

## RESERVE POWERS OF THE CROWN

JAMES A. THOMSON\*

*Evatt and Forsey on the Reserve Powers: A complete and unabridged reprint of H.V. Evatt, *The King and His Dominion Governors* (2nd ed., 1967) and E.A. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (1968 reprint), together with a new Introduction by Dr. Forsey [and] Foreword by George Winterton (Legal Books, Sydney 1990). Cloth recommended retail price \$95.00 (ISBN 1 86316 000 0).*

---

\* B.A., LL.B. (Hons)(WA) LL.M., S.J.D. (Harvard).

Exquisite executive power<sup>1</sup> conundrums emerge in any entanglement with the Crown's<sup>2</sup> reserve powers. Included are basic premises. What are the Crown's reserve powers? Do such powers still exist? What is their scope? When, and in what manner, have reserve powers been exercised? How, if at all, should they now be used? Is their codification in constitutional or legislative documents or precise formulation in special memoranda desirable or possible? Ought reserve powers to be subservient to judicial review? In response, antithetical answers abound. Elucidation is, therefore, essential. Juxtaposition - *Evatt and Forsey on the Reserve Powers*<sup>3</sup> - enlivens that endeavour. From this

- 
- 1 On Australian federal executive power see generally C. Howard, *Australian Federal Constitutional Law* (3rd ed., 1985) 110-138; H. Renfree, *The Executive Power of the Commonwealth* (1984); G. Winterton, *Parliament, The Executive and The Governor-General: A Constitutional Analysis* (1983) (hereafter *The Executive*); G. Winterton, *Monarchy to Republic: Australian Republican Government* (1986) (hereafter *Monarchy*); L. Zines, *The High Court and The Constitution* (2nd ed., 1987) 221-243; J. Richardson, "The Executive Power of the Commonwealth" in L. Zines (ed.), *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer* (1977) 50-87; E. Campbell, "Parliament and the Executive" in *id.*, 88-118; *Report of the Advisory Committee on Executive Government [to the Constitutional Commission]* (June 1987) (hereafter *Advisory Committee*); *Davis v. Commonwealth* (1988) 166 CLR 79; *Brown v West* (1990) 169 CLR 195. On Australian state executive power see generally Winterton, *Monarchy, supra*; J. Thomson, "State Constitutional Law: American Lessons for Australian Adventures" (1985) 63 *Tex LR* 1225, 1237-1240; J. Thomson, "State Constitutional Law: Some Comparative Perspectives" (1989) 20 *Rutgers LJ* 1059, 1079-1082; J. Thomson, "State Constitutional Law: The Quiet Revolution" (1990) 20 *U WA LR* 311, 317-319 (hereafter "Revolution"). On Canadian federal and provincial executive power see generally P. Hogg, *Constitutional Law of Canada* (2nd ed., 1985) 189-249; W. McConnell, *Commentary on the British North America Act* (1977) 29-55, 108-119; F. MacKinnon, *The Crown in Canada* (1976); J. Saywell, *The Office of Lieutenant-Governor: A Study in Canadian Government and Politics* (1957); J. Saywell, "Lieutenant-Governors" in D. Bellamy, J. Pammett and D. Rowat (ed.), *The Provincial Political Systems: Comparative Essays* (1976) 297-309; J. Mallory, "The Lieutenant-Governor's Discretionary Powers: The Reservation of Bill 56" (1961) 27 *Can J Econ & Pol Sci* 518. See generally D. Low (ed.), *Constitutional Heads and Political Crises: Commonwealth Episodes, 1945-85* (1988).
  - 2 In this review the Crown includes the United Kingdom's Monarch, Australian and Canadian Governors-General, Australian state Governors and Canadian Lieutenant-Governors. However the nature of their reserve powers may differ. See notes 17 and 26 *infra*. See also notes 8 and 9 *infra*.
  - 3 *Evatt and Forsey on the Reserve Powers* (1990) (hereafter *Evatt and Forsey*).

"essential foundation" the "vast literature on the reserve powers" can be explored.<sup>4</sup>

Evatt<sup>5</sup> and Forsey<sup>6</sup> were, however, aware that larger and sometimes more important issues lurked beneath their inquiries. Paramount is the clash between autocracy and representative majoritarian democracy.<sup>7</sup> To the extent that the Crown is hereditary<sup>8</sup> and its representatives appointed,<sup>9</sup> potentially exercises of executive power could simultaneously promote the former and curtail the latter. Almost as easily, an opposite conclusion - the Crown's reserve powers being

---

4 G. Winterton "Foreword" in *Evatt and Forsey*, note 3 *supra*, ix. For a select listing see Winterton, *The Executive*, note 1 *supra*, 196 n 12; G. Marshall, *Constitutional Conventions* (1984) chs 2 and 3.

5 Herbert Vere Evatt (1894-1965). See generally J. Thomson, "Judicial Biography: Some Tentative Observations on the Australian Enterprise" (1985) 8 *UNSWLJ* 380, 394 (literature on Evatt); M. Kirby, "H.V. Evatt, the Anti-Communist Referendum and Liberty in Australia" (1990) 7 *Aust Bar Rev* 93; P. Bayne, "Mr Justice Evatt's Theory of Administrative Law: Adjusting State Regulation to the Liberal Theory of the Individual and the State" *id*; A. Gardiner, "The Politics of the Appointment of Evatt and McTiernan to the High Court of Australia in 1930" BA (hons) thesis (A.N.U., 1980). In addition to Evatt's four books noted by Z. Cowen "Introduction to the Second Edition" in H. Evatt, *The King and His Dominion Governors* (2nd ed., 1968) (hereafter *The King*) xv see H. Evatt, *The Royal Prerogative* (1987) reviewed in J. Thomson, "Exhuming Executive Power" (June 1988) 15 no 4 *Brief* 33. For reviews of Evatt, *The King*, *supra* see Winterton, note 4 *supra*.

6 Eugene A. Forsey (1906-1991). See generally E. Forsey, *A Life on the Fringe: The Memoirs of Eugene Forsey* (1990). In addition to *The Royal Power of Dissolution of Parliament in the British Commonwealth* (1943 reprinted 1968) (hereafter *Dissolution*) and "The Present Position of the Reserve Powers of the Crown" in *Evatt and Forsey* note 3 *supra*, xi-ciii (hereafter "Reserve Powers") Forsey's scholarship includes *Freedom and Order* (1974); *The Question of Confidence in Responsible Government* (1985); "Epilogue" in J. Kerr, *Matters for Judgment: An Autobiography* (1978) 440-444; "The Courts and the Conventions of the Constitution" (1984) 33 *U New Brunswick LJ* 26; "Disallowance of Provincial Acts, Reservation of Provincial Bills, and Refusal of Assent by Lieutenant-Governors" (1948) 14 *Can J Econ & Pol Sci* 94. For reviews of Forsey, *Dissolution*, *supra* see Winterton, note 4 *supra*.

7 For literature discussing this clash and the evolution of responsible government in the United Kingdom, Australia and Canada see Winterton, *The Executive*, note 1 *supra*, 200, 266-268.

8 As to the possibility of and constitutional law involved in the monarchy's abolition or replacement in Australia see Winterton, *Monarchy* note 1 *supra*.

9 See s2 of the Australian Constitution (Queen appoints Governor-General); s7 of the Australia Act 1986 (Clth) & (UK) (appointment of Governors remains with Queen); s58 of the Canadian Constitution Act 1867 ("Lieutenant Governor, appointed by the Governor General"); Hogg, note 1 *supra*, 3-4, 18, 38, 193, 213 (Queen appoints Governor General).

"the corollary", "not the antithesis", of democracy<sup>10</sup> - can be sustained.<sup>11</sup> Clearly evident is the chameleon quality of Evatt and Forsey's topic. Decisions to eradicate this dilemma, by increasing, confining or abolishing reserve powers, also involve underlying considerations. Separation of powers, checks and balances<sup>12</sup> and democratization, for example by electing the Crown or its representatives,<sup>13</sup> might be included. Whether resulting reserve powers' contents and limits should be accompanied or mandated by an authoritative written exposition again depends upon choices between antecedent alternatives: written or unwritten rules, conventions, laws or constitutions.<sup>14</sup> Answers are based, to some extent, on a preference for parliamentary sovereignty or constitutionalism. Achieving written formulations then depends, apart from any other reasons or criteria, on adherence to a theory that words possess or carry some recognised or identifiable meaning.<sup>15</sup>

The *sine qua non* of the Crown's reserve powers<sup>16</sup> is no constitutional or legal requirement to follow or act only upon ministerial advice.<sup>17</sup> Actions and omissions depend upon the Crown's personal discretion. Advice from

---

10 K. Bailey "Introduction to the First Edition" in Evatt, *The King*, note 5 *supra*, xxxv.

11 See eg Evatt, *The King*, note 5 *supra*, 287-288 (Parliament extending "its own life against popular will"); Forsey, *Dissolution*, note 6 *supra* 259 (Crown preserving the Constitution); Winterton, *The Executive*, note 1 *supra*, 153-156 (opposing views).

12 For literature see J. Thomson "Using the Constitution: Separation of Powers and Damages for Constitutional Violations" (1990) 6 *Touro LR* 177, 203-204.

13 See eg Winterton, *Monarchy*, note 1 *supra*.

14 However, it is doubtful whether a clear written - unwritten distinction can be maintained. For debate on the exemplar of written constitutions see eg T. Grey, "Do we have an Unwritten Constitution?" (1975) 27 *Stan LR* 703; T. Grey, "Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought" (1978) 30 *Stan LR* 843; T. Grey, "The Uses of an Unwritten Constitution" (1988) 64 *Chi Kent LR* 211; M. Moore, "Do we have an Unwritten Constitution?" (1989) 63 *S. Calif LR* 107; H. Powell, "Parchment Matters: A Mediation on the Constitution as Text" (1986) 71 *Iowa LR* 1427; H. Powell, "Constitutional Law as Though the Constitution Mattered" [1986] *Duke LJ* 915.

15 For hermeneutic controversies see J. Thomson, "Comparative Constitutional Law: Entering the Quagmire" (1989) 22 *Arizona J Int'l & Comp L* 22, 34 n 35 (references).

16 For the suggestion that "these are not 'reserve powers' in the strict sense, but are expressly conferred by the [Australian] Constitution" see Winterton, *The Executive*, note 1 *supra*, 197; Winterton, *Monarchy*, note 1 *supra*, 32 (contrasting Queen's common law or prerogative powers with powers "conferred by statute" on Governors-General and Governors). See also note 26 *infra*.

17 Is the textual difference - "the Governor-General in Council" and "the Governor-General" - in the Australian Constitution significant? For opposing views and a negative response see Winterton, *The Executive*, note 1 *supra*, 1-17; Winterton, *Monarchy*, note 1 *supra*, 32.

ministers, commanding lower House's confidence,<sup>18</sup> to the Crown is not required and, even if proffered, can be ignored or contradicted.<sup>19</sup> Existence of this power is seldom denied.<sup>20</sup> Elsewhere, uncertainty and vehement disagreements are pervasive. For example, the usual litany of the only reserve powers<sup>21</sup> - appointment of prime ministers or premiers, dismissal of prime ministers or premiers, dissolution of lower Houses of Parliament and simultaneous dissolution of both Houses of Parliament<sup>22</sup> - is disputed either by its curtailment<sup>23</sup> or expansion.<sup>24</sup> Confining the scope of these powers by limiting the circumstances in which they exist<sup>25</sup> and imposing restraints on their exercise<sup>26</sup> is also mired in controversy.

- 
- 18 The legislatures of Qld, NT and ACT are unicameral. As to the Australian Senate's position in this regard see Winterton, *The Executive*, note 1 *supra*, 5-11.
- 19 See generally *id.*, 17, 150; Winterton, *Monarchy* note 1 *supra*, 31; *Advisory Committee*, note 1 *supra*, 38.
- 20 But see eg Howard, note 1 *supra*, 119 n 99 ("The Governor-General has no reserve powers"). It has been suggested that the Governor-General ought not to have reserve powers. Winterton, *The Executive*, note 1 *supra*, 155.
- 21 See eg *id.*, 150; Winterton, *Monarchy*, note 1 *supra*, 32; *Advisory Committee*, note 1 *supra*, 39.
- 22 For a detailed exegesis see Winterton, *The Executive*, note 1 *supra*, 212-215; Winterton, *Monarchy*, note 1 *supra*, 31-51. See also R. Plehwe, "The Role of the Crown in Hung Parliaments" (1989) 24 *Politics* 1.
- 23 This can occur by disputing the existence of or narrowing specific reserve powers or by arguing that *ex post facto* ministerial responsibility means that even reserve powers can only be exercised on ministerial advice. For views favouring the former but criticising the latter see Winterton, *The Executive*, note 1 *supra*, 197-198; Winterton, *Monarchy*, note 1 *supra*, 32-51, 161 n 27.
- 24 For example adding the Governor-General's s 128 power under the Australian Constitution. See P. Reith, "Proposal for Four Year Terms for the House of Representatives" (unpub. paper 1989) 22; D. Solomon, "Reith gives new life to reform issue" (12 Oct 1990) *The Australian* 9. But see Winterton, *The Executive*, note 1 *supra*, 212 n 153; *Advisory Committee*, note 1 *supra*, 43.
- 25 Are reserve powers confined to dire emergencies? See Winterton, *The Executive*, note 1 *supra*, 197 (affirmative answer).
- 26 Are the restraints merely constitutional conventions or provisions (express or implied) in constitutions? For the Australian Constitution, the Governor-General and suggestions favouring the latter view see Winterton, *The Executive*, note 1 *supra*, 124-127, 128-129, 151; Winterton, *Monarchy*, note 1 *supra*, 161 n 28. For Australian states and Governors see *id.*, 161 n 28 ("probably" the former view); s7 of the Australia Acts. For various views of s7 see J. Thomson, "The Australia Acts 1986: A State Constitutional Law Perspective" (1990) 20 *UWA LR* 409, 424-425.

Clashes of this dimension, despite more than a modicum of agreement,<sup>27</sup> are exemplified in Evatt and Forsey's reserve power scholarship. On each principal point in *The King and His Dominion Governors* and *The Royal Power of Dissolution of Parliament in the British Commonwealth* disagreement between Evatt and Forsey prevails. Thus, different opinions concerning the Crown's power to dissolve lower parliamentary chambers - exemplified by opposite conclusions as to the constitutionality and propriety of the Governor-General's 1926 dissolution of the Canadian House of Commons<sup>28</sup> - aptly illustrate the vagueness and ambiguity of reserve powers. Forsey focuses on this "single point" of dissolving parliaments and the 1926 episode is his *piece de resistance*.<sup>29</sup> Evatt's parameters are broader. As a result, "the immense amount of sheer uncertainty and confusion"<sup>30</sup> in such an important segment of constitutional law becomes clearly discernible and his "main argument"<sup>31</sup> seems to inevitably unfold. Analysis and definition of reserve powers is Evatt's primary pre-requisite. Their "authoritative" statement "preferably in Statute form" ought then to be undertaken.<sup>32</sup> Finally, justiciability and judicial enforcement, for example, by injunction or mandamus against the Crown is advocated.<sup>33</sup> Support for an occasional adoption of some or all of these proposals has eventuated.<sup>34</sup>

27 Cowen, note 5 *supra*, xviii ("Forsey accepted many of Evatt's views and conclusions, [but] disagreed with some").

28 Id., xviii (Evatt considered "the Governor-General was wrong in granting a dissolution" while Forsey concluded it "was in accordance with sound constitutional practice").

29 J. Marriott, "Foreword" in Forsey, *Dissolution*, note 6 *supra*, ix.

30 Bailey, note 10 *supra*, xxxvii.

31 Cowen, note 5 *supra*, xxvii. See also Bailey, note 10 *supra*, xxxvii (Evatt's "thesis").

32 Evatt, *The King*, note 5 *supra*, 7. Inevitably questions pertaining to parliamentary supremacy are aroused. For example: could federal legislation constitutionally control or subordinate all federal executive power? For an affirmative answer see Winterton, *The Executive*, note 1 *supra*, 93-110. For an analysis of Winterton's views see J. Thomson, "Executive Power, Scope and Limitations: Some Notes from a Comparative Perspective" (1983) 62 *Tex LR* 559, 580-587. Could state legislation control or subjugate state executive power? For an affirmative answer see Evatt, *The King*, note 5 *supra*, 289. See also Thomson, note 26 *supra*, 424-426 (s 7 Australia Acts).

33 Evatt, *The King*, note 5 *supra*, 287-292. For suggestions that declarations may be more appropriate see G. Sawyer, *Federation Under Strain: Australia 1972-1975* (1977) 31, 148; Winterton, *The Executive*, note 1 *supra*, 140-141.

34 See eg Winterton, note 4 *supra*, viii; Cowen, note 5 *supra*, xviii, xxix-xxxiv; *Advisory Committee*, note 1 *supra*, 39-43; *Proceedings of the Australian Constitutional Convention* (1985) vol 1, 415-417 (reprinted in Winterton, *Monarchy*, note 1 *supra*, 53-54 and in *Final Report of the Constitutional Commission* (vol 1, 1988) 93-95); M. De Merieux, "The Codification of Constitutional Conventions in the Commonwealth Caribbean Nations" (1982) 31 *Int'l & Comp LJ* 263; R. Blackburn, "The Dissolution of Parliament: The Crown

Forsey, however, disagrees.<sup>35</sup> Insurmountable difficulties, not a quest for "vast, unlimited reserve powers",<sup>36</sup> motivate that reaction. Included are the formulation of succinct, yet comprehensive and flexible, reserve power rules or principles; retention of a requisite amount of power so that the Crown can preserve or protect, but not destroy, democracy; the obtaining, when necessary, of expeditious amendments to reserve power rules in legislation or constitutions; and insufficient judicial knowledge of this realm of constitutional discourse. To this Evatt - Forsey melee one element should be added: judicial review of executive power.<sup>37</sup>

Where Forsey, rather than the Evatt thesis, prevails, will courts undertake an exegesis of the Crown's reserve powers? Initially, questions concerning the existence, scope and exercise of reserve powers would have to be justiciable.<sup>38</sup> Then affirmative judicial responses need to be rendered on more substantive issues such as subjecting exercises of reserve power to good faith requirements, stipulations of relevant considerations and natural justice rules.<sup>39</sup> Inevitably, a myriad of principles and doctrines will evolve. To the extent that these are adumbrations of written constitutions and not of legislative enactments, prerogative powers or constitutional conventions,<sup>40</sup> courts, not legislatures or electors, ultimately<sup>41</sup> determine the direction and outcome of reserve power debates and imbroglios. Thus, even on Forsey's terrain, Evatt may prevail.

Prerogatives (House of Commons Control) Bill 1988" (1989) 52 *Mod LR* 837. See also J Crawford, "Senate Casual Vacancies: Interpreting the 1977 Amendment" (1980) 7 *Adel LR* 224 (convention codified in s 15 of the Australian Constitution). See generally Winterton, *The Executive*, note 1 *supra*, 151-153; C. Sampford & D. Wood, "Codification of Constitutional Conventions in Australia" [1987] *Pub L* 231; C. Sampford, "'Recognize and Declare': An Australian Experiment in Codifying Constitutional Conventions" (1987) 7 *Oxford J Legal Stud* 369.

35 Forsey, "Reserve Powers" note 6 *supra*, lxxxiii-xciii. For other opposition see Winterton, note 4 *supra*, viii-ix.

36 *Id.*, x. (characterizing Forsey's view of reserve powers as neither wide nor narrow but limited).

37 For cases and literature on judicial review of federal and state executive power in Australia see Thomson, "Revolution", note 1 *supra*, 319 nn 47-48. For Canada see H. Fairley, "Developments in Constitutional Law: The 1984-85 Term" (1986) 8 *Sup Ct LR* 53, 82-86; G. Henderson, "Judicial Review of the Prerogative Power of Government" in F. McArdle (ed.), *Cambridge Lectures 1985* (1987) 383. For the United Kingdom see eg C. Walker, "Review of the Prerogatives: The Remaining Issues" [1987] *Pub L* 62.

38 See Winterton, *The Executive*, note 1 *supra*, 125-127 (opposing views).

39 See generally *id.*, 127-139; Thomson, note 32 *supra*, 588-589.

40 See notes 17, 26 *supra* (nature of reserve powers and their restraints).

41 Subject to constitutional amendment processes such as section 128 of the Australian Constitution. But see Thomson, note 12 *supra*, 182-183 n 20 (validity and judicial review of

Revisiting old texts to refurbish approaches to current legal problems<sup>42</sup> is often a difficult enterprise. However, at least for reserve power devotees, reprinting the Evatt and Forsey books in one volume - plus the addition of a new Introduction by Dr. Forsey - has obviated a good deal of manual exertion. Physical proximity can also engender intellectual rewards. In this instance, it is the ease and clarity with which the distance between Evatt and Forsey during their disagreements can now be perceived. In the on-going effort to dissipate "mysteries"<sup>43</sup> shrouding reserve powers that accomplishment of *Evatt and Forsey on the Reserve Powers* is extraordinarily valuable.

---

constitutional amendments); S. Sathé, *Constitutional Amendments 1950-1988: Law and Politics* (1989) (judicial review of amendments to India's Constitution).

42 Compare H. Powell, "Joseph Story's Commentaries on the Constitution: A Belated Review" (1985) 94 *Yale LJ* 1285 (reviewing J. Story, *Commentaries on the Constitution of the United States* (3 vols, 1833)). See generally the "In Retrospect" review in each issue of *Reviews of American History* from volume 12 (March 1984).

43 Evatt, *The King*, note 5 *supra*, 3.