

PARDONS

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CAVEAT

- This discussion is not about statutory pardons under the Criminal Code.
- The discussion is about the exercise of the Crown prerogative of mercy.

PART ONE:

Defining the Crown Prerogative

WHAT IS THE PREROGATIVE?

- **What is the prerogative?** – discretionary exercise of power by the Crown; not a system of rules; but with binding effect and the power itself (as distinct from the subject matter exercise via the prerogative) is not justiciable by the courts. Includes power to deploy forces, honours, mercy, passports, treaties, etc.
 - Dicey describes where it comes from - “the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown.” (*Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959).
 - Defined by Hogg as “the powers and privileges accorded by the common law to the Crown” (*Constitutional Law of Canada*, Looseleaf ed. (Scarborough: Thomson Carswell, 1997) at 1.9; accepted by the SCC in *Ross River Dena Council Band v. Canada* (2002), 213 D.L.R. (4th) 193 at 217)
 - Defined by Lordon as “comprised of a collection of powers, rights, privileges, immunities, and duties derived from the common law.” (*Crown Law* (Toronto: Butterworths, 1991) at 65)

PREROGATIVE AND LAW

- If we define “law” as a system of rules of action or conduct prescribed by state institutions (a controlling authority, government) that have binding legal force and are enforced by the courts, then what is the Crown prerogative?
- The Crown possesses rights, powers, privileges and immunities that supersede the rules that are generally considered enforceable law. The prerogative is one of those powers.
- That said, the courts have the power to determine the boundaries of the Crown’s prerogative and even to some extent its exercise. Legislation may also limit or even fully displace the prerogative power in a particular area.
- The prerogative is further limited by doctrine. Specifically, by the doctrine “that most executive action which infringed the liberty of the subject required the authority of a statute.” (Hogg, at 1.9)

PREROGATIVE CAN ONLY BE EXECUTED BY THE EXECUTIVE

- Prior to 1867 the Crown prerogative was exercised by England. After 1867 it vests in the Canadian government.
- The exercise of the Crown prerogative in Canada resides in both the federal and provincial Crowns. Jurisdiction in Canada follows the division of powers in sections 91 and 92 of the Constitution Act, 1867.
- Cabinet generally makes the executive decisions and that includes the authority to exercise the prerogative. But the Governor General, Prime Minister, Cabinet committees and individual members of Cabinet also can exercise the prerogative.

EXERCISING THE PREROGATIVE

- The decision to exercise the prerogative is usually formalized via Letters Patent, an OIC or Memorandum to Cabinet and a Record of Decision issued if Cabinet or a Cabinet Committee is making the decision. But it does not have to be done this way.
- The Prime Minister or individual ministers exercise some aspects of the prerogative, which they generally exercise in writing (ie: by letter)
- Parliament has no role in the exercise of the prerogative, though it may be consulted for political reasons so that the government knows it has support for its action.

JUDICIAL REVIEW OF THE PREROGATIVE

- An exercise of power pursuant to the prerogative does not mean that it is judicially reviewable.
- Doctrine of Justiciability – determines whether the court is the appropriate body to determine the subject matter, not the source of power. (*Black*, at 229ff).
 - The Queen was going to issue a peerage to Conrad Black. Then Prime Minister Chrétien informed the Queen that Canadian law prohibited Canadian citizens from being nominated as peers. The Queen declined to ennoble Black and he immediately became a citizen of the UK and sued the government of Canada for negligence and Chrétien personally for negligence and abuse of power and sought \$25,000 in damages. Canada and Chrétien brought a motion to dismiss for no reasonable cause of action. LeSage J dismissed the claim against Chrétien on the grounds that the exercise of the Crown prerogative with respect to foreign affairs was non-justiciable. The OCS unanimously upheld LeSage's ruling but gave different reasons, holding that communications between the Queen and the Prime Minister were an exercise of the prerogative – but with respect to granting honours – which was non-justiciable. It was non-justiciable because of the subject matter, not because it was the exercise of the prerogative.

JUDICIAL REVIEW OF THE PREROGATIVE

- What determines whether the subject matter is justiciable? – “the exercise of the prerogative will be justiciable ... **if its subject matter affects the rights or legitimate expectations of an individual.**” (*Black, OCA*, paras. 50-51) There was no property or procedural protection and involved “moral and political considerations which it is not within the province of the courts to assess.” (*Black, OCA*, paras. 62-64) Matters of “high policy” (ie: deployment of Canadian forces) are not reviewable.
- The exercise of the prerogative can be judicially reviewed for Charter violations that affect the legitimate rights and expectations of a person. The courts would not review a Charter challenge to an exercise of the Crown prerogative on an issue of “high policy”.

PART TWO:

The Prerogative of Mercy

EXECUTIVE CLEMENCY

- Executive clemency is the exercise of the Crown prerogative of mercy.
- When exercised it is considered an act of grace. It is leniency or mercy exercised in the name of political expediency, mercy, justice, fairness or forgiveness.
- There is no right to clemency. It is a grant issued at the discretion of the executive.
- Executive clemency includes pardon, exoneration, amnesty, remission, respite, relief from prohibitions and commutation

PARDON

- A pardon is generally (but not always) understood to be a grant of clemency *after* charges, trial and conviction.
 - President Ford granted Nixon “a full, free, and absolute pardon ... for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974.”
- A pardon may relieve some of the burdens of conviction but does not expunge the record of conviction and is not a declaration of innocence.
 - “A pardon is in no sense equivalent to an acquittal. It contains no notion that the man to whom the pardon is extended never did in fact commit the crime, but merely from the date of the pardon gives him a new credit and capacity.” (*R. v. Cosgrove* (1948), Tas. S.R. 99 at 106).

PARDON

“A pardon implies guilt; it does not obliterate the fact of the commission of the crime and the conviction thereof; it does not wash out the moral stain; as has been tersely said: it involves forgiveness and not forgetfulness.”

Page v. Watson, 140 Fla. 536, 192 So. 205 (1938) cited in *Murphy v. Ford*, 390 F. Supp. 1372 (1975)

AMNESTY IS A PARDON

- Amnesty is generally understood as a pardon (conditional or unconditional) extended to a class of people (usually for a political offense) who have been charged but not yet tried or convicted.
 - Ambroise Lépine was offered an amnesty by the Governor General in 1874 after he was tried, convicted and sentenced to hang. The Governor General took this action after Prime Minister Macdonald refused. The GG commuted Lépine's sentence to prison and offered an amnesty if he vacated the country for five years. Lépine refused and served out his sentence.
 - Louis Riel was also offered an amnesty by the GG in 1874. Although there was a warrant out for his arrest, he had not been charged, tried or convicted. He accepted the terms of the amnesty and remained in the USA for five years.
- Amnesty can also be a period of time during which people can admit to a crime or give up weapons without being punished.

THE IGNOMINIOUS HISTORY OF PARDONS

- The pardon is often (perhaps almost always) issued to send a message of state power. Such pardons have nothing to do with justice or mercy. Many states issue pardons on an annual basis. This is a practice with a long history.
 - Jesus and Barabbas – Pontius Pilate, in delivering the annual state Passover pardons, condemned Jesus and pardoned Barabbas, bowing to political pressure and knowingly condemning an innocent man
 - Iran issues pardons annually to mark the birthday of the Prophet Mohammad and in 2020 issued 157 pardons in one week.
- Some states hold out the illusion of clemency as mercy or justice but then make it virtually impossible to access.
 - Ancient Athenians could petition for amnesty, with a prerequisite of six thousand signatures (likely a powerful deterrent)

USE OF THE PARDON

- British kings and queens used the pardon power for everything except mercy
 - To win support of nobles, to enhance royal coffers, to man the navy, to exact testimony from accomplices that would incriminate co-defendants, to provide cheap labour for the American colonies and to enable spy swaps.
- By 1720 Parliament had limited the king's power to pardon as a means of forestalling impeachment. (*An Act for the King's most gracious, general and free pardon, 7 Geo. I, c. 29*).
 - This is interesting with respect to President Trump, who may pardon himself prior to leaving office on Jan 20th 2021. If he does pardon himself, will it forestall impeachment by Congress? There does not appear to be any limitation on the President's constitutional power to pardon.

EXONERATION

- Exonerate generally means to clear or absolve from blame or a criminal charge. It can also mean the removal of the charge. It is a public statement that the accused should never have been accused in the first place. But is not necessarily a declaration of innocence.
- A person can generally be exonerated in one of three ways:
 - (i) a pardon (whether or not the pardon is based on innocence);
 - (ii) an acquittal of all charges by a court; or
 - (iii) a dismissal of all charges by a court or prosecutor.
- A person who has been exonerated can apply to have records destroyed.

POSTHUMOUS EXONERATION

- Canada has recently issued two posthumous exonerations:
 - On May 23, 2019 Chief Pihtokahanapiwiyin (Poundmaker) was exonerated by Prime Minister Justin Trudeau. Poundmaker had been wrongfully convicted of treason-felony for his participation in the North-West Resistance of 1885.
 - On March 26, 2018 six Tsilhqot'in Chiefs who were hanged in 1864 were exonerated by Prime Minister Justin Trudeau. The exoneration statement took place in Parliament for what was called "wrongful" executions. "We recognize that these six chiefs were leaders of a nation, that they acted in accordance with their laws and traditions and that they are well regarded as heroes of their people." "We confirm without reservation that Chief Lhats'as'in, Chief Biyil, Chief Tilaghed, Chief Taqed, Chief Chayses and Chief Ahan are fully exonerated of any crime or wrongdoing."
- Both exonerations were an exercise of the prerogative of mercy.
- Neither of these exonerations appear to expunge the judicial record. And in fact this may be impossible after such a long time (136 years)

POSTHUMOUS PARDON & EXPUNGING THE RECORD

- In 2009, the British government issued a posthumous apology to Alan Turing. Subsequently more than 37,000 people (led by Stephen Hawking) signed a petition urging the Queen to pardon Turing.
- On December 22, 2013, under the Royal Prerogative of Mercy, the Queen was "Graciously pleased to extend Our Grace and Mercy unto the said Alan Mathison Turing and to grant him Our Free Pardon posthumously in respect of the said convictions."
- Turing's pardon led to a general outcry "why only pardon Turing? What about all the others?"
- England passed the *Policing and Crime Act 2017* (known as the Alan Turing Law) that pardoned 15,000 living citizens and posthumously pardoned 40,000 (including Oscar Wilde). All these men were cautioned or convicted of offences related to homosexuality.

WRONGFUL CONVICTION OR WRONGFUL LAW

- Wrongful Charges or Wrongful Convictions under a Rightful Law
 - Poundmaker – (treason/felony) arguably innocent on the facts, wrongfully charged and convicted
 - Lépine (treason/felony), Riel (high treason), the Tsilhqot'in Chiefs (murder) – never denied the facts of the events, What they all denied was that their actions were wrongdoing. Lépine and Riel said theirs was a government that, pursuant to due process, executed a criminal, Thomas Scott. The Tsilhqot'in Chiefs said they were at war.
- Rightfully Convicted under a Wrongful Law
 - Turing – (homosexual acts) was rightfully convicted but under a wrongful, repugnant law that arguably should never have been enacted.

PART THREE:

CAN DONALD TRUMP PARDON
HIMSELF?



AMERICAN PRESIDENTIAL PARDON POWER

- We have watched President Trump pardon dozens of people. In the USA, the pardon power is set out in Article II of the Constitution (Section 2, Clause 1), which provides:
 - The President ... shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of impeachment.
- This means that the president can only pardon for federal offenses and cannot use a pardon to stop an officeholder from being impeached, or to undo the effects of an impeachment and conviction.
- The Presidential pardon power cannot pardon by anticipation. (*Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1867)). The offense must have been committed even if no charges have been laid.
- The Presidential pardon power cannot be used to pardon civil contempt actions.
- Congress cannot limit the effects of a presidential pardon. (*United States v. Klein*, 80 U.S. (13 Wall.) 128, 143, 148 (1872))

THE EFFECT OF A PRESIDENTIAL PARDON

- Can President Trump pardon his family? Yes.
- Can he pardon those who participated in the riots and assault on the Capitol on January 6th? Yes. He can issue an amnesty to a class of people for any federal offences.
- That said, if those rioters are convicted for taking such action in future, the fact of their previous charge can be brought into court as evidence as a circumstance of aggravation even though it was pardoned by the President. (*Carlesi v. New York*, 233 U.S. at 59 (1914))
 - For an example of how the pardon power can be used, the American president, every year, pardons a turkey at Thanksgiving.

SELF-PARDONS

- Can President Trump pardon himself? YES.
- There is much chatter on the news citing a 1974 DOJ memo that relies on the theory that one cannot sit in judgment of oneself. This appears to be a weak argument. A presidential pardon is not self-judgment. It is an exercise of the executive prerogative in Canada and in the USA it is a constitutional power that has only two limitations – the pardon must relate to federal crimes and not be used to forestall impeachment.
- Some also argue that a self-pardon would violate the public trust. But it could well be argued that all pardons are a violation of public trust since they overturn findings of law – often for political purposes.
- A self-pardon would certainly bring the pardon power into disrepute. It would send a powerful message that the President is above the law and it would certainly have political consequences.
- There is no legal impediment to stop Trump in advance from self-pardoning. It may be challenged after the fact in court, but nothing can stop him from pardoning himself now.
- While Trump can pardon himself for federal offences, he cannot pardon himself from his impeachment by Congress.

JUSTICIABILITY

- In Canada we have some case law on the issue of justiciability of the prerogative of mercy albeit arguably as *obiter*.
- In *Black, Laskin JA* (para 55) distinguished the prerogative of mercy as justiciable if wrongfully exercised.

Though on one view mercy begins where legal rights end, I think the prerogative of mercy should be looked at as more than a royal favour. The existence of this prerogative is the ultimate safeguard against mistakes in the criminal justice system and thus in some cases the Government's refusal to exercise it may be judicially reviewable. That was the view taken by the English Queen's Bench Division in *Re Secretary of State for the Home Department, Ex p. Bentley*. There the court held that the Home Secretary's decision not to grant a posthumous conditional pardon was judicially reviewable.

JUSTICIABILITY

- Laskin JA's reference to *Re Bentley*, holding that the “decision not to grant a posthumous conditional pardon was judicially reviewable” is curious. In that case the Law Lords held that while the formulation of criteria and the decision to grant or withhold mercy were not reviewable, **consideration of the kind of mercy that might be granted was justiciable.**

“the Home Secretary failed to recognise the fact that the prerogative of mercy is capable of being exercised in many different circumstances and over a wide range and therefore failed to consider the form of pardon which might be appropriate to meet the facts of the present case. Such a failure is, we think, reviewable.....” (*Re Bentley*, per Watkins LJ)
- Even then, the Lords would issue no remedy saying it was not “right to make any formal order nor is this an appropriate case for the grant of a declaration”. Instead, the Lords merely invited the Home Secretary to “look at the matter again”, noting that “the decision, is of course, one for the Home Secretary and not for the court...”
- So perhaps Laskin JA is incorrect – the Lords did not say the decision to withhold a posthumous conditional pardon was reviewable. They said the Home Secretary failed to consider that a different form of pardon that might be available. The message seems to be that the courts will send the matter back to the decision maker who must take all relevant issues into consideration before making the decision. It does not seem, at least to this writer, that the case stands for judicial review of the decision to grant or withhold mercy pursuant to the prerogative. I am supported in this by the fact that the Lords gave no legal remedy, only advice.

IS A TRUMP SELF-PARDON JUSTICIABLE?

- This has never been tested in the courts. No previous president has had the audacity to self-pardon although we know Nixon seriously considered it.
- It seems that the way this could come to the court would be for federal charges to be laid against Trump, to which he would raise the defence that he was pardoned for all federal crimes.
- The ball then would be squarely in the courts to consider whether the matter is justiciable.

PART FOUR:

Posthumous Exoneration for Louis Riel

DISCRETIONARY EXERCISE OF THE PREROGATIVE OF MERCY HAS VIRTUALLY NO LIMITS

- Here is what we know:
 - the Executive (Prime Minister, Cabinet) can exercise the prerogative of mercy at its discretion
 - the exercise of the prerogative of mercy does *not* need Parliamentary approval
 - the prerogative of mercy includes many forms of clemency – exoneration, pardon, amnesty, commutation, respite, etc.
 - The Executive can choose the form of clemency it grants and has discretion in describing the limits of the grant (ie: a conditional amnesty, a full and free pardon, commutation of sentence subject to terms, etc.)
 - the prerogative of mercy can be granted posthumous

THE ARGUMENT FOR EXONERATION OF RIEL

- Compare him to Milgaard and Marshall
- Emphasize that an exoneration (declaration that Riel is free from guilt) is different from a pardon (which is forgiveness for a crime committed)
- The charge, conviction & execution against Riel were incorrect in law and the remedy is exoneration
- There were errors of law in the trial (magistrate not a judge; jury of 6 not 12; failure to allow the defence time to gather evidence, etc.) These errors of law require correction.

THE ARGUMENT AGAINST EXONERATION FOR RIEL

- Nothing hangs on the name. The prerogative of mercy can be called exoneration or a pardon. It is still clemency granted by the Crown at its discretion for politically expedient purposes.
- A posthumous pardon or exoneration cannot be compared to a pardon for the living (ie: Milgaard). A pardon for a living man can bring actual benefits – damages, restoration of civil rights and privileges, etc.) A posthumous pardon provides nothing for the dead man. It restores no rights or privileges and no benefits. Records for a man convicted of high treason and hanged 136 years ago cannot be expunged.
- A posthumous pardon would not restore Riel's reputation. Remember Jesus, the Jacobites, the Vietnam Draft Dodgers and Nixon. Historic reputations and the facts of history do not change because the prerogative of mercy was granted or denied. A grant of clemency is simply one more chapter in that story. One that history often forgets or relegates to a footnote.

THE MÉTIS NATION POSITION ON EXONERATION FOR RIEL

- The Métis Nation asks the question – is the intention to pardon or exonerate the man? Or to exonerate the state for wrongfully charging, trying, convicting and hanging Riel?
- The Métis Nation believes that Riel's actions were not treason. They believe he was fighting to protect Métis lands and rights. They believe Riel, the man, needs no pardon or exoneration.
- They believe he was wrongfully charged, convicted and hanged. They believe that the Canadian government bears the blame and committed the wrongs. They believe that an exoneration by the state would amount to the state exonerating itself.
- The Métis Nation will not ask the same government that committed the wrong to now exonerate the man it wronged.
- The Métis Nation believes that rather than begging for mercy from the Crown, the Métis Nation should consider pardoning the Canada.

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