realm. The court accepted this legal basis, and had that been the end of the matter, no compensation would be legally payable. However, in this case, the court found that the *Defence Act, 1842*, which provided for compensation in the event of property seizures, applied to the Crown. The statute acted to abridge the existing the Crown prerogative and extended it to include legally payable compensation.

The Supreme Court of Canada was divided on a similar issue in the *Ross River* case. The Crown prerogative at issue was the power to create a reserve for aboriginal peoples. The majority held that this power was limited by the *Indian Act* and the *Territorial Lands Act*.[38] The minority judgment, of three dissented on this point, adopted the position that the Crown prerogative power was not constrained by either statute.[39]

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32 Hogg, *supra* note 3 at 10.9(b).

33 For a discussion of these issues see, *e.g.*, *ibid.*.at 10.9.

34 See *ibid.*. at 10.9(d).

35 *Ross River*, *supra* note 3 at 217, LeBel J.

36 [1920] All E.R. Rep. 80 (H.L.).

37 *Ibid.* at 86, Lord Dunedin, cited with approval in *Ross River*, *supra* note 3 at 217, LeBel J. Another way to describe what happens when a prerogative is limited by a statute is as Lordon has done: "Parliament may by statute preserve the prerogative but regulate the manner in which it is to be exercised." See Lordon, *supra* note 7 at 67.

38 *Ross River*, *supra* note 3, LeBel J.

39 *Ross River*, *ibid.*, Bastarache J.

In *Vancouver Island Peace Society* v. *Canada*[40], the applicants sought to quash two Orders in Council approving visits of nuclear-powered and nuclear-armed vessels to Canadian ports. One argument presented by the applicants was that certain statutes[41] had the effect of displacing the Crown prerogative used by the government as a basis to the Orders. The court rejected this argument and held that the relevant Crown prerogative remained whole. That conclusion was based on a finding that the purposes of the statutes did not include the regulation of the actions at issue, nor did Parliament intended to do so.[42] Nothing in the provisions of the statutes "and nothing in the historic conditions of mischief they were enacted to deal with" persuaded the court that Parliament "intended to withdraw or to fetter the prerogative of the Crown to provide for the visit" of the ships at issue to Canadian ports.[43]

While a statute might limit a Crown prerogative, it might also, in certain very limited circumstances, act to *displace* such a prerogative wholly. From *De Keyser's Royal Hotel*:

> …if the whole ground of something which could be done by the prerogative is covered by the statute it is the statute that rules.[44]

Perhaps the clearest example of where a statute has completely displaced a prerogative in Canada is in relation to the traditional Crown prerogative rule exempting the Crown from vicarious liability in tort. Under the federal *Crown Liability and Proceedings Act*,[45] the federal Crown "is liable for the damages for which, if it were a person, it would be liable," in certain cases including that of "a tort committed by a servant of the Crown."[46]

Accordingly, only if a statute, as a matter of law, binds the Crown, does it become necessary to examine the interplay of the statute and the Crown's prerogatives. A statute binding on the Crown can, in certain instances, have the effect of limiting or displacing the Crown's prerogatives. While the issue has been examined from the *negative* side, it can also be looked at from the *positive* side. There are many instances in which the courts have held that a Crown prerogative remains whole and unfettered. For example, and as will be discussed in Section 3.3 of this paper, neither the *National Defence Act*[47] (*NDA*) nor any other statute, works to limit or displace the Crown prerogative to deploy the CF on international operations. The Crown prerogative remains the source of authority for these deployments.[48]

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40 (1993), 11 C.E.L.R (N.S.) 1 (Fed. T.D.); affirmed (1995), 16 C.E.L.R. (N.S.) 24 (Fed. C.A.); leave to appeal dismissed (1995), 17 C.E.L.R. (N.S.) 298 (S.C.C.).

41 The *Canadian Environmental Protection Act*; *Atomic Energy Control Act*; and the *Canada Shipping Act*.

42 *Vancouver Island*, *supra* note 40 at 35.

43 *Ibid.*

44 *De Keyser's Hotel*, *supra* note 36 at 86, Lord Dunedin.

45 R.S.C. 1985, c. C-50.

46 *Ibid.*, s. 3. Of note, it is difficult to think of legislation that more clearly applies to the Crown than this Act. The provincial acts governing proceedings against the Crown have also altered the associated Crown prerogative vis-à-vis the Crown in right of the provinces: see *C.E.D.*, vol. 8, *supra* note 30 "Crown," para. 29 and 82.

47 R.S.C. 1985, c. N-5.

48 Parts of the *NDA*, *ibid.*, give direction on the management and control of the CF, but do not thereby displace the associated Crown prerogatives. Specifically, Section 15 establishes the regular force and reserve force as components of the CF (and expressly provides that the Governor in Council shall authorize the maximum number of officers and non-commissioned members in each component). Section 31 grants the Governor in Council the authority to place members or elements of the CF on active service, and deems certain members to be on active service. Section 34 states that those under 18 years of age may not be deployed by the CF to a theatre of hostilities. Section 60 sets out the classes of persons subject to the Code of Service Discipline, and provides that the Governor in Council may by regulation prescribe rules in relation to the application of the Code of Service Discipline to members of other nations' forces attached or seconded to the CF. Section 273.6 provides that "the Governor in Council or the Minister may authorize the Canadian Forces to perform any duty involving public service." To date, no court appears to have made a finding that any section of the *NDA* here discussed has the effect of displacing a Crown prerogative.

2.4 Contents of the Crown Prerogative

So far, this paper has discussed the concept of the Crown prerogative and the process by which its content has been and is developed. It is appropriate at this stage to survey modern law on the subject with an objective to define the contents of the Crown prerogative by subject area.

The common law has determined the contents of the Crown prerogative. It is now possible to propose a current non-exhaustive contents list:[49]

a. Foreign affairs,

b. War and peace,

c. Treaty-making,

d. Other acts of state in matters of foreign affairs, and

e. Defence and the armed forces.[50]

Other powers and privileges considered Crown prerogatives include those respecting passports, power of mercy, diplomatic appointments, public inquires, hiring and dismissal of public servants, administration and disposal of public lands, copyright, armorial bearings, and honours and titles.[51]

It should be noted that the above list does not include reference to the prerogatives styled *personal prerogatives* of the Governor General. Such *personal prerogatives* relate to matters such as the appointment or dismissal of the Prime Minister or the dissolution of Parliament. These powers are theoretically exercised upon the Governor General's own discretion, but in practice follow directly from election results, parliamentary votes, or as directed by the Prime Minister.

2.5 Federalism and the Crown Prerogative

With the Crown prerogative's ambit developed, this paper will now explore the important area related to the identification of the user of a Crown prerogative. At the outset of this discussion, it is imperative that the concept of the Crown prerogative be well defined in relation to Canada's federal system.

The Queen's representative federally is the Governor General. In the provinces, a Lieutenant Governor assumes this role. Under section 58 of the *Constitution Act, 1867*,[52] each Lieutenant Governor is appointed by the Governor General in Council, i.e. the Queen's federal executive appoints the Queen's provincial representatives. Even so, it has been consistently held that the Lieutenant Governors are not subordinate to the federal executive, and therefore that they have all Crown prerogatives properly apportioned to the provinces. Accordingly, the Crown in Canada can in fact be considered to consist of two parts, or orders, each of which can exercise prerogatives in their respective spheres.

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[49] This list is taken from Lordon's list which he calls "Crown prerogatives of contemporary importance." See Lordon, *supra* note 7 at 75.

[50] *Ibid.* The importance of the Crown prerogative as a source of authority to the DND and the CF is clear from this list.

[51] Lordon, *supra* note 7 at 75-105.

[52] *Supra* note 18.

As to the issue of which classes of subjects each order of the Crown may properly exercise prerogatives in relation to, the system of apportionment of Crown prerogatives between the federal and provincial governments has been held to mirror the division of legislative powers contained at sections 91 and 92 of the *Constitution Act, 1867*.[53] As a result, any subject over which the provincial legislatures have constitutional legislative authority is a subject over which the Crown in right of the provinces may also exercise the Crown prerogative, and the same concept holds true for Parliament and the federal Crown. For example, and of great importance to the CF, under section 91(7) of the *Constitution Act, 1867*[54], the Parliament of Canada has legislative authority over matters related to the subject of Militia, Military and Naval Service, and Defence. Accordingly, those prerogative powers and privileges concerning matters within the subject of Militia, Military and Naval Service, and Defence belong, ultimately, to the Crown in right of Canada.

2.6 Exercise of the Federal Crown Prerogative in Canada

The Crown, in both its federal and provincial capacities, exercises the Crown prerogative. This is a complex issue in itself and can be described as a two-step issue, namely: the identification of which particular player exercises a given Crown prerogative, and the process leading to the decision to exercise a Crown prerogative.[55] In keeping with the emphasis of this paper on the federal level of government, these issues will be addressed from the federal Crown perspective.

2.6.1 Cabinet Ultimately Exercises Executive Authority

The Crown prerogative in Canada belongs to the executive.[56] By law and convention however, executive power in Canada does not rest with the head of state.[57] As will be discussed in this section, it is the political executive that actually exercises executive authority, including the Crown prerogative.[58]

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53 *Ibid*. See Hogg, *supra* note 3 at 9.2 Note 9. See also Lordon, *supra* note 7 at 68.

54 *Supra* note 18.

55 As is discussed in Section 2 of this paper, and bears repeating at this stage, the Crown prerogative consists not only of powers, but also of privileges (including immunities). The discussion on how the Crown prerogative is exercised will focus on the exercise of a Crown prerogative *power*.

56 In political theory, the executive government in Canada at the federal level consists of the monarch, the Governor General, the Prime Minister, and Cabinet.

57 The fact that the Crown prerogative is not, in fact, exercised by the formal head of state, but rather by other entities, derives mostly from a constitutional convention. As Hogg, *supra* note 3, puts it at 1.9 “an extraordinary feature of the system of responsible government is that its rules are not legal rules in the sense of being enforceable in the courts. They are conventions only. The exercise of the Crown’s prerogative powers is thus regulated by conventions, not laws.”

58 The term “political executive” is used here to set off that element of the executive that uses executive authority in Canada as a matter of practice. As will be discussed, the Canadian head of state legally retains executive authority, but in fact does not personally use it. This complex state of affairs finds its origin in court declarations that the Canadian head of state *shares* Crown prerogative authority with the political executive: in fact, and as will be discussed, convention (which is not referenced by the courts) dictates that the political executive retains executive authority alone.

Constitutionally, the Queen exercises executive authority in Canada,[59] and has, through *Letters Patent*,[60] authorized the Governor General to exercise this authority federally.[61] The Privy Council exists to "aid and advise in the Government of Canada,"[62] and under the *Letters Patent*, the Governor General is to exercise executive authority *with the advice* of the Privy Council.[63]

Considering the written constitutional law out of context, then, it might be suggested that the Governor General, as the Queen's federal representative, should exercise the Crown prerogative alone, and consult with the Privy Council as necessary. This does not reflect the way the Canadian government operates: it is Canada's system of responsible government that provides the context for executive decision-making. When the written constitution is placed in the responsible government context, the executive decisions are made by the government through the Cabinet, and the Cabinet will endure only as long as the government retains the confidence of the elected, lower House. The Queen and the Governor General stand as legally necessary figureheads in this process.[64]

The method by which the law and convention work together to reach this result is that the Cabinet, a body with no status in the *Constitution Act, 1867*,[65] is by convention the only operating part of the constitutionally mandated Privy Council.[66] While the constitution states that the Privy Council (and therefore its active component, the Cabinet) provides *advice* to the formal head of state, it provides in reality the authority for the Cabinet to take decisions on its own.[67]

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59 Executive power in Canada is addressed in Part III, being sections 9 to 16, of the *Constitution Act, 1867* (U.K.), *supra* note 18. As was mentioned in Section 2.2 of this paper, Section 9 of the *Constitution Act, 1867*, ensures that the Crown prerogatives, in respect of Canada, rest with the Queen. It reads "The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen."

60 The office of the Governor General, the Queen's representative in Canada, was created by a prerogative act of the Queen: the *Letters Patent Constituting the Office of Governor General of Canada, 1947*, R.S.C. 1985, Appendix II, No. 31. Art. I reads "We do hereby constitute, order, and declare that there shall be a Governor General and Commander-in-Chief in and over Canada…". In fact, there is no structure in place in the *Constitution Act, 1867* (U.K.), *supra* note 18, for the creation of the office of the Governor General.

61 Art. II of the *Letters Patent, 1947*, *ibid.*, reads: "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…"

62 *Ibid.* The Privy Council for Canada is established by section 11 of the *Constitution Act, 1867* (U.K.), *supra* note 18, which reads: "There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada…"

63 *Ibid.*, art. II.

64 As *per* Gregory Tardi, *The Legal Framework of Government, a Canadian Guide* (Aurora: Canada Law Book, 1992) at 83: "in political reality, the focus of [executive] power is in the Cabinet, with the Governor General retaining a role as a legally-necessary figurehead."

65 In fact, there is no mention of the Cabinet in the *Constitution Act, 1867* (U.K.), *supra* note 18.

66 The Cabinet "constitutes the only active part of the Privy Council, and it exercises the powers of that body:" Hogg, *supra* note 3 at 9.3(b). Cabinet has by convention historically been made up of all Federal ministers. The Cabinet is a part of the Privy Council, along with individual appointees: Hogg, *ibid.*at 9.3(b). Appointment to the Privy Council is for life; technically all living members of former cabinets are members of the Privy Council.

67 As *per* Hogg, *supra* note 3 at 9.2: "in a system of 'responsible government' (or cabinet or parliamentary government, as it may also be called) the formal head of state… must always act under the 'advice' (meaning direction) of ministers who are members of the legislative branch and who enjoy the confidence of a majority in the elected house of the legislative branch."

Accordingly, executive authority ultimately rests with the Cabinet: "the cabinet formulates and carries out all executive policies, and it is responsible for the administration of all the departments of government."[68] Executive authority in the hands of Cabinet includes the authority granted under the Crown prerogative.

Cabinet exercise of Crown authority was examined in the Crown prerogative context in the *Black* [69]case. In coming to its conclusion that the Crown prerogative could be exercised by the Cabinet (and, as will be examined, *infra*, individual ministers,) the court stated:

> …nothing in the *Letters Patent* or the case law requires that all prerogative powers be exercised exclusively by the Governor General.[70]

The court went on to point out that the impugned exercise of the Crown prerogative in the *Operation Dismantle*[71] case was done by Cabinet, and therefore that an argument that the Crown prerogative could be exercised only by the Governor General must fail.[72]

In summary, the Crown prerogative is, as a matter of law and convention, exercised at the federal level by the Cabinet.

While Cabinet has the ultimate authority to implement executive will, including implementation through the exercise of the Crown prerogative, it does not mean that Cabinet must sit as a whole body to do this. Cabinet committees may take associated decisions, and, importantly, individual members of Cabinet may also exercise the Crown prerogative. This point is developed in the two following sections.

2.6.2 The Principles of *Delegatus non Potest Delegare and Carltona*

The exercise of the Crown prerogative by levels of the executive below whole of Cabinet may properly be considered a delegation of prerogative authority. In other words, when ministers of Cabinet exercise the Crown prerogative, they do so with reference to the authority granted to Cabinet. It is helpful at this point of the discussion to situate what may be called the Crown prerogative delegation concept in the context of two other legal norms relating to delegation: the *delegatus non potest delegare* rule, and the *Carltona* principle. By analyzing the interaction of these norms and the Crown prerogative delegation idea, it can be seen that while neither norm is directly or legally applicable to the idea, the rationale for the *Carltona* principle provides guidance on defining the idea's scope.

The first norm, "a delegate may not re-delegate,"[73] has been referred to by the Supreme Court of Canada as a "general *rule of construction* in law."[74] [Emphasis added] Lordon describes the maxim as follows:

> It is a general principle of administrative law that a *statutory* power should be exercised by the authority on whom it is conferred and not delegated to another person or body.[75] [Emphasis added]

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68 Hogg, *supra* note 3 at 9.3(b).

69 *Supra* note 2.

70 *Ibid.* at 226.

71 *Operation Dismantle* v. *The Queen* (1985), 18 D.L.R. (4th) 481 (S.C.C.) , this case is discussed more fully at Section 2.7.2, *infra*.

72 *Ross River*, *supra* note 3, can also be used in support of this point. In that case, the majority stated (at 221 D.L.R., LeBel J.): "if the power to create reserves is derived from the royal prerogative, the Governor General, *or Governor in Council*, would normally exercise that power." [Emphasis added.]

73 John Willis, "Delegatus Non Potest Delegare" (1943), 21 Can. Bar Rev. 257 at 257.

74 *R.* v. *Harrison* (1976), 66 D.L.R. (3d) 660 (S.C.C.) at 665.

75 Lordon, *supra* note 7 at 39.

This norm is inapplicable in the context of the Crown prerogative, as is its rationale.[76] The rule is confined in ambit to statutory powers, which confinement makes sense given the purpose of the rule: to assist in the interpretation of words conveying delegation. Essentially, the rule provides that if words conveying a delegation refer to a particular person or body as the holder of a power, that person or body cannot sub-delegate, it being assumed that the words of delegation were meant to be specific. Crown prerogatives are not, by definition, provided by statute. Further, there is no wording to interpret with the aid of legal norms of construction. As a final note, the exercise of the Crown prerogative, as an essential executive function, is by its essence necessarily delegated. As has been described, the "Crown" prerogative is very rarely actually used by the Crown in Her person but is rather used by the Crown in Her public capacity. In this capacity, the Crown is represented almost entirely by delegates.

The *Carltona* principle has been described by the Supreme Court of Canada as follows:

> Where the exercise of a discretionary power is entrusted to a Minister of the Crown it may be presumed that the acts will be performed, not by the Minister in person, but by responsible officials in his department.[77]

It should be noted that the rule is stated to apply to "the exercise of a discretionary power (…) entrusted to a minister of the Crown." Notwithstanding the broad ambit of the rule suggested by this wording, it comes from a case that considered a discretionary power that flowed from a statute.[78] To the extent that the wording suggests possible application of the principle to the exercise of a Crown prerogative, it is certainly *obiter*. The *Carltona*[79] case itself concerned a statutory power. Legislation that could be considered to capture the principle in statute law confines it to a principle of interpretation.[80] Further, the principle is often cited in opposition to the *delegatus non potest delegare* rule, a rule, as has been mentioned, that concerns itself with construction of statutes.[81] Finally, the rule is often confined in the explanation to statutory powers.[82] All of this to say that the common law has probably not at this stage adapted the *Carltona* principle to the Crown prerogative context.[83]

The rationale behind the *Carltona* principle can contribute to this analysis and is relevant to this paper in terms of the delegation of the Crown prerogative from the Crown to the operative arm of the Crown. The often cited basis for the principle is as follows:

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[76] It appears neither the rule nor its rationale has been referenced in relation to an exercise of the Crown prerogative.

[77] *Harrison*, *supra* note 74 at 665.

[78] *Harrison*, *ibid*., considered the power in the *Criminal Code of Canada* permitting the Attorney-General to institute an appeal on behalf of the Crown.

[79] Carltona, Ltd. v. Commissioners of Works and Others, [1943] 2 All E.R. 560 (C.A.).

[80] The federal *Interpretation Act*, *supra* note 27, s. 24(2) goes some way to legislating the *Carltona* principle:
"Words directing or empowering a minister of the Crown to do an act or thing…include:
…
(c) his or their deputy; and
(d) notwithstanding paragraph (c), a person appointed to serve, in the department…over which the minister presides, in a capacity appropriate to the doing of the act or thing, or to the words so applying."

[81] See, *e.g.*, Lordon, *supra* note 7 at 40: "An exception to the *delegatus* principle which operates in favour of Ministers or government Departments finds its origin in *Carltona*."

[82] See, *e.g.*, i*bid*: "The *Carltona* doctrine may not apply to every *statutory* power exercisable by a Minister or Department." [Emphasis added.]

[83] Further, and as will be discussed *infra*, there does not seem to be any support for the position that the Crown prerogative can be exercised below the level of minister. By its terms, the *Carltona* principle empowers sub-ministerial levels of the executive.

> The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible.[84]

A submission can be made that this basis consists of two interlinking parts. First, it is inconceivable to imagine a state of affairs in which all executive decisions are made only by those in the highest office of the executive: there is simply too much public business. Second, through the system of responsible government, all executive decisions, regardless by whom made, are subject to the ultimate scrutiny of elected officials. A decision made by the government is subject to the will of the elected officials in that they may bring down the government. A decision taken by officials in a department is subject to a similar scrutiny by that department's head: the responsible minister. In summary, while the *Carltona* principle does not apply to delegation of the Crown prerogative as a matter of common law, it would appear arguable that the rationale for the principle does, and this rationale makes up a sound first principle upon which to examine the issue of delegation of the prerogative in any given case.

2.6.3 Exercise of the Crown Prerogative by Levels of the Executive Below Whole of Cabinet

While the rationale for the *Carltona* principle, and the inapplicability of the *delegatus non potest delegare*, would suggest that Cabinet may delegate authority to exercise the Crown prerogative to ministers, the academics and courts have made their position clear on this matter. Lordon has stated that:

> In Canada, prerogatives are exercised by the Governor General at the federal level and by the Lieutenant-Governor in each province. As members of the Privy Council, the Prime Minister and other Ministers also have some powers of the nature of prerogatives.[85]

Delegation of the Crown prerogative from the whole of Cabinet was discussed in the *Black* case.[86] In that case, the Queen nominated Conrad Black for appointment as a peer, and the Prime Minister of Canada intervened to block the conferral of the honour. Black sued the Prime Minister for abuse of power, misfeasance in public office, and negligence. In answer to the Prime Minister's argument that his actions constituted an exercise of the Crown prerogative and therefore that the claims were not justiciable, Black countered in part that a Canadian Prime Minister could not exercise the Crown prerogative, and that this power rested with the Governor General alone. The court rejected this claim stating:

> I find no support for this proposition in theory or in practice (…). By convention, the Governor General exercises her powers on the advice of the Prime Minister or Cabinet. Although the Governor General retains discretion to refuse to follow this advice, in Canada that discretion has been exercised only in the most exceptional circumstances. See [Lordon at 70] (…). Still, nothing in the *Letters Patent* or the case law requires that all prerogative powers be exercised exclusively by the Governor General. As members of the Privy Council, the Prime Minister and other Ministers of the Crown may also exercise the Crown prerogative: see [Lordon at 71].[87]

Accordingly, it is clear that not only may Cabinet exercise the Crown prerogative, but so may its individual members in certain circumstances. This paper now proposes a brief discussion on the legal basis for an exercise of the Crown prerogative by the following levels of the executive: Cabinet committee, the Prime Minister, and individual ministers.

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84 *Carltona*, *supra* note 79 at 563; cited by the S.C.C. in *Harrison*, *supra* note 74 at 285.

85 Lordon, *supra* note 7 at 71.

86 The *Black* case, *supra* note 2, actually dealt with a delegation of the Crown prerogative from the head of state down: see Section 2.6.1, *supra*.

87 *Black*, *supra* note 2 at 226. The court emphasized the point at 227, stating: "I conclude that the Prime Minister and the Government of Canada can exercise the Crown prerogative as well."

It should be noted that this paper has set out the proper authorities to exercise the Crown prerogative by stating to whom such authority *is not* limited, i.e. not only Cabinet may exercise the Crown prerogative. The issue, however, can also be approached from the opposite angle: the interpretation that the right to exercise the Crown prerogative *is* limited to certain levels of the executive. It is not entirely necessary to address this issue for the purpose of this paper, since the paper goes no farther than to establish that ministers may exercise the prerogative and addresses only issues related to the exercise of the prerogative at that level. It should be added, however, that limits on the exercise of the Crown prerogative have not been fully explored by the courts. While there is support for the proposition that Ministers may exercise the Crown prerogative, there does not appear to be any case law or academic analysis suggesting that the prerogative may be exercised by lower levels of the executive.

Cabinet Committee. Cabinet business is frequently conducted by committee.[88] A Cabinet committee's authority to exercise Crown prerogatives possessed by Cabinet can be considered to have two sources. First, the committee may be considered to be the Cabinet at the time that it meets, even though not all Cabinet members are present, nor invited or expected to attend. Second, a Cabinet committee draws authority from the implied delegation to it of decisions in the area over which that committee has expertise. For example, and as will be discussed in Section 3.6.3, the Foreign Affairs and National Security Committee is the Cabinet committee having subject matter expertise over Cabinet business including the deployment of the CF internationally. Cabinet Committees have exercised and continue to exercise the Crown prerogative in much the same way as the whole of Cabinet.

Prime Minister. The Prime Minister is the head of government, and is, *ex officio*, entitled to exercise the Crown prerogative.[89] In addition, the Prime Minister plays a central role in Cabinet, exercising great power over that body by convention. In Professor Hogg's words:

> The Prime Minister calls the meetings of cabinet, settles the agenda, presides over the meetings, and "defines the consensus" on each topic.[90]

Accordingly, the Prime Minister has a two-pronged legal basis for the use of the Crown prerogative. First, the legal authority that is derived from his or her position as head of government, and, second, the authority derived from the right to *define the consensus* of Cabinet. As has been discussed, it was the Prime Minister who made the Crown prerogative decision in the *Black* case.

It remains important to note that not all governments function alike, and whether the Prime Minister will actually run the government in a manner that permits personal exercise of the Crown prerogative depends very much on the personalities involved and the political landscape of the day. Professor Hogg states:

> In some governments a Prime Minister, who chooses to take on his own initiative, or on the advice of a few ministers, decisions which would traditionally be the preserve of the cabinet, is politically able to do so; and the extent to which the full cabinet plays a role in important decision-making may depend in large measure upon the discretion of the Prime Minister.[91]

In summary, the Prime Minister has a legal basis to exercise the Crown prerogative in certain cases, and may or may not actually do so depending on a variety of factors.

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88 "The number and jurisdiction of Cabinet Committees varies from time to time, but there are usually four policy Committees of Cabinet dealing with economic, social, government operations and management, and foreign and defence policy:" see Privy Council Office, "Memoranda to Cabinet: A Drafter's Guide," updated June 2000. While this guide is dated and not regularly updated, it remains a good source for basic information of Memoranda to Cabinet and associated machinery of government. On 15 January 07, there were 7 Cabinet Committees: http://www.parl.gc.ca/information/about/people/key/CabCom.asp?Language=E.

89 See, *e.g. Black*, *supra* note 2 at 227: "as members of the Privy Council, the Prime Minister and other Ministers of the Crown may also exercise the Crown prerogative."

90 Hogg, *supra* note 3 at 9.3(d).

91 *Ibid.*

Individual Ministers. As discussed above, ministers are members of the Privy Council, and of the Cabinet, and thus have, in Lordon's words, "some powers of the nature of prerogatives."[92] In the *Black* case the court stated in *obiter*, citing Lordon, "other Ministers of the Crown may also exercise the Crown prerogative."[93] Accordingly, there is support for the legal position that individual ministers can exercise the Crown prerogative in certain contexts, and, in fact, individual ministers have exercised and continue to exercise the Crown prerogative. As will be discussed in Section 3.6, this ministerial power to exercise the Crown prerogative includes the right of the Minister of National Defence with the Minister of Foreign Affairs, as well as the MND acting alone in certain cases, to use the Crown prerogative to deploy the CF internationally.

As with the exercise of the Crown prerogative by the Prime Minister, however, merely because individual ministers have the legal authority to exercise the Crown prerogative does not necessarily mean that in the government of the day it will be politically acceptable for them to do so.

2.6.4 How the Crown Prerogative Is Exercised

In the beginning of section 2.6, it was mentioned that the exercise of the Crown prerogative is a two-step process: which executive authority may exercise the Crown prerogative, and the means by which a Crown prerogative decision is actually made. This second aspect shall now be addressed. The exact manner in which the Crown prerogative is exercised depends on which of the two levels of the executive is involved: Cabinet or Cabinet committee; or Prime Minister or individual minister.

Cabinet or Cabinet Committee. When the Cabinet as a whole body or a Cabinet Committee takes a decision drawing its authority from a Crown prerogative, such decision is formalized. Practices have developed regarding how business is brought to Cabinet or one of its committees, and how resulting decisions are taken. A department may, alone or in conjunction with another or other departments, submit a draft Order in Council (OIC) to Cabinet or Cabinet committee,[94] along with supporting documentation including an explanatory note.[95] If Cabinet or committee agrees with the recommendation to sign the OIC, it may do so. A report of a signed Memorandum to Cabinet (MC) is regularly placed before the Governor General for "final approval."[96] Cabinet or one of its committees may also consider business brought to it through by an MC, "the key instrument of written policy advice to Cabinet."[97] If an MC is referred to Cabinet Committee in the first instance, the decision of the Committee is issued as a Committee Report and referred to whole of Cabinet for ratification.[98] In respect of all requests for decision brought before it, Cabinet will issue a Record of Decision (RD) to the relevant department for implementation.[99] It is this RD that stands as the formal exercise of an associated Crown prerogative.[100] Finally,

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92 Lordon, *supra* note 7 at 71.

93 *Black*, *supra* note 2 at 226.

94 Generally, only Treasury Board Cabinet committees will consider OICs.

95 See Privy Council Office, Regulatory Affairs Division, "Governor in Council Process Guide: Developing a Proposal Seeking the Approval of an Order by the Governor in Council," July 2004, ISBN 0-662-36451-1. Although this document is not regularly updated to reflect often changing OIC practices, it remains a good source of basic information on the OIC process.

96 *Ibid.*

97 "Memoranda to Cabinet: A Drafter's Guide," *supra* note 88.

98 *Ibid.*

99 *Ibid.*

100 Not all business brought to Cabinet or Cabinet Committee by way of MC will concern an exercise of the Crown prerogative. Frequently, MCs will be informational only, or may request exercise of authority based in something other than a prerogative source.

Cabinet and Cabinet committee may also consider requests for decision presented through means less formal than MC's including a presentation by audio-visual format. All associated decisions are made by the same process as if the matter was presented formally through a MC.[101]

Prime Minister or Individual Ministers. The Prime Minister or individual Ministers will exercise the Crown prerogative in writing, often times by way of letter to officials charged with implementing the decision.[102] Such letters are usually in response to letters requesting authority, but can conceivably be issued on their own. When a letter taking a decision under the Crown prerogative is issued in response to another letter requesting such a decision, it normally refers to the requesting letter and its contents, and both letters are required for the decision to be fully understood. Individual Ministers exercise the Crown prerogative in this manner through letters normally issued in response to letters from their Deputy Ministers. A minister who asked for a Crown prerogative decision has, in theory, three options in terms of process. First, the Minister can write to the Prime Minister asking for concurrence with a proposed decision. Second, the Minister can inform the Prime Minister of a decision that has been made. Third, the Minister can take the decision without corresponding with the Prime Minister.

Although several levels of the executive may be empowered to take a certain Crown prerogative decision, and through different processes, only one formal exercise of the Crown prerogative should be used in any given circumstance for a particular Crown prerogative decision. The reason for this is that the appropriate executive authority rarely makes a Crown prerogative decision *simpliciter* but rather makes the decision in a way that delivers strategic guidance on how the decision is to be carried out. In the event that two processes are used to take one decision, the resulting strategic direction will in the least be confusing, and may in fact be inconsistent.[103] Two concurrent processes will not lead to confusion, however, they may do so if they deal with the same general subject matter but result in decisions emanating from different sectors. An example of this might be a strategic objective letter containing strategic guidance on how an international operation should be conducted, combined with a related MC requesting additional funding for the same operation.

2.6.5 Parliament Does Not Play Any Formal Role in the Exercise of a Crown Prerogative

It is clear that Parliament does not play any role mandated by law in the exercise of the Crown prerogative. The Crown prerogative is vested in the executive government, not the legislature.[104] In the realm of executive government, Parliament's responsibility is to oversee government generally, through the system of responsible government. As is stated in Phillips & Jackson:

> The government does not have to consult, or even inform, Parliament before exercising prerogative powers. This is convenient, for many matters falling within the prerogative are not suitable for public discussion before the decision is made or the action performed. [105]

This does not mean the executive will not consult Parliament in relation to a particular exercise of the Crown prerogative, it merely means that, as a matter of law, it need not to. As Phillips & Jackson goes on to say:

> on the other hand, the government must feel assured of parliamentary support [after a Crown prerogative decision is made], especially in a matter like war or where money will be required.[106]

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[101] "Memoranda to Cabinet: A Drafter's Guide," *supra* note 88.

[102] Such letters used in the context of CF deployments are referred to as "strategic objective" letters, and are discussed more fully in Section 3 of this paper, below.

[103] A theoretical example is a Crown prerogative decision to deploy CF elements. One form of the Crown prerogative decision to deploy might state that the deployment has the strategic objective of stabilizing a region, and another might give direction to the force to assist the local government. Although both formal Crown prerogative decisions authorize the CF deployment, there will be confusion at the operational level flowing from inconsistent and possibly opposing strategic level guidance.

[104] Lordon, *supra* note 7 at 72.

[105] Phillips & Jackson, *supra* note 1 at 269ff.

[106] *Ibid.*

Accordingly, the executive will normally consult with Parliament in some way before making certain decisions under the Crown prerogative, to ensure that implementation of the decision, frequently a matter before the legislature, will take place. Practices have developed in this regard across the spectrum of Crown prerogative decisions. Section 3.6.2 of this paper will briefly touch upon developed practices to involve Parliament in decisions to deploy the CF internationally in significant numbers.

In conclusion, on the exercise of the Crown prerogative, the issue consists of *who* may exercise the prerogative and *how* it is exercised. Firstly, the Crown prerogative belongs to the executive, and may be exercised by Cabinet and its committees, and, in some forms, by the Prime Minister and individual ministers. Secondly, the form of its exercise depends on who is taking the decision. Cabinet and Cabinet committees exercise Crown prerogatives through RD's, for example OIC's or decisions in response to MC's. The Prime Minister and individual ministers take such decisions through letters, usually written in response to a letter requesting a course of action. Parliament has no legally mandated role in the formal exercise of the Crown prerogative, but may be consulted by the executive in certain circumstances.

2.7 Review by the Courts of an Exercise of a Crown Prerogative

It is important to examine the role the courts play in a particular exercise of the Crown prerogative. It has been held that an action taken by an authority based in a Crown prerogative does not, in itself, shield it from a review by the courts. In the *Black* case, the court stated "I agree with Mr. Black that the source of power – statute or prerogative – should not determine whether the action complained of is reviewable."[107]

Accordingly, a court may in theory *review* a decision made by Crown prerogative in response to a challenge brought before it. Broadly speaking, the exercise of the Crown prerogative in Canada has been challenged[108] in the courts through two legal mechanisms: judicial review and review for *Charter* compliance.

2.7.1 Judicial Review

Whether or not a particular exercise of the Crown prerogative is subject to judicial review depends on an application of the doctrine of justiciability.[109] This doctrine is not dependant on the ability of the court to make a decision, but rather on the appropriateness of the forum of the court to make the decision. As was stated in *Operation Dismantle*[110] in reference to a series of British cases, "the real issue there, and perhaps also in the case at bar, is not the *ability* of judicial tribunals to make a decision on the questions presented, but the *appropriateness* of the use of judicial techniques for such purposes."[111]

If a matter presented for judicial review is not justiciable, the court's inquiry is ended. In the *Black* case, for example, the court stated: "however, in my view, the action complained of in this case – giving advice to the Queen or communicating to her Canada's policy on the conferral of an honour on a Canadian citizen – is not justiciable. Even if the advice was wrong or given carelessly or negligently, it is not reviewable in the courts."[112] The court went on to say that "only those exercises of the prerogative that are justiciable are reviewable."[113]

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[107] *Black*, *supra* note 2 at 229ff.

[108] The word "challenged" here refers to an attempt to have the court revisit a decision made under the Crown prerogative. A decision made under the Crown prerogative can also be the subject of a claim framed in tort, or a request for a declaratory judgment, and in fact many of the cases herein discussed fall into these classes.

[109] The doctrine of justiciability extends beyond the arena of judicial review. For example, the *Black* case, *supra* note 2, was framed in tort and the claims were dismissed as non-justiciable.

[110] *Supra* note 71.

[111] *Ibid at 500*, Wilson J. The comment might be considered *obiter*. The cases referred to dealt with British restrictive trade legislation passed in the 1950's and 60's.

[112] *Black*, *supra* note 2 at 229ff.

[113] *Ibid.* at 231.

The seminal Crown prerogative case on the issue of judicial review and the doctrine of justiciability in the U.K. is *Council of Civil Service Unions* v. *Minister for the Civil Service*[114] ("*GCHQ*"). The *subject matter test* developed in *GCHQ* was adopted by the court in *Black*:

> Under the test set out by the House of Lords, the exercise of the prerogative will be justiciable, or amenable to the judicial process, if its subject matter affects the rights or legitimate expectations of an individual. Where the rights or legitimate expectations of an individual are affected, the court is both competent and qualified to judicially review the exercise of the prerogative.[115]

The question in *Black* was whether the Crown prerogative decision at issue passed the *subject matter test* and was thus amenable to judicial review. "To put this question in context" the court went on to discuss a "spectrum of judicial reviewability":

> At one end of the spectrum lie executive decisions to sign a treaty or to declare war. These are matters of "high policy": R. v. Secretary of State for Foreign & Commonwealth Affairs, Ex p. Everett (…)Where matters of high policy are concerned, public policy and public interest considerations far outweigh the rights of individuals or their legitimate expectations. In my view, apart from *Charter* claims, these decisions are not judicially reviewable.
>
> At the other end of the spectrum lie decisions like the refusal of a passport or the exercise of mercy…common sense dictates that a refusal to issue a passport for improper reasons or without affording the applicant procedural fairness should be judicially reviewable.[116]

The court held that the Prime Minister's actions which resulted in Mr. Black being refused an honour were not reviewable.

It should be noted that the discussion in *Black* on the *spectrum of justiciability* was certainly *obiter* inasmuch as it declared certain executive functions as matters of *high policy*. Further, the judgment used in support of the concept of *high policy* was English: *R.* v. *Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett*.[117] Finally, only one Lord Justice in the *ex parte Everett* case, Taylor L.J., made any mention of an executive function being classified as a matter of *high policy*.[118] Nonetheless, the *Black* obiter on this point has been followed by other courts. In the *Aleksic* case, citing *Black*, the court stated "it is, in my view, beyond doubt that an executive decision to participate in the bombing of Yugoslavia is a matter of 'high policy'. It is closely analogous to a declaration of war (…) It was a pure policy decision made at the highest levels of government, dictated by purely political factors."[119] In the *Blanco* case, the court stated, citing *Black* and *Everett* "the thrust of the Plaintiff's Statement of Claim relates to a potential assumption of arms by Canada. Such a decision would fall under the heading of 'high policy.'"[120] In *Turp* (Federal Court), citing *Blanco*, the court stated "a decision to deploy the Canadian Armed Forces is one of 'high policy'".[121]

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[114] [1984] 3 All E.R. 935 (H.L.). Before this case, it was generally held in the U.K. that decisions made under the Crown prerogative were not amenable to the judicial process.

[115] *Black*, *supra* note 2 at 232.

[116] *Ibid.*

[117] [1989] 1 All E.R. 655 (C.A.).

[118] It is arguable that the idea behind the concept of 'high policy' has used in other English cases, and does have some precedent. In *GCHQ*, *supra* note 114, which preceded *ex Parte Everett*, *ibid.*, Lord Roskill stated that some decisions amounting to an exercise of the Crown prerogative might be considered to be in the 'excluded categories,' or categories of decisions not subject to judicial review. This *obiter* was referred to in *Abbasi* v. *Secretary of State for Foreign and Commonwealth Affairs*, [2002] E.W.J. No. 4947 (C.A.), where the court developed the concept of 'forbidden areas' of Crown prerogative use not subject to judicial review (see para. 106). *Abbasi* was followed on this point in *Campaign for Nuclear Disarmament* v. *Prime Minister*, [2002] E.W.J. No. 6344 (Q.B.) at para. 50.

[119] *Aleksic* v. *Canada (Attorney General)* (2002), 215 D.L.R. (4th) 720 (Ont. Div. Ct.) at 732.

[120] *Blanco* v. *Canada* (2003), 231 F.T.R. 3 at 6.

[121] *Turp* v. *Chrétien* (2003), 111 C.R.R. (2d) 184 (F.C.) at 188.

In summary, on the issue of judicial reviewability of a decision made by Crown prerogative, the courts will not even consider the challenge if the impugned decision is found to be non-justiciable. Under the *subject matter test*, a decision will be justiciable if it affects the rights or legitimate expectations of an individual. The *subject matter test* has developed further in Canada by the addition of the *spectrum of judicial reviewability* which provides that decisions of *high policy* are never judicially reviewable. Decisions of *high policy* include decisions relating to the deployment of the CF internationally.[122]

2.7.2 Review of an Exercise of a Crown Prerogative for *Charter* Compliance

The previously cited 1985 Supreme Court of Canada decision in *Operation Dismantle*[123] is the seminal case on the issue of the reviewability of a Crown prerogative decision for *Charter*[124] compliance. That case concerned a challenge to the decision of the Canadian government to permit the testing of an air-launched cruise missile in Canadian airspace. The challenge was framed on the basis that the decision would violate the rights guaranteed to them and other Canadians by section 7 of the *Charter*.[125]

Section 32(1)(a) of the *Charter* deals with its applicability. It reads:

> This Charter applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament (…)

The argument that the *Charter* does not apply to an exercise of executive power on the *Charter*'s own terms was rejected by Wilson J. in *Operation Dismantle* in the following terms: "those words of limitation [from clause 32(1)(a)] (…) are merely a reference to the division of powers in ss. 91 and 92 of the *Constitution Act, 1867* (…) The royal prerogative is 'within the authority of Parliament' in the sense that Parliament is competent to legislate with respect to matters falling within its scope."[126] The rest of the court agreed in the result on this discrete point, without analysis, Dickson J. stating "I agree with Madame Justice Wilson that Cabinet decisions fall under s. 32(1)(a) of the Charter and are therefore reviewable in the courts and subject to judicial scrutiny for compatibility with the Constitution."[127]

While the Supreme Court of Canada clearly said that an exercise of the Crown prerogative is in theory subject to a review for *Charter* compliance, it emphasized that the review must be limited to an analysis of the *Charter* argument, stating: "the question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s. 7 of the *Canadian Charter of Rights and Freedoms*. This is a totally different question."[128]

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122 This point will be expanded upon in Section 3.4 of this paper.

123 *Supra* note 71.

124 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

125 In *Operation Dismantle*, *supra* note 71, seven Justices sat during the arguments, but only six judges took part in the judgment. While all participating Justices agreed with the result, 11 pages of the 36 pages making up the decision were taken up by Dickson J.'s decision, and four other Justices concurred with this decision. Wilson J. signed her 25-page judgment alone, and it is this judgment that is most often cited in support of guidance on the issue of *Charter* applicability to Crown prerogative decisions. With this in mind, the *Operation Dismantle* decision is seminal in the area of Crown prerogative law.

126 *Ibid.* at 497ff.

127 *Ibid.* at 491, Dickson J.

128 *Ibid.* at 504, Wilson J.

In summary, decisions made under the Crown prerogative are reviewable for compliance with the *Charter*, but such reviews are strictly limited to a determination of whether a *Charter* right has been limited or not.

An underlying assumption in Wilson J.'s decision in *Operation Dismantle* is that the doctrine of justiciability could apply not only to a case framed in tort or a judicial review application, but also to a court review based on an issue of *Charter* compliance. What this would mean is that the courts would not entertain a *Charter* challenge to a Crown prerogative decision involving issues of *high policy*. This point of law appears unsettled. From the majority judgment:

> The approach I have taken is not based on the concept of justiciability. I agree in substance with Madame Justice Wilson's discussion of justiciability and her conclusion that the doctrine is founded upon a concern with the appropriate role of the courts as the forum for the resolution of different types of disputes. I have no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts.[129]

It is unclear whether or not the courts will apply the doctrine of justiciability in a judgment on a review of an exercise of the Crown prerogative for *Charter* compliance. Justiciability would seem a valid area of inquiry where the review concerns whether a decision was made correctly (the concern being that the court is not the appropriate place for seeking an answer to this question). However, the validity of a justiciability concern could be argued to disappear with a *Charter* challenge: if the court is not the appropriate place to decide on a *Charter* matter, then there would appear to be no other appropriate place to do so. This line of reasoning has been supported by case law. In another context, in *Black*, the court stated:

> Where matters of high policy are concerned, public policy and public interest considerations far outweigh the rights of individuals or their legitimate expectations. In my view, *apart from Charter claims*, these decisions are not judicially reviewable.[130] [Emphasis added]

Wilson J. clearly references the doctrine of justiciability in her decision in *Operation Dismantle*. The argument that the doctrine should apply to future *Charter* challenges resulting from Crown prerogative decisions may now have a clear legal foundation.

3. THE SPECIFIC CASE OF THE CROWN PREROGATIVE POWER TO DEPLOY THE CF ON MILITARY OPERATIONS OUTSIDE OF CANADA

The purpose of this Section is to discuss the application of the law in the specific context of a Crown prerogative to deploy the CF on an international military operation. Because the subject involves working from the specific context to an analysis of the general law applicable to it, the order in which the issues are addressed will differ from the order in which they were presented in the previous section. Further, there has been a dearth of case law on aspects of this discrete subject. For this reason, this section contains greater reference to practice, as opposed to law or convention. As will be discussed, a decision to deploy the CF internationally is an exercise of the federal Crown prerogative. No statute acts to limit the executive's authority in this area. While decisions to deploy the CF are, in theory, subject to the review of the courts, the courts have held that they are decisions made on matters of *high policy*. This means that the courts have declined to second-guess Crown prerogative decisions under applications for judicial review. Further, no *Charter* claims flowing from CF deployments have been successful to date.

As with any exercise of the Crown prerogative, the legislature does not play a legally mandated role in the executive's decision making process in the area of international deployments of CF elements. Nonetheless, certain practices have developed over time to involve Parliament.

Cabinet or a Cabinet committee may make a decision to deploy the CF internationally, as may the Prime Minister, the Minister of National Defence and the Minister of Foreign Affairs. Cabinet will take a decision to deploy the CF internationally by signing a draft Order in Council presented before it, or through a Record of Decision: a formal response to a Memorandum to Cabinet or presentation given to it. The Prime Minister and individual Ministers will likely use "strategic objective" letters for the same purpose.

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[129] *Ibid.* at 494, Dickson J.

[130] *Black*, *supra* note 2 at 232.

3.1 Federalism

As a preliminary matter, the Crown prerogative at issue in the case of an executive decision to deploy the CF outside of Canada in support of a military operation is a prerogative exercised by the federal, as opposed to a provincial, executive:

> The Queen is expressly declared to be Commander-in-Chief of all armed forces of and in Canada (Constitution [*Constitution Act, 1867*] s.15.). Since exclusive legislative authority in relation to militia, military and naval service and defence is conferred on the Parliament of Canada, (s.91(7)) the applicable prerogative powers appear to be exercisable by the Crown in right of Canada.[131]

3.2 The Power to Deploy the CF on Military Operations Outside of Canada Is Within the Contents of the Crown Prerogative

There is a wealth of case law establishing that the power to deploy the CF on military operations outside of Canada is within the contents of the Crown prerogative. From the House of Lords decision in *Chandler* v. *D.P.P.*:[132]

> It is in my opinion clear that the disposition and armament of the armed forces are, and for centuries have been, within the exclusive discretion of the Crown (…)[133]

In addition, the academics have consistently reinforced this common law position. From Lordon:

> The Crown has certain prerogative powers or duties to act in defence of the realm, including the power to station and control the armed forces.[134]

3.3 The Crown Prerogative Power to Deploy the CF on International Military Operations Has Not Been Limited or Ousted by Legislation

As discussed in section 2.3 of this paper, a Crown prerogative may, in certain circumstances, be limited or ousted by legislation. The Crown prerogative power to deploy the CF internationally has not been limited: the clear legal position is that the historical Crown prerogative to deploy the CF internationally in support of military operations remains whole and unfettered.

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131 *C.E.D* "Crown," *supra* note 30, at section 89.

132 *Chandler* v. *D.P.P.*, [1962] 3 All E.R. 142.

133 *Chandler*, *ibid.*. at 146, Lord Reid. See also *Aleksic*, *supra* note 119 at 732: "It is, in my view, beyond doubt that an executive decision to participate in the bombing of Yugoslavia is a matter of 'high policy'. It is closely analogous to a declaration of war…It was a pure policy decision made at the highest levels of government, dictated by purely political factors;" from *Turp* (F.C), *supra* note 121 at 188, citing *Blanco, supra* note 120: "a decision to deploy the Canadian Armed Forces in one of 'high policy;'" from *Turp* v. *Chrétien* (Sup. Ct.), Montreal 500-05-071731-028 (Sup. Ct.) at 5: "Il s'agit d'une question qui est du resort de la prérogative de l'état et de relations internationales dans les affaires intéressant la défense et des rapports entre état et donc de questions non assujetties au pouvoir de surveillance et de controle de cette cour" (one translation is "the court finds that the question in issue comes under the heading of state prerogatives and international relations in matters involving defence and the relations between states, and, thus, that it involves questions that are not subject to this Court's superintending and review powers.").

134 Lordon, *supra* note 7 at 81. See also Phillips & Jackson, *supra* note 1 at 345: "The control of the armed forces is part of the royal prerogative: Chandler v. D.P.P…"

The *NDA* does not operate to limit or oust the Crown prerogative to deploy the CF internationally.[135] In particular,[136] section 31(1) of the *NDA*, which gives the Governor in Council legislative authority to make an *active service* designation, does not displace the Crown prerogative in this area. It is important, when considering the interplay of the *NDA* and the Crown prerogative to keep separate the concept of being placed on *active service* and the idea of being liable to perform a lawful duty, including a duty to be deployed internationally. These ideas are not directly linked: a member of the CF can be placed on active service without being deployed, and a deployed CF member need not be placed on active service. Article 31(1) of the *NDA* reads:

> The Governor in Council may place the Canadian Forces or any component, unit or other element thereof or any officer or non-commissioned member thereof on active service anywhere in or beyond Canada at any time when it appears advisable to do so:
>
> (a) by reason of an emergency, for the defence of Canada; or
>
> (b) in consequence of any action undertaken by Canada under the United Nations Charter; or
>
> (c) in consequence of any action undertaken by Canada under the North Atlantic Treaty, the North American Aerospace Defence Command Agreement or any other similar instrument to which Canada is a party.

A reading of Article 31(1) makes it clear that it is the *NDA*, and not the Crown prerogative, that provides the legal basis to place the CF on *active service*. However being placed on active service is not the same as being deployed. A member's status as being placed on active service simply means that a number of consequences are brought into existence with respect to that member, which consequences relate to the level of disciplinary control the CF has over the member (when a member is on active service the CF increases its disciplinary control over that member) and the limitation on the member's eligibility to release from the CF (a member on active service has decreased release eligibility).[137] In fact, by a 1989 order in council[138] all CF regular force members are placed on active service in Canada and abroad, and all reserve force members are placed on active service when beyond Canada. It is clear, then, that a member may be placed on active service, without being deployed, and, in fact, the vast majority of CF members can be described this way.

Rather than section 31(1) of the *NDA*, it is section 33(1) that must be considered in the context of a decision to deploy an element of the CF. That section reads:

> The regular force, all units and other elements thereof and all officers and non-commissioned members thereof are at all times liable to perform any lawful duty.

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[135] Lordon, *supra* note 7 does not say anything different when he states, at 82: The *National Defence Act* and regulations thereunder have, to a large extent, pre-empted the prerogative powers of the Crown in Canada to control and manage its armed forces. Under section 4 of the Act, responsibility for the control, organization, and disposition of the Canadian Forces is delegated to the Minister of National Defence. Section 4 of the *NDA*, *supra* note 47, reads: "The Minister holds office during pleasure, has the management and direction of the Canadian Forces and of all matters relating to national defence (…)". It will be recalled that Lordon also states, at 81, that "the Crown has certain prerogative powers or duties to act in defence of the realm, including the power to station and control the armed forces." The statements are not in opposition. When Lordon speaks of a statutory power concerning the "control" and "disposition" of the CF, he does not refer to the power to deploy the CF but rather to a power to control and dispose of them in garrison or on exercise, or *after* the Crown has exercised its prerogative power to deploy them. Lordon bases his statement on section 4 of the *NDA* which grants powers as to "management and direction" of the CF, and not "control" nor "disposition." It is clear that Lordon's meaning must be considered with the referenced statute wording in mind.

[136] And contrary to the dissenting opinion of J. DeP. Wright J. in *Aleksic*, *supra* note 119 at 724.

[137] The consequences of being placed on active service include the CF's right to retain a member on active service beyond the expiration of his or her engagement (per *NDA*, *supra* note 47, s. 30(1)), and the availability of higher punishments for those on active service convicted of certain Code of Service Discipline offences (per *NDA*, ss. 77, 88, 97)

[138] P.C. 1989-583 (6 April 1989). The order in council in this case is issued under a statutory, rather than Crown prerogative, power.

This section makes a CF member liable to perform "any lawful duty," and this class of duties includes duties that may be lawfully assigned to members of the CF by way of and following exercise of Crown prerogative authority. Such a duty lawfully assigned could include a duty to deploy internationally. Clearly section 33(1) does not provide the legal basis to make a deployment decision, it merely provides that once such a decision is made, all CF elements are liable to perform any consequent lawful duties. Further, there is nothing linking this liability to perform any lawful duty with the idea of being placed on active service.

3.4 Judicial Review of a Decision to Deploy the CF on an International Military Operation

The courts have applied the doctrine of justiciability in any judicial review request made in respect of a decision made under the Crown prerogative. In determining whether a matter is justiciable, the court applies the *subject matter test* from the English *GCHQ* case.[139] That test states that a matter will be justiciable if its subject matter affects the rights or legitimate expectations of an individual. Since the *Black* case,[140] however, the courts in Canada have held that certain Crown prerogative decisions are excluded from judicial review as a class: those decisions that amount to *high policy*. It is likely that if an application for judicial review were to be brought in respect of a Crown prerogative decision to deploy the CF outside of Canada, the court would find the matter non-justiciable.[141] As previously discussed, courts have already made this determination.[142]

Before leaving the issue of potential judicial review of a decision to deploy the CF outside of Canada, it is necessary to address two potential objections to the application of the concept of *high policy* as applies in recent cases. The first objection might be that the idea of *high policy* is misconceived and should be discarded by the courts. Such an argument might be founded in the dissenting opinion in *Aleksic*: that case concerned in part a claim for damages framed in tort made against the Attorney General of Canada in relation to the military bombardment campaign in Yugoslavia. One of the contentious issues was to determine whether the tort claims were justiciable: the majority held that they were not since the concerned governmental action was a matter of *high policy*. In his dissent, however, J. DeP. Wright J. stated:

> In my opinion, the only issue of "High Policy" involved in this case is whether Canada is a nation under the Rule of Law or whether there are times in our national life when the Executive may inflict damage upon citizens unfettered by considerations of domestic law, international law or solemn agreements between the Crown and other nations.[143]

This opinion was not adhered to by the other sitting judges, nor has it been used by another court. It finds no support in the cases that preceded it. The passage cited seems long on rhetoric at the expense of analysis. Of course there are very real *considerations* of domestic law at issue in the context of a Crown prerogative decision: the *subject matter tes*t, which has been developed over a series of cases, and the overarching obligation on the Crown to respect the *Charter*. While it is not entirely clear, it appears that the dissent in *Aleksic* would do away with the concept of high policy, and perhaps the *subject matter test*. It is suggested that the dissenting opinion is

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139 *Supra* note 114.

140 *Supra* note 2.

141 As discussed, the court need not apply the *high policy* doctrine strictly to conclude that a Crown prerogative decision to deploy Canadians outside of Canada is not subject to judicial review: being part of a class of Crown prerogatives that are not justiciable. See the following authorities that could be cited in support of a similar conclusion; they do not reference the concept of *high policy*: Phillips & Jackson, *supra* note 1 at 345; *Chandler*, *supra* note 132 at 151, Lord Radcliffe; *Campaign for Nuclear Disarmament*, *supra* note 118 at para. 15 and 50; *GCHQ*, *supra* note 114 at 942; *Turp* (Sup. Ct.), *supra* note 133 at para. 11.

142 See, *e.g.*, *Aleksic*, *supra* note 119 at 732: "it is, in my view, beyond doubt that an executive decision to participate in the bombing of Yugoslavia is a matter of *high policy*. It is closely analogous to a declaration of war…It was a pure policy decision made at the highest levels of government, dictated by purely political factors;" *Blanco*, *supra* note 120 at 6, citing *Black*, *supra* note 2, and *ex Parte Everett*, *supra* note 117: "the thrust of the Plaintiff's Statement of Claim relates to a potential assumption of arms by Canada. Such a decision would fall under the heading of 'high policy';" and *Turp* (F.C.), *supra* note 121 at 188: "a decision to deploy the Canadian Armed Forces is one of 'high policy.'"

143 *Aleksic*, *supra* note 119 at 724, J. DeP. Wright. J.

of limited value in that it appears to criticize the legal regime that governs the interaction between the courts and the executive in the area of the exercise of the Crown prerogative, while providing no alternative regime to replace it.

A second potential argument against the *high policy* line of cases might be that an exercise of the Crown prerogative power to deploy the CF on an international military operation should be distinguished from the exercise of the Crown prerogative at issue in the *Black* case, and is more comparable to the exercise of the Crown prerogative power in the *Chaisson* case,[144] the only case to distinguishes *Black* to date. In the *Chiasson* case, the court was asked to make an order of *mandamus* in relation to a decision by the government to refuse to consider an application for the award of a Canadian bravery decoration based acts committed during the Second World War.[145] The *Canadian Bravery Decorations Regulations*[146] set out the procedure whereby such applications are considered. The court stated:

> Unlike the *Black* case where there were no written instruments controlling the power being exercised by the Prime Minister, it is certainly arguable in the present case that the Regulations, once adopted, constitute a set of rules which provide criteria for a Court to determine if the procedure prescribed therein has been followed, and if the Committee has exercised the jurisdiction assigned to it. That the Regulations themselves were promulgated under the royal prerogative does not render questions of compliance with the procedure they prescribe matters plainly beyond judicial review.[147]

The factual element of *Chiasson* that served to bring it outside the ambit of the *Black* case is the existence in that case of regulations outlining how the relevant Crown prerogative is to be exercised. It was the existence of these regulations that led the court to conclude that the associated exercise of the Crown prerogative was reviewable, on the grounds that the written instrument provided guidelines against which the decision might be reviewed. While in theory there is no reason to assume that the '*Chiasson* exception' to the *high policy* line of cases could not as a matter of principle extend to a decision made by the Crown to deploy the CF overseas in support of a military mission, such decisions are not made pursuant to regulations setting out applicable guidelines or procedures.

In summary, the courts would be unlikely to interfere with an exercise of the Crown prerogative discretion to deploy the CF on an international military operation by remedy on an application for judicial review.

3.5 Review of a Decision to Deploy the CF on an International Military Operation: *Charter* Compliance

As discussed,[148] the Supreme Court of Canada's decision in *Operation Dismantle* [149]made it clear that an exercise of the Crown prerogative is subject to review for *Charter*[150] compliance, but that such a review will be limited to an analysis of whether or not the applicant's rights as protected by the *Charter* are violated by the exercise.[151] It is possible to conceive of an argument that a particular Crown prerogative decision to deploy the CF outside of Canada resulted in a violation of the *Charter*. While the facts at issue in the *Operation Dismantle* case did not raise a *Charter* concern, Wilson J. specifically stated in that case:

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144 *Chaisson* v. *Canada* (2003), 226 D.L.R. (4th) 351 (F.C.A.).

145 The cited case considered a motion to the main action. Ultimately, the court refused to overturn the Prothonotary decision dismissing a motion to have the action struck.

146 1996, P.C. 1997-123, C. Gaz. 1997.I.2091.

147 *Chaisson*, *supra* note 144 at 356.

148 See Section 3.10.

149 *Supra* note 71.

150 *Supra* note 124.

151 *Operation Dismantle*, *supra* note 71 at 504, Wilson J.: "the question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s. 7 of the *Canadian Charter of Rights and Freedoms*. This is a totally different question."

> this is not to say that every governmental action that is purportedly taken in furtherance of national defence would be beyond the reach of s. 7. If, for example, testing the cruise missile posed a direct threat to some specific segment of the populace – as, for example, if it were being tested with live warheads – I think that might well raise different considerations.[152]

Accordingly, it would appear that a Crown prerogative decision to deploy the CF outside of Canada could theoretically be subject to review for *Charter* compliance.

It appears that, to date, no court has held that a Crown prerogative decision to deploy the CF outside of Canada has infringed a *Charter* right. Even if such a review were successful at the level of proving a *Charter* breach, the Crown would always be able to argue Section 1 of the *Charter* as justification. As was stated by Wilson J. in *obiter* in *Operation Dismantle*:

> A court might find that [a Crown prerogative decision to test a live cruise missile] constituted a violation of s. 7 and it might then be up to the government to try to establish that testing the cruise missile with live warheads was justified under s. 1 of the Charter.[153]

3.6 Exercise of the Crown Prerogative Power to Deploy the CF on International Military Operation

3.6.1 Introduction

As discussed in Section 2.6, above, while Cabinet and its committees can exercise the Crown prerogative, so may the Prime Minister and individual ministers in certain circumstances. This applies to the specific case of the Crown prerogative to deploy the CF on international military operations. There are, in theory and in practice, four levels of authority who could take the relevant Crown prerogative decision, listed here in order of pre-eminence: Cabinet (either whole of Cabinet or a committee), the Prime Minister, the Minister of National Defence with the concurrence of the Minister of Foreign Affairs, and the Minister of National Defence acting alone.

While authorities at several levels of the executive may take an associated Crown prerogative decision by any of several means, it is imperative that only one authority take a particular decision, and by only one means. Experience has shown that this is especially important where the Crown prerogative power exercised is the power to deploy the CF. In almost all such instances, the decision will not be a simple 'yes' or 'no,' but will involve some form of strategic guidance on how the associated mission is to be conducted. If this direction comes from several sources, there is a strong likelihood that this strategic direction will not be exactly the same, resulting in the potential for confusion. It is also possible that the direction will be inconsistent. For instance, if the Prime Minister issues a strategic objective letter at the same time that Cabinet issues an order through a Memorandum to cabinet process, confusion will ensue as to who actually exercised the Crown prerogative and what the ambit of the decision is.[154]

Our analysis will end with a brief description of practices that have developed to engage Parliament in an executive decision to deploy the CF internationally in significant numbers; as well as explanations of the legal basis for such a decision at each of the four above-mentioned levels, and the procedure by which a Crown prerogative decision is formalized.[155]

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[152] *Ibid.*at 518, Wilson J.

[153] Ibid.

[154] This confusion will not result if there are two distinct decisions in relation to a single subject matter, for example if the PM sets the strategic objectives of a mission, and an MC requests associated funding.

[155] The general discussion on these issues is at Section 2.6, *infra*.

3.6.2 Parliament Does Not Play Any Legally-mandated Role in the Exercise of the Crown Prerogative Power to Deploy the CF on an International Military Operation

Parliament need not be consulted before a Crown prerogative decision is taken to deploying the CF on an international military operation. The words of Phillips & Jackson bear repeating in this context:

> The government does not have to consult, or even inform, Parliament before exercising prerogative powers. This is convenient, for many matters falling within the prerogative are not suitable for public discussion before the decision is made or the action performed. On the other hand, the government must feel assured of parliamentary support afterwards, especially in a matter like war or where money will be required.[156]

This said, from Prime Minister St. Laurent's statements in the House of Commons relating to a possible deployment of the CF to Korea,[157] certain practices have developed regarding when and how Parliament will be offered the opportunity to consider a Crown prerogative decision to deploy the CF on a particular significant international operation. Although not legally necessary, there are several practical reasons for such practices. As earlier mentioned, under a system of responsible government, the executive must maintain the confidence of the elected House of Parliament. By bringing an executive decision to Parliament for consideration, the executive places a political hurdle to a possible position of the elected House that this same executive decision be used as a basis for a vote of non-confidence. Additionally, the public may respond well to a decision by the executive to present a matter to Parliament for consideration. In theory, a greater range of opinion would be heard in that forum rather than solely in government.

Until 1992, the general practice was to deploy significant elements of the CF internationally by issuing an Order in Council, either placing such elements on active service under powers granted by the *NDA* or maintaining them on active service.[158] When the Order in Council *placed* elements on active service[159], the effect was to engage a companion section of the *NDA*, now section 32.[160] A requirement was then created to summon Parliament, in certain circumstances, to debate the Order. On the other hand, *maintaining* on active service had no similar effect.[161] In practice, the Order would be tabled in the House to allow for debate, with or without a final vote. Smaller contingents would be sent on international operations without Parliamentary consideration beyond ad hoc questions in Question Period, or debates on supply.[162]

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156 Phillips & Jackson, *supra* note 1 at 269ff.

157 In debates in the House of Commons 8 September 1950, the Prime Minister essentially confirmed that Parliament would be invited to "approve or disapprove" of a decision of the government relating to a possible deployment to Korea.

158 As discussed in section 3.3, *supra*, making an active service order does not equate to making a decision to deploy as a matter of law. However, by engaging in the practice of making a separate active service Order for each deployment, successive governments linked the idea of an active service order with the concept of a Crown prerogative to deploy.

159 Examples of such orders include those for CF involvement in: Korea (1950), UN Emergency Force in the Middle East (UNEF) (1973), UN Iran Iraq Military Observer Group (1988), UN Transition Assistance Group in Namibia (1989), UN Observer Group in Central America (1990), situation generated by Iraq invasion of Kuwait (1990), Somalia (1992).

160 *NDA* section 32 reads: "Whenever the Governor in Council places the Canadian Forces or any component or unit thereof on active service, if Parliament is then separated by an adjournment or prorogation that will not expire within ten days, a proclamation shall be issued for the meeting of Parliament within ten days, and Parliament shall accordingly meet and sit on the day appointed by the proclamation, and shall continue to sit and act in like manner as if it had stood adjourned or prorogued to the same day."

161 Examples of such *maintenance* orders include those for CF involvement in: NATO forces in Europe (1951 and again in 1961), UNEF (1956), Congo (1960), Cyprus (1964).

162 Examples include CF involvement in: Golan (1948), Yemen (1963), Vietnam (1972), Haiti (1990).

Since 1992, however, the practice of creating individual Orders in Council for each mission has ceased.[163] The practice has evolved to engaging Parliament in decisions involving significant troop numbers through less formal means. The mechanism has been almost exclusively for the government to bring a motion that the lower House *take note* of a certain situation or of a decision taken by the government involving the deployment of the CF.[164] Alternatively, the government can bring forward another type of motion. On May 17th 2006, for example, the government brought a motion that "…this House support the Government's two year extension of Canada's diplomatic, development, civilian police and military personnel in Afghanistan and the provision of funding and equipment for this extension."[165] With a number of deployments, the government has not engaged Parliament at all.[166]

These practices of engaging Parliament in decisions to deploy the CF internationally in significant numbers allows Parliament to ask questions and make comments concerning the deployment, while retaining the ultimate decision-making authority in the hands of the executive. Importantly, such involvement does not imply a Commons right to approve of the Crown prerogative decision or to over-ride a decision already made by the executive, but it does give elected members of the House a say. Also, it is important to remember that only those deployments involving significant troop levels have historically been subject to this parliamentary consultation practice.

3.6.3 Cabinet and Cabinet Committee

Cabinet as a whole body and in committee may exercise the Crown prerogative to deploy the CF internationally. Cabinet has taken such a decision by way of Order in Council. In addition, however, Cabinet has issued Records of Decisions (RD), In certain cases, Cabinet has been presented with a Memorandum to Cabinet, and has issued an RD in response thereto. Cabinet has also responded with an RD following a visual presentation. Likewise, Cabinet has done this work by committee. Recent practice has seen the Foreign Affairs and National Security Committee become the Cabinet sub-body with subject matter expertise to entertain a request for a Crown prerogative decision to deploy the CF internationally.[167] This committee refers associated decisions to whole of Cabinet, with committee recommendations.

3.6.4 Prime Minister

The Prime Minister has a two-pronged legal basis for the use of the Crown prerogative: his or her position as head of government, and the Prime Minister's conventional right to *define the consensus* of Cabinet. The Prime Minister has the right to take, and has taken, the decision to deploy the CF on international military operations. Since September 11th 2001, the Prime Minister has exercised the associated decision exclusively by *strategic objective letter*. The *strategic objective letter* clearly and unequivocally defines the policy, operational, legal, geographic and temporal scope of the CF deployment. Such a letter might be written without a basis in correspondence, but usually follows a letter to the Prime Minister from an individual Minister or Ministers. The Prime Minister often cites the ministerial letter and confirms that he or she concurs with its contents.

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[163] As discussed at section 3.3, *supra*, by 1989 Order in Council P.C. 1989-583, all CF regular force members at all times, and all reserve force members when on operations outside of Canada, are placed on active service. Many missions have gone forward without mission a specific Order in Council since 1992, including Cambodia (1992), Yugoslavia (1993 and 1995), Kosovo (1999), Afghanistan (2002 to present).

[164] Following are recent examples of take note debates on CF deployments: CF role in Afghanistan (15 November 2005); situation in Haiti (10 March 2004); deployment of CF personnel in Afghanistan (28 January 2002); international actions against terrorism (15 October 2001); the planned meeting between the Prime Minister and the President of the United States, with the ensuing debate considering a possible deployment to a coalition for the campaign against terrorism (20 September 2001); possible peacekeeping in Ethiopia and Eritrea (17 October 2000).

[165] The motion narrowly passed, 149 yeas to 145 nays.

[166] For example, deployments to: East Timor (1999, although a question was asked during Question Period); NATO ISAF (2003); Macedonia (2001, with questions asked in Question Period); Haiti (2004).

[167] The Committee members can be found at: http://www2.parl.gc.ca/Parlinfo/compilations/FederalGovernment/ComiteeCabinet.aspx?Language=E

3.6.5 Minister of Foreign Affairs and Minister of National Defence

Cabinet ministers possess an authority to use the Crown prerogative in certain cases, and this authority can, in the right circumstances, extend to the use of the Crown prerogative to deploy the CF internationally.

Any decision to deploy the CF in support of a military operation outside of Canada directly concerns two federal departments:[168] Foreign Affairs and International Trade Canada[169] and the Department of National Defence,[170] and their respective elected Ministers. A practice has developed whereby these Ministers work together to exercise the Crown prerogative power. Several processes have been used to formalize the joint decision: a joint letter, signed by each Minister; two mirror image letters sent concurrently to the Prime Minister; and a letter written by the Minister of National Defence (MND) on behalf of himself and Minister of Foreign Affairs (MFA).

Because of the political sensitivities involved in certain CF operations, the MND and MFA will, in a majority of situations, inform the Prime Minister of a Crown prerogative decision to deploy the CF internationally. Where troop levels are high or the mission involves sensitivities of another nature, the ministers will request the concurrence of the Prime Minister in the decision. When this mechanism is used, the Crown prerogative decision at issue is properly considered to be the Prime Minister's.

Recent practice has seen the Crown prerogative power to deploy the CF on international military operations exercised by the MFA and the MND only in limited circumstances, for example where the deployment is of low numbers, to established positions.

3.6.6 Minister of National Defence

In the same way, the MND may alone, in certain circumstances, exercise the Crown prerogative to deploy the CF internationally. In recent practice, the MND has only done this in cases of small troop numbers going to established missions, for example staff officers being deployed internationally in the headquarters of an international organisation such as the United Nations or the North Atlantic Treaty Organisation. As with a decision of the MND with the MFA, the MND alone will, in a majority of cases, notify the Prime Minister of a decision. The MND may also ask the Prime Minister's concurrence with a Crown prerogative decision, and, again, a decision taken in this way is properly thought of as a decision made by the Prime Minister.

4. SUMMARY AND CONCLUSION

The definition of Crown prerogative herein advocated is Professor Hogg's: "the powers and privileges accorded by the common law to the Crown."[171] The content of the Crown prerogative is determined by the common law, through judicial consideration of statute. Matters for which prerogative powers and privileges exist include acts of state in matters of foreign affairs, as well as defence and the CF. The apportionment of the Crown prerogative between the federal and provincial orders of executive government mirrors the apportionment, from the

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[168] Depending on the type of deployment contemplated, other Departments or Agencies may be involved. For example, deployments with a strong development mandate may directly involve the Canadian International Development Agency.

[169] The Department website states "we ensure the security of Canadians within a global framework, and promote Canadian values and culture on the international stage." (http://www.international.gc.ca/department/about_us-en.asp, last viewed 15 January 2007.)

[170] The Department website states "the Minister of National Defence is responsible for the overall control and management of the CF, and for all matters relating to national defence and emergency preparedness. Specifically, the Minister is responsible for developing and articulating Canada's defence policy." (http://www.forces.gc.ca/site/faq/Answers_e.asp#four3, last viewed 15 January 2007.)

[171] Hogg, *supra* note 3 at 1.9.

Constitution Act, 1867,[172] of legislative powers between the federal Parliament and provincial legislatures. For example, section 91(7) of the *Constitution Act, 1867* gives the federal Parliament legislative authority over matters of *Militia, Military and Naval Service, and Defence*. The federal executive has the prerogatives associated with this subject area.

The Crown prerogative in Canada is, through our system of Parliamentary democracy, exercised by the political executive rather than the head of state. Political executive authority in Canada is concentrated in the hands of the Cabinet, the Prime Minister, and individual Ministers, all of which, in theory, have powers of prerogatives. While there is no formal methodology for capturing a Crown prerogative decision, practices have developed in this matter. A Cabinet or Cabinet committee decision is normally captured in a Record of Decision, normally in the form of an Order in Council or a response to a Memorandum to Cabinet. The Prime Minister and ministers will issue decisions by letter, either in reply to requesting correspondence, or on their own. In all events, by its very nature, a Crown prerogative decision is not subject to formal legislative approval. It is important to note, however, that the Executive may consult the legislature in sensitive matters in accordance with practices that have developed in this regard. A common way to present a Crown prerogative decision to the legislature is through a *take note* debate.

Crown prerogative decisions are theoretically subject to consideration by the courts by way of judicial review application or *Charter*[173] challenge. Judicial review of Crown prerogative decisions is subject to the *subject matter test* and the doctrine that decisions of *high policy* are not justiciable. The courts have also accepted as theoretically possible a *Charter* review confined to the narrow issue of whether a Crown prerogative decision violates an applicant's rights as guaranteed under the *Charter*.

In section 3, dealing with the specific case of the deployment of the CF on military operations outside of Canada, it was affirmed that the power to order such a deployment resides clearly within the federal Crown prerogative. This prerogative has not been fettered by legislation. While such a decision to deploy the CF internationally is, in theory, subject to an application for judicial review, the courts have consistently held that such decisions are matters of *high policy* and have declined to intervene. Such a Crown prerogative is in theory subject to *Charter* review, but no such review has to date been successful.

The Crown prerogative decision to deploy the CF internationally rests with the federal Executive and therefore, in theory, may be taken by Cabinet (or Cabinet committee); the Prime Minister; the MND and MFA jointly (as the members of Cabinet with relevant portfolios); and, occasionally, by the MND alone. Regardless by whom, and by what means, a Crown prerogative is exercised, experience has shown it imperative to have only one decision made in any given case to avoid the risk of conflicting strategic direction. In practice, Cabinet, or one of its committees, will capture such a decision with the appropriate Record of Decision: normally an Order in Council or a response to a Memorandum to Cabinet. A Prime Ministerial or ministerial decision is captured in a *strategic objective letter*. When a decision is taken by the MFA and MND, or by the MND alone, it is customary to inform the Prime Minister of the decision taken. When the Minister or Ministers seek Prime Ministerial concurrence following the exercise of a Crown prerogative, the decision is properly considered to be the Prime Minister's.

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[172] *Supra* note 18.

[173] *Supra* note 124.