

# Introduction

*Philippe Lagassé and Nicholas A MacDonald\**

In January 2016, the Government House Foundation of British Columbia and the Institute for the Study of the Crown in Canada held a conference on the Crown in the 21st Century at Government House in Victoria, British Columbia. The Conference gathered Lieutenant Governors, scholars, practitioners, and observers of the monarchy to reflect on the history and future of the Crown in Canada. Speakers explored the relationship between the Crown and Indigenous peoples, the politics of the monarchical revival that took place in Canada under the government of Prime Minister Stephen Harper (2006-2015), as well as the role of the Queen's vice-regal representatives and the monarchy's relationship with the Commonwealth. Over three days, from 14 to 16 January, the Conference assembled five panels and three keynote speakers to address various aspects of Canada's constitutional monarchy. The third such conference in recent years, this event demonstrated the continuing relevance and importance of scholarship on the Canadian Crown.

The aim of this special issue of the *Review of Constitutional Studies* is to present scholarly highlights of the Conference on the Crown in the 21st century. The five articles in this special issue include two of the keynote addresses and three panel papers. The first article by Professor Robert Hazell and Dr Bob Morris returns to the Crown's country of origin and explores the future of the monarchy in the United Kingdom. Hazell and Morris argue that the Crown's constitutional functions may have come to an end, but the monarchy still retains a symbolic function that could allow it to endure. They explain how the Crown came to be marginalized in the British Constitution and examine the roles that the monarchy continues to play in British society. The second and third articles address one of the more contentious issues that have surrounded the Crown in Canada: royal succession. In her article, Professor Anne Twomey argues against the Canadian government's decision to have the Parliament of Canada assent to recent changes to the rules of royal succession

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put forth in British law. Drawing on past Canadian and Australian precedents, Twomey suggests that Parliament's assent is insufficient to change the law of succession in Canada. In contrast, Warren Newman, long-time counsel for the Department of Justice of Canada, defends that logic. Newman contends that the Canadian approach reflects the particularities of Canada's constitutional evolution and the need to address such changes in a pragmatic fashion.

Professor Paul Daly explores judicial deference toward the Crown in the issue's fourth article. Daly notes that the Crown's special status in Canadian administrative law remains salient and affords significant protections for the executive. According to Daly, this unique treatment before the courts is ill-advised and should be addressed by placing the Crown's powers on a statutory footing; doing so could dissuade the courts from treating the Crown's prerogative and common law powers differently than authorities granted to the executive by Parliament. Last, Professor Hugo Cyr provides an in-depth examination of the Crown's role in government formation. Cyr carefully counters common misperceptions about the conventions that guide government formation in Canada, and he addresses the impact that these misconceptions have on the possible evolution of conventions themselves. His article further provides a comprehensive outline of how the principles of government formation would apply in various scenarios.

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Given that this special issue was inspired by and drew upon the Conference on the Crown in the 21st Century, we would also like to thank those who helped realize that event:

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# If the Queen Has No Reserve Powers Left, What Is the Modern Monarchy For?

*Robert Hazell and Bob Morris\**

*The modern monarch has no political power. The Queen's personal prerogatives — the power to appoint the Prime Minister; to summon and dissolve parliament; and to give royal assent to bills — have been almost entirely extinguished. In exercising these powers, the monarch no longer retains any effective discretion.*

*What remains of monarchy are symbolic 'high' state ceremonial, and head of state representative duties. However, the Queen also has other important, non-constitutional functions: to symbolise national identity; provide stability in times of change; and encourage public service. These functions can be analysed by looking at four features of the modern monarchy's role: the national monarchy, the international monarchy, the religious monarchy, and the welfare or service monarchy. Does the monarchy's wider role mitigate the loss of discretion in terms of its 'hard' constitutional functions?*

*The monarchy will undergo further change as it responds to external pressures, including from the 15 realms, and the differing preferences of individual monarchs. Although at present the public and media remain firmly pro-monarchy, this should not be taken for granted: the media are fickle, and their persistent invasions of privacy remain one of the greatest threats to the future of the monarchy.*

*Le monarque moderne n'a pas de pouvoir politique. Les prérogatives personnelles de la Reine, c'est-à-dire le pouvoir de nommer le premier ministre, de convoquer et de dissoudre le Parlement et de donner la sanction royale aux projets de loi, ont presque entièrement été abolies. En exerçant ces pouvoirs, le monarque ne conserve plus de discrétion réelle.*

*Ce qui reste de la monarchie sont les plus hautes fonctions symboliques et cérémonielles et des fonctions de représentant de chef d'État. Cependant, la Reine a également d'autres devoirs importants qui ne sont pas rattachés à la Constitution : servir de symbole d'identité nationale, assurer la stabilité en période de changement et encourager le service public. On peut faire l'analyse de ces fonctions en examinant quatre caractéristiques du rôle moderne de la monarchie : la monarchie nationale, la monarchie internationale, la monarchie religieuse et la monarchie du bien-être ou de service. Le rôle plus large de la monarchie atténue-t-il la perte de discrétion sur le plan de ses fonctions constitutionnelles « dures »?*

*La monarchie subira d'autres changements au fur et à mesure qu'elle réagit aux pressions extérieures, y compris de la part des 15 royaumes, ainsi que les différentes préférences des monarques individuels. Bien que le public et les médias demeurent fermement monarchistes, ceci ne devrait pas être tenu pour acquis : les médias sont inconstants et leurs atteintes continuelles à la vie privée demeurent une des plus grandes menaces pour l'avenir de la monarchie.*

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## **Introduction**

Ever since the English Civil War, which determined that the Monarch reigned subject to Parliament, the powers of the Monarchy have gradually been reduced. In each century, those powers have grown less, and this process of attrition has continued into modern times, so that Queen Elizabeth II has less power than she did on her accession in 1952. As this paper will show, all the important prerogative powers remaining in the hands of the Monarch in the UK have been removed or diluted in recent years. In particular, the power to choose a prime minister and the power to dissolve Parliament have been significantly curtailed. So, if the Queen has no reserve powers left, what is the modern Monarchy for?

This article goes on to discuss the answers traditionally given by Buckingham Palace about the role of the Monarchy by looking at four principal current aspects: the national Monarchy, the international Monarchy, the religious Monarchy, and the welfare or service Monarchy. To anticipate the remainder of our argument, we conclude that the loss of the Monarchy's "hard" constitutional functions has not necessarily depleted its standing; indeed, its acceptance by the political class may well depend on its powerlessness and complete neutrality. But for the general public, its popularity will depend on its wider roles, in particular the welfare Monarchy, and its contribution to celebrity culture, which may prove a double-edged sword.

### **I. The loss of the Monarch's reserve powers**

In writing about the royal prerogative, it is customary to distinguish between those powers still remaining in the hands of the Monarch and those powers which are now exercised directly by government ministers. The majority of prerogative powers now come into the latter category. But the Queen still exercises some prerogative powers herself, known variously as her reserve powers, constitutional powers, or the personal prerogatives (a term first coined by Sir Ivor Jennings).<sup>1</sup> The most important powers are:

- to appoint and dismiss ministers, in particular the prime minister
- to summon, prorogue and dissolve Parliament
- to give Royal Assent to bills passed by Parliament.

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<sup>1</sup> Sir Ivor Jennings, *Cabinet Government*, 3rd ed (Cambridge: Cambridge University Press, 1959) ch XIII.

## The appointment of the prime minister

The appointment and dismissal of ministers is made on the advice of the prime minister. The last time a prime minister was dismissed was in 1834: few would maintain that this power could be exercised today.<sup>2</sup> As the Cabinet Manual records, “Historically, the Sovereign has made use of reserve powers to dismiss a prime minister or to make a personal choice of successor, although this was last used in 1834 and was regarded as having undermined the Sovereign” (the episode was William IV’s dismissal of Lord Melbourne and replacement by Sir Robert Peel).<sup>3</sup>

The power to appoint a prime minister retained a discretionary element for longer, but that too is now gone. In 1931, King George V persuaded Ramsay MacDonald not to resign, but to head a National government dominated by the Conservatives after his Labour government had broken up.<sup>4</sup> A small discretionary element remained in the case of a mid-term change of prime minister (such as Churchill being succeeded by Eden in 1955, or Macmillan by Douglas-Home in 1963), with the Monarch taking advice from the outgoing prime minister and party grandees, in the days when Conservative party leaders were anointed rather than elected. But that ended when the political parties introduced elections for the party leader: the Conservatives introduced election of the leader by the parliamentary party in 1965, and the Conservative and Labour parties have since extended voting rights to all party members.<sup>5</sup>

When a party wins an overall majority in a general election, the result is clear and the Queen appoints the party’s leader as prime minister. When the result is unclear because no party has an overall majority, the convention is that the Queen will appoint that person who is most likely to command the confidence of the House of Commons. In the run up to the 2010 election, when a hung Parliament was expected, the cabinet secretary published guidance in the form of an advance chapter of a wider Cabinet Manual. The guidance made it clear that it was for the political parties first to negotiate to determine

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2 Save as a deep reserve power. Robert Blackburn, in an article aimed at restricting any discretionary use of the Monarch’s personal prerogatives, suggested that “A monarch is duty bound to reject prime ministerial advice, and dismiss the Prime Minister from office, when the Prime Minister is acting in manifest breach of convention.” The example he gave was if a Prime Minister, after a successful no confidence motion, refused to resign or call a general election. Robert Blackburn, “Monarchy and the Personal Prerogatives” (2004) Public L 546 at 551.

3 UK, Cabinet Office, *Cabinet Manual* (London: Cabinet Office, 2011), para 2.9.

4 Vernon Bogdanor, *Monarchy and the Constitution* (Oxford: Clarendon Press, 1995) at 104-12.

5 The Labour Party introduced “one member one vote” in 1993. In 1998 the Conservative Party introduced a postal ballot of all party members (who must have been paid up members for three months), after an initial selection of the two front-runners by the parliamentary party.

who could command confidence in the event of a hung Parliament, and the Queen would then appoint that person. A full draft of the Cabinet Manual was published after the election, and after minor revision following scrutiny by three parliamentary committees, the first edition of the Cabinet Manual was published in October 2011. It follows quite closely the New Zealand Cabinet Manual, which is now in its fifth edition.

Chapter 2 of the Cabinet Manual, on Elections and Government Formation, codifies the constitutional conventions about the appointment of the prime minister. The key paragraphs about a hung Parliament are as follows:

***Parliaments with no overall majority in the House of Commons***

2.12 Where an election does not result in an overall majority for a single party, the incumbent government remains in office unless and until the Prime Minister tenders his or her resignation and the Government's resignation to the Sovereign. An incumbent government is entitled to wait until the new Parliament has met to see if it can command the confidence of the House of Commons, but is expected to resign if it becomes clear that it is unlikely to be able to command that confidence and there is a clear alternative.

2.13 Where a range of different administrations could potentially be formed, political parties may wish to hold discussions to establish who is best able to command the confidence of the House of Commons and should form the next government. The Sovereign would not expect to become involved in any negotiations, although there are responsibilities on those involved in the process to keep the Palace informed ...

The Cabinet Manual goes on to describe what happens if the prime minister resigns mid term, stating that it is for the party or parties in government to identify who can be chosen as the successor (para 2.18). So, the Monarch is left with no discretion in any circumstance in which she may be required to appoint a prime minister, whether post election or mid term. Indeed, the Cabinet Manual makes clear that the whole purpose is to remove any residual discretion:

In modern times the convention has been that the Sovereign should not be drawn into party politics, and if there is doubt it is the responsibility of those involved in the political process, and in particular the parties represented in Parliament, to seek to determine and communicate clearly to the Sovereign who is best placed to be able to command the confidence of the House of Commons (paragraph 2.9).

One further reform advocated by the Institute for Government and the Commons Political and Constitutional Reform Committee would be to hold a vote on the floor of the House of Commons as the first piece of business after



an election, to determine who commands confidence in the new Parliament.<sup>6</sup> This is the practice followed in Scotland and Wales,<sup>7</sup> and would help clearly to distance the Monarch from the political process; but it has not yet found favour with the government at Westminster.

## The power to summon and dissolve Parliament

The summoning and dissolution of Parliament has also been done by the personal prerogative. By convention, it has been the constitutional right of the prime minister to determine the timing of a dissolution and hence of the next election, and to advise the Monarch accordingly. The majority view amongst constitutional experts has been that the Monarch could refuse an untimely request for dissolution, even though there has been no refusal in modern times.<sup>8</sup> But any doubt or dispute is now academic, because the prerogative power of dissolution has been abolished by the *Fixed-term Parliaments Act 2011*. Unlike the *Canada Elections Act* of 2007, which expressly preserved the prerogative power of the Governor General to dissolve Parliament, dissolution in the UK is now regulated by statute and not the prerogative; it is a matter for Parliament, not the Executive (the prerogative power was preserved in Canada in order to avoid the need for constitutional amendment).

The *Fixed-term Parliaments Act 2011* provides for five-year parliaments, with polling on the first Thursday in May five years after the previous general election, and automatic dissolution 17 working days before the election. Section 3(2) states baldly, “Parliament cannot otherwise be dissolved.” There is provision for midterm dissolution in section 2, but again by statute not under the prerogative. Section 2 allows for a midterm dissolution in only two circumstances: if two thirds of all MPs vote for an early general election; or, if the House passes a formal no confidence motion “that this House has no confidence in Her Majesty’s Government,” and no alternative government which can command confidence is formed within 14 days. The only tiny element of discretion which remains is the timing of an election following a mid term dissolution: section 2(7) provides that “the polling day ... is the day appointed by Her Majesty by proclamation on the recommendation of the Prime Minister.” The election would normally be held within three to four weeks.

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6 UK, House of Commons Political and Constitutional Reform Committee, *Government Formation Post-Election* (HC 1023, London: The Stationary Office Ltd, March 2015) paras 62-63.

7 *Scotland Act 1998* (UK), c 46, s 46; *Government of Wales Act 2006* (UK), c 32, s 47.

8 Robert Blackburn disagrees, Blackburn, *supra* note 2 at 561. For a rejoinder, see Rodney Brazier “Monarchy and the Personal Prerogatives - A personal response to Professor Blackburn” (2005) Public L 45, 45-47.

So, the prerogative power of dissolution has gone. What about the power to summon Parliament and determine the date of first meeting of the new Parliament? This is done by proclamation issued by the Monarch, but on the advice of the prime minister; the outgoing prime minister determines the date when the new Parliament will meet. This used to be six days after the election, but in 2007 the Modernisation Committee of the House of Commons recommended an interval of 12 days, to allow more time for induction of new MPs.<sup>9</sup> This practice was followed in 2010 and 2015.

### **The power to prorogue, and recall Parliament**

The prerogative power to prorogue Parliament remains, but has not caused the kind of controversy which has occurred in Canada. The Cabinet Manual explains prorogation as follows:

2.24 Parliament may be prorogued before being dissolved or may just adjourn ... Prorogation brings a parliamentary session to an end. It is the Sovereign who prorogues Parliament on the advice of his or her ministers. The normal procedure is for commissioners appointed by the Sovereign to prorogue Parliament in accordance with an Order in Council. The commissioners also declare Royal Assent to the Bills that have passed both Houses, so that they become Acts, and then they announce the prorogation to both Houses in the House of Lords.

There has been no controversy about prorogation in the UK because the power is used routinely and has not been abused. The power to recall Parliament is not a prerogative power, but is worth mentioning briefly here. Under the Standing Orders of the House (SO 13), the House of Commons is recalled during a recess only when the government proposes a recall, and the Speaker agrees.<sup>10</sup> The initiative lies with the government. Gordon Brown as prime minister proposed that a majority of MPs should also have the right to request a recall.<sup>11</sup> The proposal was referred to the Commons Modernisation Committee and the Committee initiated but did not complete an inquiry, so the proposal was not implemented.

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9 UK, House of Commons Modernisation Committee, *Revitalising the Chamber: the Role of the Backbench Member*, (HC 337, London: The Stationary Office Ltd, June 2007) ch 3.

10 The House has been recalled 29 times since SO 13 was introduced in 1948.

11 UK, HC, "The Governance of Britain", Cm 7170 in *Sessional Papers*, (July 2007) paras 37 to 39.

## **The power to give Royal Assent to Bills, and Royal consent to Bills affecting the prerogative, and personal interests of the Crown**

Royal Assent to a Bill was last refused in 1707, when Queen Anne, on the advice of her ministers, withheld Royal Assent to a bill to arm the Scottish Militia. It is inconceivable that the Monarch would withhold Royal Assent today, save on the advice of ministers. Robert Blackburn suggests that the Monarch's role is limited to one of due process, and Royal Assent is a certificate that the bill has passed through all its established parliamentary procedures.<sup>12</sup> Rodney Brazier has argued that a monarch might still veto a Bill which sought to subvert the democratic basis of the Constitution, but accepts that this leads to grave difficulties of definition.<sup>13</sup> Even in such an extreme case, Brazier would prefer the Monarch to find a means other than withholding Royal Assent to express their concerns.<sup>14</sup> The only circumstance in which it is conceivable that Royal Assent might be withheld is if a bill had been passed by both Houses against the wishes of the government, and it afforded the government a last-ditch means of preventing the bill from becoming law. That might happen with a minority government which could not prevent the passage of legislation by the opposition majority, but did not wish to see it enacted.

### **The retention of a deep reserve power**

To conclude the argument of Part I, the Monarch's personal prerogative powers contain no real political power. The Queen has no effective discretion in deciding whom to appoint as prime minister, whether to summon, dissolve, or prorogue Parliament, or to grant Royal Assent to bills. It is true that the Monarch might, in very exceptional circumstances, still have to exercise a choice: for example, if the prime minister is killed or suddenly dies. In that event, there would be no time to hold a vote of the party membership. A caretaker prime minister would need to be appointed until the party had elected a new leader; the Monarch would look to the cabinet to nominate the caretaker.<sup>15</sup> Other hypothetical examples are possible: if the prime minister sought a sudden prorogation in order to avoid a parliamentary vote of no confidence (as happened recently in Canada);<sup>16</sup> or if the government appears to have lost confidence while

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12 Blackburn, *supra* note 2 at 554.

13 Mike Bartlett's play *King Charles III* (2014) is predicated on the new King Charles refusing Royal Assent to a bill restricting the freedom of the press.

14 Brazier, *supra* note 8 at 47.

15 Philip Norton, "A Temporary Occupant of No 10? Prime Ministerial Succession in the Event of the Death of the Incumbent" (2016) Public L 18.

16 Peter Russell & Lorne Sossin, eds, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009).

Parliament is prorogued, and then refuses to advise that Parliament be summoned (as has happened in realms in the South Pacific). In such circumstances, the Monarch retains a deep reserve power to dismiss the prime minister or to summon Parliament against the wishes of the prime minister. The Monarch is the ultimate constitutional longstop; but in Britain's political culture, it is hard to see those longstop powers ever needing to be exercised.

## **II. What is the modern Monarchy for?**

The Sovereign's own website expressed the situation as follows:

The Queen's role is to:

Perform the ceremonial and official duties of Head of State, including

representing Britain to the rest of the world;

Provide a focus for national identity and unity;

Provide stability and continuity in times of change;

Recognise achievement and excellence;

Encourage public and voluntary service.<sup>17</sup>

Part I of this paper has already dealt with the UK Head of State constitutional functions. This Part will group the rest as follows:

- *The national Monarchy* — those head of state functions outside the purely political/constitutional as described in Part I;
- *The "international" Monarchy*, that is where the UK Sovereign is also the head of state in 15 other Commonwealth states, known as the "realms," and is styled as Head of the Commonwealth;
- *The religious Monarchy* — the Sovereign as head of the Church of England, the "established" church, together with the Monarchy's rather different relationship with the Presbyterian Church of Scotland; and
- *The welfare/service Monarchy* — this aspect includes those functions where the Sovereign, and members of the royal family, exercise forms of social patronage in relation to charities and other parts of civil society.

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<sup>17</sup> In December 2015. In 2016 the website underwent a major redesign, and this text no longer appears.

## The national Monarchy

Although primarily ceremonial, these functions have important political and social content.<sup>18</sup> The Sovereign formally opens each session of Parliament, which now commences in May or June.<sup>19</sup> Travelling in a state coach in ceremonial dress, with a mounted cavalry escort (usually with her husband and other members of the royal family), the Queen delivers a speech from the throne in the House of Lords. The members of the House of Commons are summoned to attend and remain standing throughout the proceedings. The speech, prepared by the prime minister, outlines the most important measures that the government — the Queen's government — plans to bring forward in the forthcoming session.<sup>20</sup>

Typical of Britain, the ceremonies belie the reality. Whereas the procedures seem to exalt the House of Lords as the more important of Parliament's two Houses, the reverse is the truth. It is an example of how a state, once a personal Monarchy, has become effectively a democratic republic whilst retaining monarchical forms.<sup>21</sup>

The national role includes an annual cycle of scripted events. It starts with the Queen's televised Christmas message leading on to the New Year's honours list which, with the summer Birthday list, biannually bestows civic honours and medals recognizing achievement of various kinds. With wonderful catholicity, awards are made to captains of industry and school dinner ladies, professors and entertainers, doctors and soldiers.<sup>22</sup> Spring has the annual Commonwealth service at Westminster Abbey. The summer sees the Trooping of the Colour,

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18 "...no approach which defines power narrowly and ignores spectacle and pageantry can possibly claim to be comprehensive. Politics and ceremonial are not separate subjects, the one serious, the other superficial. Ritual is not the mark of force, but is itself a kind of power." David Cannadine & Simon Price, eds, *Ritual of Royalty: Power and Ceremonial in Traditional Societies* (Cambridge, Cambridge University Press, 1992) at 19.

19 Since May 2010 and the *Fixed-term Parliaments Act 2011* (UK), c 14, parliamentary sessions have run from May until May. Before then the parliamentary year began in the autumn, which is the reason why Guy Fawkes and his co-(Roman Catholic) conspirators chose the state opening in November for the gunpowder plot. The Sovereign's survival in 1605 is still commemorated annually on 5 November, the date of the conspiracy's discovery.

20 With less fanfare, the Queen also opens each newly elected five year Synod of the Church of England and for which see below.

21 Even in 1867, Bagehot observed "A Republic has insinuated itself beneath the folds of a monarchy," Walter Bagehot, *The English Constitution* (Oxford: Oxford University Press, 1927) at 44. The first reference to the UK as a "crowned republic" has been traced to the Epilogue (published 1873) of Tennyson's *Idylls of the King*. See Frank Prochaska, *The Republic of Britain 1760-2000* (London: Allen Lane, 2000) at 120.

22 The chances of receiving one are enhanced by a recipient's closeness to government, although public servants form a diminishing proportion of those honoured. See, UK, House of Commons Public

a military pageant involving the Household regiments on the Horse Guards parade. Late summer/early autumn includes a long stay at Balmoral Castle in Aberdeenshire and a visit to the Highland Games as well as other engagements in Scotland.<sup>23</sup> Remembrance Day in November has the Queen attending the cenotaph service in Whitehall. Visits also take place to Windsor Castle in Berkshire (both a weekend retreat and a site of formal entertainment), and (more privately) Sandringham House in Norfolk where Christmas and the New Year is spent. State visits, both inwards by foreign heads of state and by the Queen outwards, are accommodated in the programme. The daily engagements of the Queen and other senior members of the royal family are published in the Court Circular. Every January, their number is totted up by an obliging private citizen who writes to the *Times* newspaper with the results.<sup>24</sup>

For the Queen, there is also much other and more formal business. She hosts investitures where honours are conferred. She greets new and retiring ambassadors and newly-appointed Church of England bishops and High Court judges. She presides over meetings of the Privy Council which conducts swiftly — and whilst standing — much public business including the approval of subordinate legislation. She will meet outgoing and incoming senior civil and military officers, and the colonels of her regiments. Normally, too, she will see the prime minister for an hour or so every Wednesday evening for a private audience.<sup>25</sup> The Queen reads a considerable range of Cabinet and other papers to prepare for such occasions. In general, her labours relieve executive government from the burdens of ceremonial rule unlike in states where the head of the executive is also head of state.<sup>26</sup>

The Monarchy comes with financial costs defrayed by the taxpayer. Formerly, the costs of undertaking public duties were underwritten by

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Administration Committee, *The Honours System*, (HC 19, London: The Stationary Office Ltd, August 2012) at para 36.

23 Scottish independence is the aim of the governing party, the Scottish National Party (SNP), in the devolved Scottish government. Although the SNP's official policy is to retain the Queen as head of state of an independent Scotland, it is thought that this position might not last if independence were achieved.

24 The Queen completed 393 engagements in 2014, the Prince of Wales the most of all the active royal family at 533, closely followed by his sister, the Princess Royal, at 528. The Queen's rate of strike is understandably declining as she reaches her 90<sup>th</sup> year: Martin, "Prince Charles 'Hardest Working Royal' for Seventh Year Running" (1 January 2015) *Royal Central*, online: <<http://royalcentral.co.uk/state/prince-charles-hardest-working-royal-for-seventh-year-running-42005>>.

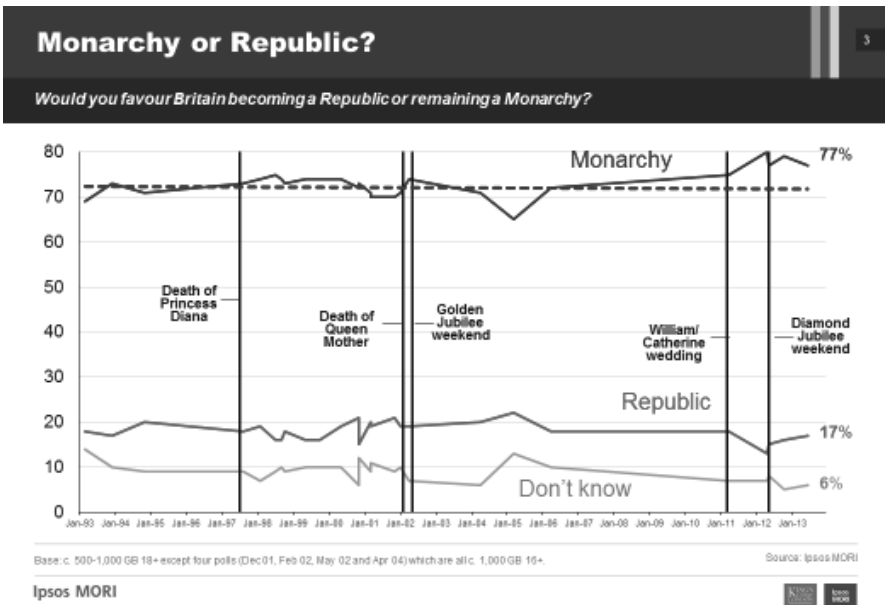
25 See Peter Morgan's play *The Audience*, first performed in 2013 with Helen Mirren playing the Queen.

26 In the USA, for example, the President is not only his own prime minister but, in responding to expectations of exercising moral leadership, also as it were an American Archbishop of Canterbury, Roman Catholic Cardinal and Chief Rabbi.

Parliament in Civil List settlements made at the beginning of each reign. Well into Elizabeth II's reign it was discovered that undeclared concessions had meant the Sovereign paid no tax on personal income. This was rectified from 1993 and the Queen (and the Prince of Wales) now voluntarily contributes tax like everyone else.

The recent coalition government decided to move to a different support system under the *Sovereign Grant Act 2011*. This set the level of support initially (reviewable every five years) at 15 per cent of the profits of the Crown Estate. The latter was until 1760 managed directly by the Sovereign and used for the cost of civil government until George III surrendered the Estate in return for a fixed Civil List. The new arrangement delivers an annual sum in the region of £36 million. It is a form of indexation previously resisted because indexation was thought to discourage economy.<sup>27</sup>

Whatever reservations may exist about the new financial regime, what cannot be said is that the Monarchy is unpopular. On the contrary, it remains very popular indeed with solid 70 per cent approval ratings.



27 The Palace publishes detailed annual accounts of how the Sovereign Grant is spent: see <<https://www.royal.uk/royal-finances-0>>. The new arrangements have been criticised for being insufficiently austere: Gordon Rayner, "Queen's Finances are Safe from Cuts for Two Years" (21 June 2015) *Daily Telegraph*, online: <<http://www.telegraph.co.uk/news/uknews/queen-elizabeth-II/11689154/Queens-finances-are-safe-from-cuts-for-two-years.html>>.

These have been maintained with hardly a tremor even after the *annus horribilis* of 1992 or the 1997 death of Diana, first wife of the Prince of Wales and the mother of his two sons. The organization Republic has gained little political traction. Although there are hesitations about how the Prince of Wales will perform as the Queen's successor, they do not appear to amount to reservations about the institution itself. The extent to which this state of affairs is dependent on the minimal political role of the Monarchy is explored in what follows.<sup>28</sup>

Finally, the extinction of the active constitutional roles alters the relationship between the Sovereign and the politicians. A former royal private secretary, William Heseltine, writing in 2004 before the *Fixed-term Parliaments Act 2011* changed things, attached real importance to the fact that the prime minister had to request a dissolution in circumstances where the Sovereign retained some discretion. He foresaw the removal of that power leading to a situation where

the element of deference which is now paid by a Prime Minister to sovereigns would I think begin to disappear, and with it a useful aspect of the British political nexus ... A relationship in which the politicians are required to be a little deferential to a higher authority is a useful one for keeping them in their place ...<sup>29</sup>

Fixed-term Parliaments could mean that prime ministers will not feel as bound to defend an institution upon which they are that much less dependent. But for other politicians, inaccurate perceptions may help to ensure continuing deference: few perhaps are aware that the Queen is left with no discretion in the exercise of the personal prerogative powers.

There is also the point noted by Frank Prochaska that constitutional changes which, at first sight, seem hostile to the Monarchy can actually strengthen the institution. Speaking of the Parliament Act 1911, which significantly reduced the powers of the House of Lords,

Many contemporaries assumed that the Act would lead to the decline of royal prestige, perhaps even to the collapse of the monarchy ... But with hindsight, the Act

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28 John Wolffe points out that the degree of general popularity is accompanied by a significant decline in the audience for the Queen's televised Christmas address from 27 million in 1982 to 15.7 million in 1994 and 7.7 million in 2007. He concluded that the decline "suggests that the Queen was no longer articulating a cultural consensus" John Wolffe, "Protestantism, Monarchy and the Defence of Britain 1837-2005" in Callum G Brown & MF Snape (eds), *Secularisation in the Christian World - Essays in Honour of Hugh McLeod* (Farnham, UK: Ashgate, 2010) at 73. Audience figures appear to have continued at around the same level since.

29 Sir William Heseltine, "The Fabian Commission on the Future of the Monarchy" (2004) Constitutional L & Policy Rev 84.



may be seen as another instalment in the incremental rise of democratic republicanism, which brought the crowned republic into sharper focus.<sup>30</sup>

## The international Monarchy

Uniquely amongst remaining world monarchies, the British Monarchy is not contained by its geographical boundaries. The British Sovereign is both “head” of the Commonwealth of 53 independent sovereign countries and actually head of state in 15 of these countries — the “realms”<sup>31</sup> — other than the UK. In those countries, the Queen is represented by a Governor General carrying out constitutional and public functions similar to those undertaken in the UK. Her long reign since 1952 means that she has visited all the realms, and all the other Commonwealth countries with the exception of the relatively late joiners, Cameroon (1995) and Rwanda (2009). She has, as a result, become personally familiar with their societies and their leading politicians.

When visiting the realms, the Queen acts on the advice of the responsible ministers in the particular country and not on the advice of her UK ministers. This can, on occasion, lead to tensions if their interests conflict.<sup>32</sup> On the other hand, her visits outside the Commonwealth occur solely in her UK persona and not in respect of her headship of the other realms. On such occasions, her association with the promotion of solely UK interests has led to criticism in that regard<sup>33</sup> and a tendency for the realms to promote international roles for their Governors General.

These arrangements are a residue of empire, the outcome of local political maturation, and British withdrawal, forced or otherwise. The *Succession to the Crown Act 2013* required the agreement of all the realms before it could be brought into force in the UK. This was because altering the rules of royal succession to make them gender neutral meant that all the monarchies had to agree lest different rules in different realms resulted in different people as monarchs. The realms were free to alter their constitutions without reference to the UK, but the UK could not do so on this occasion without seeking the realms’

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30 Prochaska, *supra* note 21 at 153.

31 The countries are Antigua and Barbuda, Australia, The Bahamas, Barbados, Belize, Canada, Grenada, Jamaica, New Zealand, Papua New Guinea, St Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Solomon Islands, and Tuvalu.

32 For example when Canada hosted the Commonwealth Heads of Government meeting in 1973 and Pierre Trudeau invited the Queen to attend (which she did), against the wishes of the UK government. See Philip Murphy, *Monarchy and the End of Empire* (Oxford: Oxford University Press 2013) at 131.

33 Bogdanor, *supra* note 4 at 293.

consent; the realms were relatively freer to alter their constitutions than was the UK itself. This inversion of former imperial realities took some people by surprise. On the other hand, as Peter Boyce has pointed out, the fact that the initiative for change remains in the hands of the UK also reminds the realms that “their crown is derivative, if not subordinate.”<sup>34</sup>

As to the realms generally, the present position appears to be as follows. Of the “old” Dominions, New Zealand has the least-developed republican movement. The totemic significance given to the 1840 Waitangi treaty and its monarchical dimension by the important Maori minority would have to be navigated with particular care. In Australia, a once-clear majority in favour of a republic has dwindled, and in Canada there may be still but a small minority. Writing in 2008, Peter Boyce thought that, although the argument is rarely about principled republicanism rather than symbolism and national identity, “One of the most significant findings of recent opinion polls in Canada and Australia has been that a clear majority believe that the Crown links should be severed at the expiry of Queen Elizabeth’s reign.”<sup>35</sup> Attempts in Australia to claim that the outcome of the recent UK referendum on EU membership has increased support for a republic have been discounted. Significantly, the Australian prime minister, Malcolm Turnbull, who led the campaign for a republic in the Australian 1999 referendum, has not made it an election issue and has discouraged any further initiative on the basis that the next opportunity to return to the issue should not be before the end of the Queen’s reign, a position true, perhaps, for all the realms — whatever the present state of opinion within them.

It seems reasonable, therefore, to expect some change after the reign of Elizabeth II. Early runners could include Australia and Jamaica, as well as Tuvalu, Saint Vincent, and the Grenadines where referenda have previously failed.<sup>36</sup> However, it would not always be a simple process. Both Australia and Canada would need the agreement of their constituent states/provinces. Despite majority opinion in favour, the 1999 Australian referendum failed because there was no agreement on how the new head of state should be ap-

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34 Peter Boyce, *The Queen’s Other Realms: The Crown and its Legacy in Australia, Canada and New Zealand* (Sydney: Federation Press, 2008) at 23.

35 *Ibid* at 210.

36 The Australian republic referendum was in 1999; St Vincent and the Grenadines in 2009; Tuvalu has held two referendums on the constitution, in 1986 and 2008, both asking whether Tuvalu should become a republic. The last two Prime Ministers of Jamaica, Portia Simpson-Miller (2012-16), and her successor Andrew Holness, have both promised to amend the constitution to make Jamaica a republic.

pointed. There are similar difficulties in Jamaica, where constitutional change requires a two-thirds majority of both Houses, plus a referendum.

British attitudes to a growth of republicanism outside Britain are relaxed. At the time of the Australian referendum, Buckingham Palace made it clear that the question was one entirely for Australians to decide. Indeed, British officials suggested that republican status might help Anglo-Australian relations, once they were “purged of irritations and misunderstandings generated by real or imagined British condescension or by public controversy surrounding the Royal Family.”<sup>37</sup> Similarly, Philip Murphy has noted the extent to which the British government encouraged the new African Commonwealth countries to be republics: “Officials and ministers feared that by involving the Crown in the politics of post-colonial Africa, they might be exposing the Queen to potential ‘embarrassment’ in a way that would damage national prestige and undermine her capacity to serve as the focus of a specifically *British* identity.”<sup>38</sup>

Whether the UK Sovereign should remain the Commonwealth’s “head” is linked to the general acceptability of the UK’s Sovereign perpetually in that role. The office — such as it is — is not hereditary. There is no rule of succession, nor is there any means by which one could be legislated. The present position rests on the London Declaration of 1949 and its formula for permitting the inclusion of republics (in the immediate case India alone) to the Commonwealth where the king was accepted as “the symbol of the free association of its [the Commonwealth’s] independent member nations and as such the Head of the Commonwealth.”

Also relevant is the extent to which the Commonwealth has been developing some nascent political (as opposed to co-operative) machinery of its own beyond the secretary-general role established in 1965. Nowadays, between the biennial Commonwealth Heads of Government Meetings (known as CHOGM), the last host country’s head of the executive carries on in a shadow caretaking function for the following two years until the next heads of government meeting. Previous talk about some kind of revolving headship has so far come to nothing.

Philip Murphy and Daisy Cooper have argued that the role of head of the Commonwealth should lapse on the Queen’s death. The Prince of Wales is placed in an impossible position: putting himself forward will be “anach-

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37 Boyce, *supra* note 34 at 241.

38 Phillip Murphy, *Monarchy and the End of Empire: The House of Windsor, the British Government, and the Post-War Commonwealth* (Oxford: Oxford University Press, 2013) at 15.

ronistic and presumptuous”; not expressing interest would be characterised as neglectful. But quite apart from the prince’s purely personal dilemma, Murphy and Cooper maintain that “... Charles would not merely be an unsuitable symbol but a positively harmful one, reinforcing the prejudice that the Commonwealth is merely a throwback to Empire.”<sup>39</sup> They argue, too, that it is the very existence of the headship that may have inhibited the growth of the Commonwealth Secretariat into a stronger and more significant institution. Nonetheless, a report that the Prince of Wales was to accompany the Queen to the 2015 Malta CHOGM claimed that the Queen was understood to be determined to see the headship descend to her son even while understanding that “it is not a done deal.”<sup>40</sup>

Throughout all this, Elizabeth II’s devotion to the Commonwealth has remained notable. However, the Queen’s enthusiasm for the Commonwealth has not always been shared by her governments.<sup>41</sup> The relationship with the Commonwealth added a post-imperial role and reach to an otherwise wholly UK institution which in important ways compensated for the decline in monarchical roles elsewhere. Harold Evans, press head at 10 Downing Street under Prime Minister Harold Macmillan, records Macmillan debriefing him after a discussion with the Queen revealed her disappointment that a planned visit to Ghana might not go ahead: “She took very seriously her Commonwealth responsibilities, said the PM, and rightly so for the responsibilities of the UK Monarchy had so shrunk that if you left it at that you might as well have a film star.”<sup>42</sup>

## **The religious Monarchy**

Since 1689, at a time of intense struggle against Roman Catholic monarchies in continental Europe, the Sovereign of England has had to be “in communion with” the protestant Church of England and, since 1707 onward, has sworn an oath on accession to uphold the Church of Scotland, the Kirk, a protestant

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39 Phillip Murphy & Daisy Cooper, *Queen Elizabeth II Should be the Final Head of the Commonwealth* (London, Commonwealth Advisory Bureau, 2012).

40 Royal Nikkah, “Charles Courts Commonwealth” (22 November 2015) *Sunday Times*, online: <[http://www.thesundaytimes.co.uk/sto/news/uk\\_news/Society/article1636087.ece](http://www.thesundaytimes.co.uk/sto/news/uk_news/Society/article1636087.ece)>. The final communique was silent on the point though it “welcomed the presence” of the Prince of Wales and his wife, The Commonwealth, Press Release, “Commonwealth Heads of Government Meeting Communique” (29 November 2015), online: <<http://thecommonwealth.org/sites/default/files/news-items/documents/CHOGM%202015%20Communique.pdf>>.

41 See Ben Pimlott, *The Queen: A Biography of Elizabeth II* (London: Harper Collins, 1996) at 462-9 especially.

42 Harold Evans, *Downing Street Diary: The Macmillan Years 1957-63* (London: Hodder & Stoughton, 1981) at 71, cited in in Murphy, *supra* note 38 at 171.

Presbyterian church. Until the *Succession to the Crown Act 2013*, in addition to the ban on Roman Catholics, non-Trinitarian Christians and all other religions or none, no one married to a Roman Catholic could succeed as sovereign. A new sovereign has to make a declaration of their Protestantism and swear a coronation oath which includes upholding the Church of England and its privileges. Virtually all civic disabilities imposed on Roman Catholics from the seventeenth century were abolished during 1828-1829.

In England, the Sovereign is “Supreme Governor” of the Church of England, and formally makes all senior Church appointments. The Sovereign does not have any sacerdotal role. Accession is not dependent on coronation, though since the tenth century Wessex Saxon kings, the ceremony has used similar formulae to signify the descent of God’s grace and blessing on the Monarch. In Scotland, the Sovereign is not in any sense head of the Kirk but sends representatives (and very occasionally attends herself) to the Kirk’s annual General Assembly without participating in its deliberations.

All these arrangements were features of a confessional state. Theological uniformity was regarded as a good in itself and something that worked towards the security of the nation. One effect was to bind executive government and the Church of England together into a joint project of governance and social control, roles managed more at arm’s length in Scotland.

Much has changed since 1689, and only a small residue of the confessional state remains. Government control of the Church of England is attenuated to the point that the Church is, for all intents and purposes, autonomous. Committees of the Church recommend and, in effect, appoint to all senior posts: the prime minister nowadays automatically advises the Sovereign to appoint the Church’s nominees. Whilst the Measures of the Church’s Synod, its Parliament, are subject to the approval of a parliamentary committee, they are enabled to amend statute and themselves have the force of statute. In the past, even these residues were attacked as inconsistent with the religious freedoms of others and demands were made for disestablishment. Disestablishment occurred only in Ireland (1869) and Wales (1920), and active hostility has, apart from certain secularist sources,<sup>43</sup> declined along with Christian religious observance in general.

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43 The best known and oldest is the National Secular Society. See its Charter at <<http://www.secularism.org.uk/secularcharter.html>>, accessed 13 December 2015. Nonconformist Christian churches were also formerly actively opposed to Anglican establishment but seem no longer to make it a current campaigning issue. See Bob Morris (ed), *Church and State: Some Reflections on Church Establishment in England* (London: Constitution Unit, University College London, 2008).

This general decline in religious belief and attendance has put both established churches into seemingly inexorable decline.<sup>44</sup> Moreover, the religious landscape of the UK has changed radically. In addition to the formation of non-Christian religious communities, about half of the population is now prepared to say that it has no religion. Greater religious plurality is accompanied by a significant decline in religious belief. It is very unlikely that anyone nowadays believes that the Sovereign is chosen by any sort of deity. As a *Guardian* columnist has put it: “without a divine being to anoint the royal family, how can we be expected to think of them as different?”<sup>45</sup>

This underlies the issue of abdication. If the Sovereign is uniquely anointed by God, then lifelong service can be considered a necessary consequence. This is understood to be why Elizabeth II refuses to contemplate abdication. The personal devotion is admirable, but on the other hand, the result may be gerontocratic succession. In 2016, the Queen was 90 and her heir was 68. The effects of carrying on regardless mean that an heir in very late middle age will succeed as an old man, and be succeeded in turn by a son who was 34 in 2016 but likely to be much older when his turn comes.

Solutions such as skipping a generation or resorting to some sort of late regency are not ideal. The first would need legislation and constitute a poor reward for an heir who has served very faithfully and industriously. The present *Regency Acts* offer no wiggle room. They are predicated on the appointment of a regent in the event only of the Sovereign’s actual incapacity. Some sort of “soft” regency where the heir silently took over most if not all the public duties would still leave the vital constitutional functions with the aged Sovereign. Of course, no discussion could be encouraged in advance of “therapeutic” abdication until the event was encompassed. But it remains the case that a private and personal commitment may be acting contrary to a more general public interest, let alone the interests of an heir. Perhaps such matters can be handled more flexibly in other European monarchies precisely because none of them anoints their monarchs. The practical, managed result is that their monarchs reign for a generation during which their progeny can grow into their adult and family life before taking their turn in their adult maturity.<sup>46</sup>

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44 See Malcolm Doney (ed), *How Healthy is the C of E? The Church Times Health Check* (Norwich: Canterbury Press, 2014); and Bob Morris, “Alternative Futures for Formal Church Establishment: Two Case Studies from the UK” in François Guesnet, Cécile Laborde & Lois Lee (eds), *Negotiating Religion: Cross-Disciplinary Perspectives* (London: Routledge, 2016).

45 Decca Aitkenhead, “God Meets Queen Mum” (2 April 2002) *The Guardian*, quoted by Wolfe, *supra* note 28 at 68.

46 Abdication seems to be accepted practice in Belgium (1951, 2013), the Netherlands (1948, 1980, 2013), Spain (2014), and Luxembourg (1919, 1964, 2000). There is no similar tradition in the three Scandinavian monarchies.

Elizabeth II has throughout remained a strong supporter of the Church of England, although she is in no way hostile to other religious groups. On the contrary, she has seen the Church of England as an appropriate spokesman for and protector of all religions.<sup>47</sup> As John Wolffe has put it, “the monarchy has been looking towards a Christian Britain giving way to a religiously plural rather than a secular one.”<sup>48</sup> This is a view apparently reciprocated by all the other main religious groups who seem to value the benign interest of an English national church which, amongst other things, has 26 Bishops sitting as full members of the Upper House of Parliament. The classic defence of this arrangement is that of the sociologist, Tariq Modood:

... the minimal nature of an Anglican establishment, its proven openness to other denominations and faiths seeking public space, and the fact that its very existence is an ongoing acknowledgment of the public character of religion, are all reasons why it may seem far less intimidating to the minority faiths than a triumphal secularism.<sup>49</sup>

In addition to the citation “Head of the Commonwealth,” all the Commonwealth realms have adopted that part of the Queen’s UK title that refers to the citation “by the Grace of God.” Two realms — Canada and New Zealand — also include the citation “Defender of the Faith.”<sup>50</sup> The Prince of Wales has mused on whether the latter title should be reinterpreted as “Defender of Faith,” reflecting Britain’s multicultural society. He subsequently clarified that he intended no change to the title as such, and his official website comments that

He believes very strongly that the world in which we live can only become a safer and more united place if we all make the effort to tolerate, accept and understand cultures, beliefs and faiths different from our own.<sup>51</sup>

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47 Archbishop of Canterbury, Press Release, “Faith Communities Display Sacred Objects to the Queen” (15 February 2015), online: <<http://rowanwilliams.archbishopofcanterbury.org/articles.php/2355/faith-communities-display-sacred-objects-to-the-queen>>. Norman Bonney has characterised these claims as “Anglican Multifaithism,” an attempt to shore up Anglican significance. See Norman Bonney, *Monarchy, Religion and the State: Civil Religion in the United Kingdom, Canada, Australia and the Commonwealth*, (Manchester: Manchester University Press, 2013) at 128-143.

48 Wolffe, *supra* note 28 at 70.

49 Tariq Modood, “Establishment, Multiculturalism and Citizenship” (1994) 65:1 Political Q 53 at 72-73.

50 The title “Fidei Defensor” was granted to Henry VIII in 1521 by one Pope and taken away by another after Henry’s break with Rome in 1530. Originally awarded for a book defending the seven sacraments, it was later reconferred by Parliament.

51 “Do the Prince and Duchess Attend Church?” *The Prince of Wales and the Duchess of Cornwall* (2016), online: <<http://www.princeofwales.gov.uk/faqs/do-the-prince-and-the-duchess-attend-church>> and “Does The Prince of Wales Intend to Have a Multi-Faith Coronation?” *The Prince of Wales and the Duchess of Cornwall* (2016), online: <<http://www.princeofwales.gov.uk/faqs/does-the-prince-of-wales-intend-have-multi-faith-coronation-0>>. For the argument that it should be emphatically a

The website also makes clear that the Prince has no expectation that the next coronation will be a multifaith event. The next accession and coronation will expose these religious questions. Whilst there is probably nothing to be done about the Scottish oath under the Act of Union 1707 and sworn immediately on accession to uphold the Church of Scotland, the Protestant Declaration oath (1910) and the Coronation Oath (1688) raise sharper questions.<sup>52</sup> As John Wolffe maintains:

It is improbable that any government will choose to grapple with such potentially contentious issues until forced to do so by the accession of a new monarch, but equally unlikely in the vastly changed circumstances of the twenty-first century that these texts would remain unaltered without considerable controversy.<sup>53</sup>

There is still the point that the UK Sovereign's obligatory Anglicanism might be thought dissonant in those Commonwealth realms such as Australia and Canada where majorities are anything but Anglican and may be, in fact, Roman Catholic — the religion that continues to face constitutional discrimination in the UK. This fact featured, if to no great extent, in the 1999 Australian referendum campaign. Australian monarchists argued that the point was irrelevant because the real head of state was the Governor General and no religious tests applied to that office. Indeed, office holders had included two Jews and at least one atheist.<sup>54</sup> Though true, that response is less than a complete rebuttal of an affront to non-Protestant religious groups in the Commonwealth; it may be contended that “the national Church of England is apparently able to dictate the rules of succession in respect of heads of state not only for the whole of the United Kingdom but also outside it.”<sup>55</sup> It remains to be seen whether the remaining Roman Catholic disabilities will feature significantly in constitutional discussions of this kind in the realms. They have not so far been salient when the practical implications on the ground must normally seem remote and uncontentious.

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Christian event, see Nick Spencer & Nicholas Dixon, *Who Wants a Christian Coronation?* (London: Theos, 2015), online: <<http://www.theosthinktank.co.uk/publications/2015/09/01/who-wants-a-christian-coronation>>.

52 See Appendix for the text of the oaths.

53 Wolffe, *supra* note 28 at 69.

54 Gareth Grainger & Karen Jones, *The Australian Constitutional Monarchy* (Sydney: ACM Publishing, 1994) at 191-193.

55 Norman Bonney & Bob Morris, “Tuvalu and You: The Monarch, the United Kingdom and the Realms” (2012) 83:2 Political Q 368 at 372.



A long held axiom used to be that the Monarchy and the Church of England stood or fell together.<sup>56</sup> That may have been a plausible belief when the Monarch *was* the executive. Nowadays, that is no longer the case and the notion of mutual interdependence has much less cogency. There is, accordingly, a question of how far the Monarchy should remain tied to a particular religious denomination, and whether the current defence of “Anglican multifaithism” will be sufficient to carry the Monarchy through the growth of religious pluralism and unbelief. It is hard to imagine, for example, that any modern democratic republic would impose a religious test on its head of state.<sup>57</sup>

These uncertainties sometimes rise to the surface of public life. At Easter 2014, there was a brief discussion involving coalition ministers (including the prime and deputy prime ministers) about whether Britain could still be regarded as a Christian country. Letters to the *Telegraph* newspaper argued whether ministerial assertions that Britain did remain Christian could be supported.<sup>58</sup> More of this can be expected to materialize when the reign of Elizabeth II draws to a close.<sup>59</sup>

The problem is how to adjust for the present an inheritance descended from a different past. This is tricky territory for a monarchy whose rationale must be to find ways of addressing the population as it is rather than as it once was. It follows that the religious role will remain serviceable only if it can be remade.<sup>60</sup>

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56 It is still possible for this view to be advanced in Parliament. For example, in 2013 on the Second Reading of the Succession to the Crown Bill, Sir Gerald Howarth said “I believe that the established Church and the Crown are indissolubly linked.” UK, HC, *Parliamentary Debates*, sess 2012-2013, vol 557, No 1, col 252-253 (22 January 2013). However, nothing in the subsequent debates demonstrated any significant support for that view. An investigation of popular attitudes to the Monarchy discovered no spontaneous awareness of its religious dimensions: Michael Billig, *Talking of the Royal Family* (London: Routledge, 1992).

57 Hard but not impossible: see Art 74 of the Tunisian Constitution 2014, which requires the President to be a Muslim. For the background see Chris Stephen, “The Tunisia Quartet: How an Impossible Alliance Saved the Country from Collapse,” *The Guardian* (8 December 2015).

58 The discussion and the relevant data are discussed in Bob Morris, “Is Britain a Christian Country and, Whatever the Case, What Then?” *The Constitution Unit*, UCL (25 April 2014), online: <<http://constitution-unit.com/2014/04/25/is-britain-a-christian-country-and-whatever-the-case-what-then/>>. See also Stuart MacAnulla, “Cameron’s Conservatism: Why God, Why Now” (2014) 85:4 *Political Q* 462.

59 A recent example is the report (published 7 December 2015) of the Woolf Institute’s Commission on Religion and Belief in British Public Life, *Living With Difference: Community, Diversity and the Common Good* (Cambridge: The Woolf Institute, 2015), online: <<https://coralivingwithdifference.files.wordpress.com/2015/12/living-with-difference-community-diversity-and-the-common-good.pdf>>.

60 There is a long literature on this subject. Examples of “reformist” Anglican views are Wesley Carr “A Developing Establishment,” (1999) 102:805 *Theology* 2, and Roy Strong, *Coronation: A History of Kingship and the British Monarchy* (London: Harper Collins, 2005) at 497-501. For a strong

## **The welfare/service Monarchy**

More perhaps than any other, this aspect shows how far the Monarchy has travelled in recent generations. From an august, heavily ceremonialized imperial presence,<sup>61</sup> it has moved to a much more demotic (including as to speech accent) and visible head of state form, interacting with the general population far beyond confined court circles.

A principal component of this change has been the Monarchy's association with charitable endeavour. The Queen's website explains:

An important part of the work of The Queen and the Royal Family is to support and encourage public and voluntary service.

One of the ways in which they do this is through involvement with charities and other organisations. These range from well-known charities such as the British Red Cross to new, smaller charities like the Reedham Children's Trust, to regiments in the Armed Forces.

About 3,000 organisations list a member of the Royal Family as patron or president. The Queen has over 600 patronages and The Duke of Edinburgh over 700.<sup>62</sup>

The Prince of Wales's website gives a high place to his charitable work:

For more than 35 years His Royal Highness The Prince of Wales has been a leader in identifying charitable need and setting up and driving forward charities to meet it.<sup>63</sup>

The website declares that the Prince raises £100 million a year and has fourteen linked charities, thirteen of which he has founded himself. They extend to a broad range of areas including the Built Environment, the Arts, Responsible Business and Enterprise, Young People, Global Sustainability and Rural Affairs. He has related charities or organisations in Australia, Canada and the US. He is also Patron or President of more than 400 other organisations. His sister, Anne, the Princess Royal, has been president of Save the Children Fund since 1970 and acquired a solid reputation of effective involve-

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secularist position, see Bonney, *supra* note 47 and, for a "modernising" perspective, see Bob Morris (ed), *Church and State in 21st Century Britain* (Basingstoke, UK: Palgrave Macmillan, 2009) at table 14.1, 238-240.

61 See David Cannadine "The Context, Performance and Meaning of Ritual: The British Monarchy and the 'Invention of Tradition', c.1820 — 1977" in Eric Hobsbawm & Terence Ranger (eds), *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983) at 101-164.

62 "Charities and Patronages" *Home of the Royal Family*, online: <<http://www.royal.gov.uk/CharitiesandPatronages/Overview.aspx>>.

63 See, "Biography" *The Prince of Wales*, online: <<http://www.princeofwales.gov.uk/the-prince-of-wales/biography>>.

ment in that and her other public endeavours, which have included a first-class equestrian career. Her part of the royal website records that in 2014 she fulfilled 528 engagements in the UK and abroad.

Whilst some of the Prince of Wales's activities have been thought idiosyncratic, they have also been innovative and thoughtful and have — for the benefit of young people in particular — reached areas not well-favoured elsewhere. Frank Prochaska, the main chronicler of these developments, has pointed out that since at least George III the royal family has sought public approval by engaging in “good works.”<sup>64</sup> As is evident from the prominence given to these activities on royal websites, the welfare and service function is seen as a very important part of the modern Monarchy's role.

The royal family have also been effective fundraisers. Prince Charles is following a tradition going back at least to his great-grandfather:

As Prince of Wales, and even more so as King Edward VII, he was extremely successful in persuading his rich, parvenu, socially ambitious friends like Cassell, Rothschild and Speyer to give seriously large sums to the Royal Hospital Fund. Here was the role that his successors have made very much their own: urging others to part with their money for charitable purposes, rather than parting with it themselves.<sup>65</sup>

Royal visits also have a long pedigree, and have lost none of their popularity: lords lieutenant who coordinate bids from the counties say that they receive far more requests from charities and local organisations than the royal family can possibly satisfy.

### III. Conclusions: the future of the Monarchy

Part I has shown that the Sovereign is left with no discretion in the exercise of the personal prerogatives. What is left to the Monarchy are symbolic “high” state ceremonial duties, and head of state representative duties. Part II has investigated four other principal aspects of the modern Monarchy and the extent to which they are susceptible to monarchical initiative as opposed to extraneous forces. Further change can be expected, as the Monarchy itself adapts to changing external circumstances, and the changing preferences of individual monarchs.

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64 Frank Prochaska, *Royal Bounty: the Making of a Welfare Monarchy* (London: Yale University Press, 1995).

65 David Cannadine, “‘Social Workers,’ a Review of *Royal Bounty*” (1995) 17:9 *London Rev of Books* 10.

## **External factors driving change**

### ***The commonwealth and the realms***

The Commonwealth may develop more clearly autonomous machinery to distance itself further from its colonial and imperial origins. Whether Prince Charles succeeds the Queen as head of the Commonwealth will depend on the politics of the Commonwealth at the time, the dynamic between the leading member states, and the alternatives. International organizations do not have to have figureheads: the UN simply has a Secretary General. In some respects, it might be a relief to the UK government if the Monarch ceased to be head of the Commonwealth, because it would prevent the Monarch from becoming a focus for the tensions which inevitably arise when the UK and the Commonwealth are at loggerheads over various issues. It would also remove a source of tension because of the Queen's scope to act on Commonwealth matters without UK ministerial advice.<sup>66</sup>

Prince Charles' accession may also provide a turning point for the realms, offering an occasion to consider introducing their own head of state in place of a distant British Monarch. The Palace has always said it would readily accept the decision of any realm to become a republic.<sup>67</sup> Privately, it might actually welcome such decisions because they would reduce the additional time and workload involved in being head of 15 other states, and also reduce scope for embarrassment (e.g. Australia's dismissal of the prime minister in 1975, the invasion of Grenada in 1983, Fiji's two coups in 1987). It would enable the British Monarch to focus on Britain. But whether any of the realms do break free will depend on their devising an alternative method acceptable to them for choosing their head of state, the difficulty on which the Australian referendum foundered in 1999. If one of the realms manages to do this, it is likely that others will follow.

### ***Religion***

Prince Charles' accession will also provide an early test of the religious Monarchy. The accession oaths (which require the new Monarch to maintain Protestantism and the established churches) and the coronation oath (which ties the Monarch tightly to the Church of England) seem ripe for review. The Church of England's leadership values the close link with the Crown, and will want to use the coronation to celebrate the Church's central organizing role. It will also be a test of "Anglican multifaithism," the Church's claim to represent

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<sup>66</sup> Murphy, *supra* note 32, ch 7-8.

<sup>67</sup> e.g. for Australia in 1999, see *ibid* at 185.

other faiths: will they be marginalised, or genuinely involved? In the longer run, Anglican multifaithism may itself come under pressure inside the Church of England if the evangelical tendency favouring congregational as opposed to societal priorities continues to grow. The Monarchy may then be caught between the growing secularism and religious pluralism of society on the one hand and the evangelicalism of the Church on the other.

### **Internal factors driving change**

The other driver of change is the changing preferences of individual monarchs. The Queen has been scrupulously professional in never expressing views on political matters and thus avoiding controversy.<sup>68</sup> Prince Charles has sought to engage ministers with his “black spider” letters, and there is concern that he will continue to express views on policy issues even when he becomes King.<sup>69</sup> That would be a major change for the Monarch to express such views publicly. He would be firmly advised by the government to confine his outbursts to his weekly audience with the prime minister. But he would still be able, through his official engagements, to signal his support for causes close to his heart, and the press would be quick to highlight any differences between his preferences and those of the government.

### ***Gerontocracy and abdication***

Another internal threat to the Monarchy is a gradual slide into a gerontocracy, because of the longevity of individual monarchs. In 2016, the Queen will be 90. If she lives as long as the Queen Mother, who died aged 101, Prince Charles will be 80 when he becomes king. If he in turn lived to 100, Prince William would succeed to the throne at the age of 67. We may be in for a series of elderly monarchs, succeeded by heirs apparent who have spent all their adult life in waiting, only to assume the throne in old age. It may reasonably be asked whether it is kind to our monarchs to expect them to go on like this, or whether it is kind to their people to have a succession of monarchs who are all very old.

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68 For an apparent exception, see *The Sun* 9 March 2016, which carried the front page headline “Queen backs Brexit.” This led the Palace to make a formal complaint to the new Independent Press Standards Organisation, who upheld the complaint on 17 May 2016.

69 Rob Evans, “Prince Charles Letters” (4 June 2015) *The Guardian*, online: <<https://www.theguardian.com/uk-news/2015/jun/04/prince-charles-letters-black-spider-memos-freedom-information>>, Robert Booth, “Prince Charles will not be silenced when he is made king, say allies” (20 November 2014) *The Guardian*, online: <<https://www.theguardian.com/uk-news/2014/nov/19/becoming-king-not-silence-prince-charles-allies>>.

This is the one remaining issue where the Monarch has a clear individual choice. No government is going to advise a monarch to abdicate because of old age; but no government is going to prevent a future monarch from doing so. For the Queen, abdication is unthinkable because of the abdication crisis of 1936 and her own express, personal dedication; but, for her successors, it may be less taboo. If they want to look for a different model, they need look no further than the Netherlands, where the last three queens have abdicated at around the age of 70 (most recently, Queen Beatrix abdicated in 2013 at the age of 75). The 15 realms would have to agree to an abdication, and might require some shepherding (as happened with the Dominions in 1936, and with the realms in changing the rules of succession in 2011-14); but the change in the rules of succession showed that, although protracted, the process was not impossible.

### ***Lack of privacy, and other human rights***

A final threat to the Monarchy is the self-sacrifice involved on the part of the Monarch and those in direct line of succession. We have already mentioned the requirement of lifelong service, with no prospect of retirement. Second is the loss of freedom. The Queen, Prince Charles, and Prince William have to abandon freedoms which the rest of us take for granted: freedom of privacy and family life; freedom of expression; freedom to travel where we like; free choice of careers; freedom of religion; freedom to marry whom we like. For the Royal family these basic human rights are all curtailed. The question is whether future heirs are willing to make the self-sacrifices required of living in a gilded cage.

Bagehot observed of the Monarchy, "Its mystery is its life. We must not let daylight upon the magic."<sup>70</sup> But we have, especially through relentless invasions of privacy by the press. Prince Charles and his sons have been the main victims, and Prince William and Kate are caught up in celebrity culture. But the press is insatiable, and also fickle; if the popularity of the Monarchy comes to depend on the support of the press, that Faustian pact may prove, in the long run, to be the greatest threat to the future of the Monarchy.

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<sup>70</sup> Bagehot, *supra* note 21 at 53.

## **APPENDIX**

### **THE ROYAL ACCESSION AND CORONATION OATHS**

#### **Oath under the Acts of Union 1706/7**

The new Sovereign has to swear to maintain and preserve the Protestant religion and Presbyterian church government of Scotland. The oath is administered the day immediately after accession at the meeting of the Accession Privy Council. The text sworn by Elizabeth II was as follows:

I, Elizabeth the Second by the Grace of God of Great Britain, Ireland and the British dominions beyond the seas, Queen, Defender of the Faith, do faithfully promise and swear that I shall inviolably maintain and preserve the Settlement of the True Protestant Religion as established by the laws of Scotland in prosecution of the Claim of Right and particularly an Act entitled an Act for the Securing the Protestant Religion and Presbyterian Church Government and by the Acts passed in both Kingdoms for the Union of the two Kingdoms, together with the Government, Worship, Discipline, Rights and Privileges of the Church of Scotland.

#### **Oath under the Accession Declaration Act 1910**

The Act prescribes the following form of words:

I [monarch's name] do solemnly and sincerely in the presence of God profess, testify and declare that I am a faithful protestant, and that I will, according to the true intent of the enactments which secure the protestant succession to the throne of my realm, uphold and maintain the said enactments to the best of my powers according to law.

This formula was substituted for an earlier and much longer wording under the 1689 Bill of Rights which expressed severe hostility to the Roman Catholic religion in terms which came to be regarded as deeply offensive to the Monarch's Roman Catholic subjects.<sup>71</sup> The oath is to be taken at the first Parliament of the reign or at the Coronation. Elizabeth II took the oath at the opening of her first Parliament.

#### **The Coronation Oath**

This is prescribed in the Coronation Oath Act 1688. Without explicit statutory authority, the wording has been revised in some details (e.g. in the citation of

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<sup>71</sup> The text may be found at Morris, "Church and State," *supra* note 60 at 37.

then-existing realms) from time to time on the basis of the doctrine of “implied repeal.” As administered to Elizabeth II in 1953, it was as follows:

Will you solemnly promise and swear to govern the Peoples of the United Kingdom of Great Britain and Northern Ireland, Canada, Australia, New Zealand, the Union of South Africa, Pakistan, and Ceylon, and of your Possessions and the other Territories to any of them belonging or pertaining, according to their respective laws and customs?

*I solemnly promise so to do.*

Will you to your power cause Law and Justice, in Mercy, to be executed in all your judgements?

*I will*

Will you to the utmost of your power maintain the Laws of God and the true profession of the Gospel? Will you to the utmost of your power maintain in the United Kingdom the Protestant Reformed Religion established by law? Will you maintain and preserve inviolably the settlement of the Church of England, and the doctrine, worship, discipline, and government thereof, as by law established in England? And will you preserve unto the Bishops and Clergy of England, and to the Churches there committed to their charge, all such rights and privileges, as by law do or shall appertain to them or any of them?

*All this I promise to do.*



# Royal Succession, Abdication, and Regency in the Realms

*Anne Twomey\**

*When there was one indivisible Imperial Crown, the law concerning royal succession, abdication, and regency remained uniform throughout the Empire and was controlled by the Parliament of the United Kingdom. When that Crown became divisible, problems arose as to whether existing British laws concerning the Crown had been incorporated into the law of each self-governing Dominion and how such laws could be amended in the future with respect to each separate Crown. The independence of the Realms and the termination of the power of the Westminster Parliament to legislate for the Realms has exacerbated the uncertainty as to how such laws apply and may be amended. This article addresses the application of the law concerning royal succession, abdication, and regency in the Realms of Canada, Australia, and New Zealand, focusing in particular on the recent changes to the rules of succession to the throne and the litigation that it prompted in Canada. It also considers what action would need to be taken if a regency was required to accommodate an incapacitated monarch.*

*Lorsqu'il y avait une Couronne impériale indivisible, la loi concernant la succession royale, l'abdication et la régence demeura identique partout dans l'Empire et elle fut contrôlée par le Parlement du Royaume-Uni. Lorsque cette Couronne devint divisible, des problèmes se posèrent à savoir si les lois britanniques existantes se rapportant à la Couronne avaient été intégrées dans le droit de chaque dominion autonome et comment de telles lois, dans le cas de chaque Couronne distincte, pourraient être modifiées à l'avenir. L'indépendance des royaumes et la fin de la compétence législative du Parlement de Westminster quant aux royaumes aggrava l'incertitude à savoir comment de telles lois s'appliquent et peuvent être modifiées. Dans cet article, l'auteure aborde l'application de la loi concernant la succession royale, l'abdication et la régence dans les royaumes du Canada, de l'Australie et de la Nouvelle-Zélande, en accordant notamment la priorité aux modifications récentes aux règles de succession au trône et aux litiges qu'elles provoquèrent au Canada. L'auteure examine également les mesures qui seraient nécessaires dans le cas où une régence fut requise afin d'accueillir un monarque incapable.*

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## Introduction

In 1936, Charles Dixon, a British civil servant struggling with the notion of a divisible Crown, asked what would happen if the British decided to chop off the head of the King.<sup>1</sup> How many times would it have to be done, he asked? Once for Australia? Again for Canada? A third time for New Zealand? The conceptual problem to which Dixon drew attention is that while there are separate offices of the Sovereign in each of the Realms, a single person (currently) holds all of those offices. However, this notion is consistent with the much more ancient theory of the “King’s two bodies” — the body natural, which is subject to infirmity, incapacity and death, and the body politic, which never dies and is “utterly void of infancy, old age, and other natural defects and imbecilities, which the body natural is subject to.”<sup>2</sup>

The bridge between the human frailties of the body natural and the continuity and stability of the body politic is the collection of law that deals with succession to the Crown, abdication, and regency. While this collection of law may operate seamlessly in the United Kingdom to accommodate the Sovereign’s two bodies, difficulties arise in relation to the Realms as they are no longer subject to British political or legal sovereignty. This article examines these difficulties and how they may be dealt with in the Realms of Australia, New Zealand, and Canada when necessary.<sup>3</sup>

## Reception and paramountcy of laws concerning the Crown

The difficulties and disputes concerning the application to the Realms of laws concerning succession to the Crown, abdication, and regency turn upon an understanding of the reception of law in the Realms, its application by paramount force, the transformation of the Crown from indivisible to divisible, the termination of the paramount force of British laws, and the establishment of legislative independence in the Realms. This requires a short tour of the history of British sovereignty and the Crown, but it provides the necessary framework from which all the current issues hang.

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1 Sir Charles William Dixon, *Memoirs of Sir Charles William Dixon KCMG, KCVO, OBE*, (1969) [unpublished, archived at University of Sydney Library], 43.

2 *Case of the Duchy of Lancaster* (1561), 1 Plowd 212, 213; 75 ER 325, 326.

3 These Realms are addressed because their Constitutions existed prior to the Crown becoming divisible, raising particularly difficult interpretative questions. Different issues arise in Realms with more recent constitutions, which either deal with issues concerning succession directly (e.g., the Constitution of Tuvalu) or may be interpreted more readily in the context of a divisible Crown (e.g. the Constitutions of Papua New Guinea and the Solomon Islands).

The rules of succession to the Crown find their source in the common law rules concerning the inheritance of property, as adjusted to provide for a single monarch,<sup>4</sup> and as altered by statute. The primary Imperial statutes are the *Bill of Rights 1688* and the *Act of Settlement 1700*.<sup>5</sup> Both excluded Catholics from the throne and the 1700 Act re-set the line of inheritance to the heirs of Princess Sophia, Electress of Hanover. As Clement has observed, while the descent of the Crown is hereditary, the title to it is statutory.<sup>6</sup>

Both the common law and statutory rules concerning the Crown became part of the law of British colonies, including Australia, New Zealand, and Canada. In most colonies, British statutes were declared to have been “received” as part of a colony’s law at a specific date<sup>7</sup> and could be amended or repealed by laws enacted by the legislature of the colony.<sup>8</sup> There was also, however, a category of Imperial statutes, including constitutional statutes concerning the Crown,<sup>9</sup> that applied directly or by necessary intendment to the colonies *ex proprio vigore*.<sup>10</sup> This meant that they applied by their own force as an exercise of the sovereignty of the Westminster Parliament and operated as part of the law of the relevant colony. Unlike received statutes, these Imperial statutes applied by paramount force and therefore could not be amended by laws enacted within the colony. According to the doctrine of repugnancy, any local law that was repugnant to (i.e., inconsistent with) an Imperial statute of paramount force was void.<sup>11</sup>

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4 For practical reasons, contrary to the common law rules of inheritance, where the Sovereign has no sons the Crown is inherited by the eldest daughter and her issue, rather than by all the Sovereign’s daughters as coparceners. See William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, Oxford, 1765) Vol 1, 186-7; and C d’O Farran, “The Law of Accession” (1953) 16:2 Mod L Rev 140, 141.

5 Other relevant statutes include: the *Union with Scotland Act 1706*; the *Royal Marriages Act 1772*; the *Union with Ireland Act 1800*; the *Accession Declaration Act 1910*; and *His Majesty’s Declaration of Abdication Act 1936*.

6 W H P Clement, *The Law of The Constitution*, 3d ed (Toronto: Carswell, 1916) 7.

7 For example, in the colony of New South Wales the reception date is 1828: *Australian Courts Act, 1828*, 9 Geo 4 c 83. For the dates in different parts of Canada, see: Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Carswell, 2007) 33-40. Note that there is no difference between conquered and settled colonies, in this respect, because the ‘public law’ of England applied to all colonies, however acquired.

8 See further: Philip Girard, “British Justice, English Law, and Canadian Legal Culture” in Phillip Buckner, ed, *Canada and the British Empire* (Oxford: Oxford University Press, 2008) 264-5; Alex Castles, “The Reception and Status of English Law in Australia” (1963) 2:1 Adel L Rev 1.

9 A B Keith, *Responsible Government in the Dominions*, vol 3 (Oxford: Clarendon Press, 1912) 1327-8; A H F Lefroy, *Canada’s Federal System* (Toronto: Carswell, 1913) 55.

10 Hogg, *Constitutional Law*, *supra* note 7 at 47.

11 See further: D B Swinfen, *Imperial Control of Colonial Legislation 1813-1865* (Oxford: Clarendon Press, 1970) 53-63.

This common law doctrine was confirmed in binding statutory form by the *Colonial Laws Validity Act 1865*. Section 1 provided that an Imperial statute would extend as part of the law of a colony if it was made applicable to the colony by “express words or necessary intendment.” Section 2 rendered “void and inoperative” any colonial law that was repugnant to such an Imperial statute extending to the colony. While this statute was enacted to resolve a dispute in South Australia, it was extended to apply to all Britain’s colonies. In Canada, for example, it was reinforced by section 129 of the *Constitution Act, 1867*,<sup>12</sup> which conferred upon the Canadian federal and provincial legislatures power to repeal or alter pre-confederation laws, except for Imperial statutes of the Westminster Parliament applying as part of the law of Canada.<sup>13</sup>

Both the *Bill of Rights* and the *Act of Settlement* expressly provide that they are intended to extend to the dominions of the Realm. To the extent that they were applicable to the circumstances of the colonies, they therefore applied as part of the law of the British colonies that existed at that time and those that were later acquired.<sup>14</sup> For example, in *O’Donohue v Canada*, Rouleau J in the Ontario Superior Court of Justice took the view that the *Act of Settlement* forms part of Canadian law by virtue of being an Imperial statute applying to Britain’s dominions.<sup>15</sup> Justice McPherson of Australia has also observed that the provisions of the *Act of Settlement* “affecting the royal succession, which fixed the identity of the sovereign to or from whom duties of allegiance and protection were owed throughout the empire” applied as part of the law of the dominions, including Australia, New Zealand, and Canada.<sup>16</sup>

In the nineteenth century, although the law of succession to the throne as set out in the *Bill of Rights* and the *Act of Settlement* was part of the law of each of the British colonies, no colonial legislature could alter that law because: (a) it applied to them by paramount force; and (b) there was one indivisible Imperial Crown which did not fall under the legislative jurisdiction of any colony.<sup>17</sup>

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12 Note that this Act was originally named the *British North America Act 1867*, but was renamed in 1982.

13 See further: Hogg, *Constitutional Law*, *supra* note 7 at 52; Bora Laskin, *Canadian Constitutional Law*, 3d ed (Toronto: Carswell, 1969) 72.

14 Keven Booker & George Winterton, “The Act of Settlement and the Employment of Aliens” (1981) 12:3 *Federal L Rev* 212, 224; B H McPherson, *The Reception of English Law Abroad* (Brisbane: Supreme Court of Queensland Library, 2007) 237.

15 *O’Donohue v Canada*, [2003] 109 CRR (2d) at para 3, OTC 623 [*O’Donohue*].

16 McPherson, *supra* note 14 at 237. See also the observation by Leslie Zines that the Imperial law of succession applied as a paramount law to Australia, New Zealand, Newfoundland and all the Dominions, in its own right: Leslie Zines, *The High Court and the Constitution*, 5th ed (Sydney: Federation Press, 2008) 436.

17 Clement, *supra* note 6 at 2.

There was therefore no possibility that there would be differences in the rules of succession to the throne at that time. Nor, however, could there have been any “principle of symmetry” or “rule of recognition” that the Sovereign of the United Kingdom was the same person who was the Sovereign of Australia, New Zealand, or Canada, as there were no separate Crowns.

## **Divisibility of the Crown and the *Statute of Westminster***

This position altered fundamentally in the period from 1926 to 1931 when two changes were made. First, the Crown became divisible as a consequence of a change in convention<sup>18</sup> so that the Sovereign, when exercising his or her powers with respect to a self-governing Dominion, did so on the advice of ministers responsible to the legislature of that Dominion.<sup>19</sup> This meant that there was a separate Crown of Australia, Crown of New Zealand, and Crown of Canada, under which the Sovereign acted in accordance with the advice of Ministers from those respective Dominions.

The second major change was the enactment of the *Statute of Westminster 1931*, which in section 2 removed the repugnancy doctrine and allowed Dominion Parliaments to repeal or amend British laws that had previously applied to them by paramount force. In addition, the third paragraph of the preamble to the *Statute* and section 4 of the *Statute* had the effect that the Westminster Parliament would no longer legislate for any of the Dominions, except with their request and consent. This meant that each Dominion Parliament could (subject to any internal federal limitations) enact changes to the law of succession as it applied to the Crown of the Dominion and the Westminster Parliament could not impose any future changes to the succession to the Crown upon the Dominions without their consent. King George V recognised this problem, suggesting that it would be better to allow the 1929 Conference to break up, “rather than consent to the abolition of the Colonial Laws Validity Act without any provision to ensure no tampering with the Settlement Act.”<sup>20</sup>

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18 “The Report of the Imperial Conference of 1926 upon Inter-Imperial Relations” (18 November 1926), (Cmd 2768, Printed by His Majesty’s Stationery Office, London, 1926); and Imperial Conference 1930 — Summary of Proceedings, (November 1930), (Cmd 3717) 27.

19 *R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte Indian Association of Alberta*, [1982] 1 QB 892, 917 (Lord Denning MR) [*Ex Parte Indian Association*].

20 Letter by His Majesty, King George V to the Prime Minister (30 November 1929), quoted in: Harold Nicolson, *King George the Fifth, His Life and Reign* (London: Constable & Co Ltd, 1952) 485.

The British Government accordingly argued at the 1929 Conference on the Operation of Dominion Legislation that the *Colonial Laws Validity Act* should continue to apply to certain foundational laws that touched the essential structure of the Empire. However, the Irish Free State, Canada, and South Africa objected on the basis that, as the Dominions and the United Kingdom were now co-equal in status, none could be bound by the will of another.<sup>21</sup> The Irish argued that uniformity should instead be achieved by mutual consent and reciprocal legislation enacted on a voluntary basis.<sup>22</sup> The Conference accepted this view, agreeing that succession to the throne fell into a category “in which uniform or reciprocal action may be necessary or desirable for the purpose of facilitating free co-operation among the members of the British Commonwealth in matters of common concern.”<sup>23</sup> The retention of exclusive British legislative power over succession to the throne was regarded as inconsistent with the principle of equality.<sup>24</sup>

Hence, the *Statute of Westminster* lifted the legal constraint which until then had prevented the Dominions from altering the law concerning succession to the Crown of the Dominion. It also, through section 4, ensured that any United Kingdom law concerning succession to the throne would not extend as part of the law of the Dominion unless the Dominion had given its request and consent. In an effort to achieve symmetry between British and Dominion laws on succession to the throne, a convention was declared in the second paragraph of the preamble to the *Statute* which provides that any alteration in the law touching the succession to the throne requires the assent of the Parliaments of all the Dominions and the Parliament of the United Kingdom.

As Laskin noted in Canada, before the *Statute of Westminster* came into effect, the Canadian Parliament had no power to deal with succession to the throne, but afterwards, section 4 of the *Statute* meant that if the United Kingdom changed its law of succession, Canadian request and consent would be needed in order for such a law to be effective in Canada and it would be

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21 Thomas Mohr, “The Colonial Laws Validity Act and the Irish Free State” (2008) 43 *Irish Jurist* 21, 37.

22 *Ibid.*, 37-38.

23 “Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929” (January 1930), London, His Majesty’s Stationary Office (Cmd 3479) at para 57 [Report on Dominion and Merchant Shipping Legislation].

24 Australia, “Report of Sir William Harrison Moore on the Conference on the Operation of Dominion Legislation,” 11 July 1930, *Parliamentary Papers*, Vol 1929-30, 1337 at 1367. See also, *ibid* at para 60.

“open to Canada to make changes for its own purposes, subject to the conventional arrangement for assent or even, as a matter of law, despite it.”<sup>25</sup>

## Termination of British legislative power over the Realms

The critical principle underlying this change was one of equality — the Westminster Parliament no longer had the right or power to change the law of succession in relation to the Crown of a Dominion. As a matter of equality, power in relation to succession to the Crown of each Dominion rested with that Dominion, with a convention that future changes would be achieved co-operatively, either by each Dominion enacting its own legislation (as later occurred in relation to changes to the royal style and titles) or by it requesting and consenting to British legislation applying “as part of the law of that Dominion.”<sup>26</sup>

This last option was terminated in the 1980s when Canada, Australia, and New Zealand each acquired full legislative independence,<sup>27</sup> terminating the application of section 4 of the *Statute of Westminster* and any ability of the Westminster Parliament to legislate in such a way that its law became “part of the law of the Dominion.” Any amendments enacted by the Westminster Parliament to the *Act of Settlement*, the *Bill of Rights*, and other British statutes concerning succession to the Crown could therefore not affect the application of those Acts as part of the law of Canada, Australia, and New Zealand. As Cox has noted with respect to New Zealand, “the right to alter and amend the laws of succession of the New Zealand Crown belongs to the Parliament of New Zealand.”<sup>28</sup>

## Changes to the rules of succession to the throne — the Canadian controversy

The consequence of this history of the constitutional development of the Realms is that the British *Succession to the Crown Act 2013*, which only purported to

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25 Laskin, *supra* note 13 at 72.

26 *Statute of Westminster, 1931*, 22 Geo V c 4 (U.K.), s 4.

27 *Canada Act 1982* (UK), 1982, c 11 s 2; *Constitution Act, 1982*, s 53 (item 17), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act 1982*]; *Australia Act 1986* (UK), 1986, c 2, s 1 and s 12; *Australia Act 1986* (Cth), s 1 and s 12; *Constitution Act 1986* (NZ), ss 15(2) and 26.

28 Noel Cox, “Law of Succession to the Crown in New Zealand” (1999) 7 *Waikato L Rev* 49, 69. Cox also noted at 68 that “the development of a distinct New Zealand Crown means that the succession law in New Zealand must be seen as separate from that in the United Kingdom, though they presently have identical provisions.”

amend the law of succession with respect to the Crown of the United Kingdom and its colonies, did not apply directly to any of the 15 other Realms. It did not even purport to affect the application of the *Act of Settlement* and the *Bill of Rights* as part of the law of those Realms. It could only have an effect in relation to a Realm to the extent that a law of the Realm picked up and applied the British law as its own law or recognised as its Sovereign a person identified by reference to British law. In order to maintain uniform rules of succession, Australia and New Zealand legislated to change the rules of succession as part of their own domestic law, applying to their own Crowns.<sup>29</sup> So did a number of the smaller Realms.<sup>30</sup>

Canada, however, took a different course. The Canadian Government asserted that it did not have its own laws of succession to the Canadian Crown and that succession was determined by British law.<sup>31</sup> It concluded that whoever was the Sovereign of the United Kingdom was also, by virtue of that fact, Sovereign of Canada. It enacted the *Succession to the Throne Act, 2013*, which did not change any laws applying in Canada with regard to the succession, but rather simply indicated parliamentary assent to the enactment of the British law, pursuant to the convention set out in the second paragraph of the preamble to the *Statute of Westminster*.

To constitutional lawyers from outside Canada, this approach can only be explained by domestic political pragmatism. It defies history and precedent and appears to cause Canada to revert to a pre-1926 Dominion status. It is most surprising because it was Canada that fought for equality of status in 1929, so that the United Kingdom ceased to control the rules of succession to the Crown.<sup>32</sup> It was Canada, in 1936, which insisted that the abdication legislation record Canada's request and consent to its application as part of Canadian law, because the British law could not otherwise apply with respect to Canada.<sup>33</sup> Few would ever have expected that Canada would, in the 21st century, deny one of the foundational aspects of its development of independence.

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29 *Royal Succession Act 2013* (NZ), 2013/149; and *Succession to the Crown Act 2015* (Cth).

30 See, eg: *Succession to the Throne Act 2013* (Barbados); and *Succession to the Crown Act 2013* (St Kitts and Nevis).

31 Canada, Legal and Social Affairs Division, "Legislative Summary of Bill C-53: Succession to the Throne Act, 2013", No. 41-1-C-53-E (Ottawa: Library of Parliament, 30 August 2013). See also the comments of the Canadian Minister of Justice and Attorney-General: Rob Nicolson, "Changing the Line of Succession to the Crown" (2013) 36:2 Can Parliamentary Rev 8.

32 See further: Mohr, *supra* note 21 at 37.

33 Telegram from Canadian Prime Minister to UK Prime Minister, 6 December 1936, Kew, United Kingdom, The National Archives of the United Kingdom (DO 121/33); and Canberra, National Archives of Australia (A1838 1490/5/53/1 Prt 2). [Telegram CPM-PM].



From an outsider's perspective, this looks like a stark case of short-term political pragmatism taking priority over fundamental constitutional principle. Section 41 of Canada's *Constitution Act, 1982* requires support by a resolution of the legislative assembly of each province before any amendment to the Constitution can be made in relation to the "office of the Queen, the Governor General and the Lieutenant Governor of the province." To avoid technical arguments about whether a change in the rules of succession is an amendment of the Constitution in relation to the office of the Queen<sup>34</sup> and to avoid the need to obtain the parliamentary support of the province of Quebec, the Canadian Government appears to have dealt with the Gordian knot by turning a blind eye to it and pretending that the matter of succession to the Canadian Crown is determined in London. It washed its hands of responsibility for the succession to its own Crown, thereby avoiding the political difficulty of dealing with the provinces.

Canada was not the only jurisdiction that had the political inconvenience of having to deal with sub-national entities. Australia, also a federation, had to deal with the fact that the Crown is an integral part of State Constitutions. Instead of seeking to legislate unilaterally with respect to succession to the Australian Crown, which no doubt would have provoked a constitutional challenge, the Australian Government took a cooperative approach, negotiating an agreement with the States through the Council of Australian Governments, resulting in each State enacting legislation requesting the enactment of federal legislation changing the rules of succession,<sup>35</sup> pursuant to section 51(xxxviii) of the Commonwealth Constitution. It took two years to complete the process, but it was achieved in a manner that respected fundamental constitutional principles concerning the Crown and federalism.

The former Canadian Government, while taking what seemed like the quicker and easier route of abdicating Canadian responsibility for succession to its own Crown, in the longer term has undermined fundamental principles of federalism and provoked lengthy and ongoing litigation on the issue.

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34 For a discussion of these arguments, see: Margaret Banks, "If the Queen were to abdicate: Procedure under Canada's Constitution" (1990) 28:2 *Alta L Rev* 535, 537-9; Anne Twomey, "Changing the Rules of Succession to the Throne" [Spring 2011] *Public L* 378, 397-400; Peter W Hogg, "Succession to the Throne" (2014) 33 *NJCL* 83, 93-4.

35 *Succession to the Crown (Request) Act 2013* (NSW) (assent 1 July 2013); *Succession to the Crown Act 2013* (Qld) (assent 14 May 2013); *Succession to the Crown (Request) Act 2014* (SA) (assent 26 June 2014); *Succession to the Crown (Request) Act 2013* (Tas) (assent 12 September 2013); *Succession to the Crown (Request) Act 2013* (Vic) (assent 22 October 2013); *Succession to the Crown Act 2015* (WA) (assent 3 March 2015).

### ***Motard and Taillon v Attorney General (Canada)***<sup>36</sup>

At first instance, Bouchard J of the Quebec Superior Court dismissed a challenge to the Canadian *Succession to the Throne Act, 2013* brought by two Law Professors, Geneviève Motard and Patrick Taillon.<sup>37</sup> They had contended that: (a) the British *Succession to the Crown Act* did not have the effect of changing the rules of succession with respect to Canada; (b) the Canadian *Succession to the Throne Act* was unconstitutional because it amounted to a constitutional amendment in breach of section 41 of the *Constitution Act, 1982*; and (c) the Canadian *Succession to the Throne Act* breaches provisions of the *Canadian Charter of Rights and Freedoms* concerning religious discrimination.

The Court was faced with a dilemma. In *O'Donohue v Canada*, Justice Rouleau had held that the rules of succession to the Crown of Canada, including the rule that no Catholic or person married to a Catholic can accede to the Crown, did not breach the anti-discrimination provisions of the *Charter* because these rules have “constitutional status” in Canada and being “part of the fabric of the Constitution,” are not subject to *Charter* scrutiny.<sup>38</sup> If, as Rouleau J asserted, the rules of succession were “by necessity incorporated into the Constitution of Canada,”<sup>39</sup> then they could not be changed without a constitutional amendment.<sup>40</sup> If the amendment to the Constitution was one “in relation to ... the office of the Queen,” then section 41 of the *Constitution Act, 1982* required that the amendment be authorized by resolutions of the Senate, the House of Commons, and the legislative assembly of each province.

Hence, if the *Bill of Rights* and the *Act of Settlement* formed part of Canadian law, but not the Constitution, they would be in breach of the *Charter* and, to the extent that they survived, they could not be amended by either the Canadian *Succession to the Throne Act, 2013*, which only purported to assent to the enactment of a British law, or the British *Succession to the Crown Act 2013*, which neither purported to extend to Canada, nor could do so since the enactment of the *Canada Act 1982* (UK). If the *Bill of Rights* and the *Act of*

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36 Note that the author was an expert witness appearing on behalf of Motard and Taillon in this proceeding, explaining the constitutional position concerning the reception and application of the rules of succession to the separate Crowns of the Realms in the Commonwealth of Nations, as discussed in this chapter.

37 See at first instance: *Motard and Taillon v Attorney-General (Canada)*, 2016 QCCS 588, 266 ACWS (3d) 349 [*Motard*, cited to QCCS]. The case is currently on appeal and is anticipated to eventually reach the Supreme Court.

38 *O'Donohue*, *supra* note 15 at paras 35-37.

39 *Ibid* at para 24.

40 *Constitution Act 1982*, *supra* note 27, s 52(3).

*Settlement* formed part of the Canadian Constitution, then they avoided the *Charter* problem, but they could not be altered without the enactment of a constitutional amendment in accordance with the appropriate procedure.

Bouchard J sought to avoid this dilemma by holding that the *Bill of Rights*, the *Act of Settlement* and the other laws concerning succession to the Crown did not form part of the Canadian Constitution. Instead, the *principles* contained in those Imperial Acts formed part of the Canadian Constitution. Incorporation of these principles is achieved by the combined effects of the statement in the preamble to the *Constitution Act, 1867* that Canada is “under the Crown of the United Kingdom ... with a Constitution similar in principle to that of the United Kingdom” and section 9 of that Act which states that executive authority is vested in the Queen.

The relevant principle is variously described in the judgment as a “principle of hereditary succession,”<sup>41</sup> a “rule of recognition,”<sup>42</sup> or a “rule of symmetry”<sup>43</sup> that whoever was King or Queen of the United Kingdom was also the King or Queen of Canada. The Court concluded that the changes to the rules of succession to the British throne did not result in any amendment of the Constitution or law of Canada,<sup>44</sup> while at the same time the principle that the monarch of the United Kingdom was also the monarch of Canada did not give rise to any breach of the *Canadian Charter of Rights and Freedoms*, as the *Charter* “cannot render structural constitutional principle invalid.”<sup>45</sup>

This judgment gives rise to a number of legal and conceptual problems. First, it does not adequately address the primary point that the laws of succession, as Imperial statutes that expressly stated that they applied to Britain’s colonies, formed part of the law of those colonies, including Canada.<sup>46</sup> The substantive reasoning in the judgment is addressed to the separate question of whether these Acts form part of the Constitution of Canada. While a conclusion is reached in the judgment that these Imperial statutes do not form part of the *law* of Canada,<sup>47</sup> this is not supported by any reasoning other than that

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41 *Motard, supra* note 37 at paras 46, 53, 59, 98, 130, 133, 145.

42 *Ibid* at paras 46, 53, 96, 105, 109, 153.

43 *Ibid* at paras 38, 104-105, 127-128, 146.

44 *Ibid* at paras 141-146.

45 *Ibid* at para 154.

46 See, e.g. the recognition by Hogg that the *Act of Settlement* is “an imperial statute enacted by the Parliament of the United Kingdom with application not only to the United Kingdom but also to its dominions, including Canada”: Peter W Hogg, *Constitutional Law of Canada* 5th ed, vol 1 (Toronto: Thomson Carswell, 2007) (loose-leaf revision 2010-1) ch 1 at 10..

47 See e.g. *Motard, supra* note 37 at paras 62, 146.

concerning the different issue of whether they form part of the Constitution of Canada.<sup>48</sup>

Even if these Imperial statutes do not form part of Canada's Constitution, either as statutes or as principles,<sup>49</sup> they are, at least according to the orthodox application of the rules concerning the reception of British laws and the application of Imperial statutes of paramount force,<sup>50</sup> still laws that apply as part of Canadian law, which can only now be amended by Canadian law. This was acknowledged by the British Parliamentary Counsel at the time of the 1936 abdication crisis, when he advised that the *Act of Settlement* formed part of the law of all the Dominions, and that Canada's request and consent to any amendment to it would be required for such a change to have effect in Canada.<sup>51</sup> There is also ample evidence of common acceptance within Canada of the *Bill of Rights* and the *Act of Settlement* applying as part of Canadian law.<sup>52</sup> As such, they can no longer be amended by British laws, meaning that Canada now has rules of succession that differ from those of the United Kingdom.

The second problem is that if one accepts that the principles of the *Bill of Rights* and the *Act of Settlement* form part of the Canadian Constitution,<sup>53</sup> then one must examine those Acts to determine what those principles are. An examination of them reveals principles such as religious discrimination against

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48 *Ibid* at paras 48 and 54.

49 See also *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 at 374-375, 100 DLR (4<sup>th</sup>) 212, where the principle of parliamentary privilege was held to form part of the Canadian Constitution, even though the specific article of the English *Bill of Rights*, from which it is derived, did not.

50 See e.g. Keith's recognition that Imperial statutes concerning the Crown, of their very character, applied as part of the law of the Dominions: Keith, *supra* note 9 at 1327-8. See also: Clement, *supra* note 6 at 56; and W R Lederman, *Continuing Canadian Constitutional Dilemmas*, (Toronto: Butterworths, 1981) 74.

51 Memorandum by Sir Maurice Gwyer to the UK Attorney-General (23 November 1936), Kew, United Kingdom, The National Archives of the United Kingdom (PREM 1/449) [Gwyer Memorandum].

52 See e.g. the list of Imperial laws that apply as part of Canadian law, developed by the Canadian Department of External Affairs in the 1940s, published in: Maurice Ollivier, *Problems of Canadian Sovereignty: From the British North America Act 1867 to the Statute of Westminster 1931* (Toronto: Canadian Law Book Co, 1945), Appendix B, 465-469. See also the inclusion of the *Act of Settlement* in the *Revised Statutes of Ontario, 1897* (Toronto: LK Cameron, Law Printer to the Queen, 1902). See further: Norman Ward, *Dawson's The Government of Canada*, 5th ed (Toronto: University of Toronto Press, 1970) 62; Josh Hunter, "A More Modern Crown: Changing the Rules of Succession in the Commonwealth Realms" (2012) 38:3 Commonwealth L Bull 423, 445-6. See also the assertion by Lefroy that the *Bill of Rights* and the *Act of Settlement* "are equally included in Canada's constitution": A H F Lefroy, *A Short Treatise on Canadian Constitutional Law* (Toronto: Carswell, 1918) 40.

53 W P M Kennedy, *The Constitution of Canada* (Don Mills, Canada: Oxford University Press, 1922), 378.

Catholics<sup>54</sup> and in favour of Protestants<sup>55</sup> in the succession to the throne and that the inheritance of the Crown is subject to legislative alteration. However, it is not possible to discern a principle from those Acts that the person who holds the Crown of Canada is the same person who holds the Crown of the United Kingdom, as there was no separate Crown of Canada at the time that these statutes were enacted.

Moreover, the *Act of Settlement* conferred the Crown on the heirs of the Electress of Hanover. This created a personal union of Crowns, but did not impose a rule of recognition that the Sovereign of Britain was also the head of state of Hanover or *vice versa*. On the contrary, a separate law of succession, which provided for inheritance by Salic law (preventing females from inheriting), continued to apply in Hanover. Hence, when Queen Victoria inherited the Crown of the United Kingdom, she did not inherit that of Hanover, which instead passed to William IV's brother, the Duke of Cumberland. If one were therefore to draw any principle regarding the application of the rules of succession to separate Crowns from the *Bill of Rights* and the *Act of Settlement*, it would be that there is only one Crown for Britain and its colonies (which remains the case), but where there is a personal union of Crowns of two or more independent territories or nations, then the law of succession of each of those independent territories or nations determines the inheritance of the relevant Crown. This is also consistent with the principle of equality to be found in the *Statute of Westminster*, which clearly forms part of the Constitution of Canada.<sup>56</sup>

The third problem is that if one accepts Justice Rouleau's finding in *O'Donohue v Canada* that the "impugned portions of the *Act of Settlement*," being the prohibition on Catholics and those married to a Catholic from acceding to the throne, are an integral part of the Canadian Constitution,<sup>57</sup> then the British *Succession to the Crown Act 2013*, which removes the bar on persons married to a Catholic from acceding to the throne, is in conflict with that entrenched constitutional position. If the principle of discrimination against heirs married to Catholics is entrenched in the Canadian Constitution, it cannot be changed without a constitutional amendment.

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54 Any person who "shall profess the popish religion or shall marry a papist shall be excluded and be for ever incapable to inherit, possess or enjoy the crown and government of this realm and Ireland and the dominions thereunto belonging... or to have, use or exercise any regal power, authority or jurisdiction within the same" *Bill of Rights, 1688* (UK), 1 Will & Mar, c 2, s 13, art IX. See also *Act of Settlement, 1700* (UK), 12 & 13 Will III, c 2 [*Act of Settlement 1700*].

55 The Sovereign must be a Protestant who is in communion with the Church of England, *ibid*, s 3.

56 *Constitution Act 1982*, *supra* note 27, ss 52(2)(b), 53.

57 *O'Donohue*, *supra* note 15 at para 17.

Finally, if one instead draws a rule of recognition from the reference to the “Crown of Great Britain and Ireland” in the preamble to the *Constitution Act, 1867* or to the reference to the Queen in section 9, then that leads to further problems. First, this Crown no longer exists<sup>58</sup> and is therefore a historic statement only. Secondly, at the time of the abdication in 1936 the notion that an automatic rule of recognition might exist was expressly rejected by the Canadian Government, which insisted that to be effective in Canada, any change to the rules of succession had to extend as part of Canadian law.<sup>59</sup> Thirdly, if the preamble were regarded as asserting that the Canadian provinces remained united under the Crown of the United Kingdom, then that would mean there is no separate Crown of Canada and the Queen is advised with respect to Canadian matters by her British Ministers. As this is clearly not the case,<sup>60</sup> references to the “Queen” in the *Constitution Act, 1867* cannot sensibly be interpreted today as meaning the Queen of the United Kingdom, rather than the Queen of Canada, and the preamble cannot be interpreted as meaning that Canada remains federated under the Crown of the United Kingdom, rather than its own Crown. As noted above, no “rule of recognition” could have existed until such time as the Crown became divisible and a separate Canadian Crown was created. No such rule of recognition was therefore set out in the *Bill of Rights*, the *Act of Settlement* or the *Constitution Act, 1867*, as all preceded by a very long time the creation of a separate Crown of Canada.

These issues will hopefully be addressed when the case proceeds upon appeal.

## **Abdication**

Abdication causes a “demise of the Crown,” meaning that the office of Sovereign is passed from one person to another. A Sovereign may abdicate at common law and may do so constructively, rather than formally, by fleeing the nation, as in the case of James II.<sup>61</sup> Abdication may also occur by legislation, which is necessary where any change in the line of succession to the throne is required

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58 This Crown ceased to exist in 1922 and was replaced by the Crown of the United Kingdom of Great Britain and Northern Ireland. See further: Zines, *supra* note 16 at 437.

59 Telegram CPM-PM, *supra* note 33. See also comments by John Read, who was the Legal Adviser to the Canadian Government on the issue: John Whyte & William Lederman, *Canadian Constitutional Law* 2nd ed (Toronto: Butterworths, 1977) 3-27.

60 See e.g. *Ex Parte Indian Association*, *supra* note 19.

61 E H Coghill, “The King — Marriage and Abdication” (1937) 10 *Austl LJ* 393, 395-6. Compare Brazier, who has taken the view that abdication is only complete upon the enactment of legislation: Rodney Brazier, “The Constitutional Position of the Prince of Wales” [Autumn 1995] *Public L* 401, 410.

(for example, by excluding from the line of succession any future children of the abdicating Sovereign).

If the Sovereign of the United Kingdom were to abdicate in favour of the heir apparent and this were done by instrument without ministerial advice, then there would be a demise of the Crown and the laws of succession as part of the law of each of the Realms would apply so that the heir apparent became Sovereign in each Realm without the need for separate action in each Realm.

If, however, the abdication occurred upon the advice of British Ministers, it is likely that advice would also be needed from the Prime Ministers of the Realms to give effect to the abdication of each Crown, as British Ministers could not be responsible for advice to the Sovereign of Canada, the Sovereign of New Zealand, or the Sovereign of Australia to abdicate from that office.<sup>62</sup>

Further, if legislation was required to change the succession, then the same issues would arise as discussed above in relation to succession to the throne. The Realms would have to alter their own legislation concerning succession to the Crown, unless their legislation or Constitution identified the Sovereign by reference to prevailing British laws.

These issues arose in 1936 with the abdication of King Edward VIII. In that case, legislation was required to ensure that any descendants of Edward, Duke of Windsor, would not be in line of succession to the throne. It was also needed to alter the *Royal Marriages Act* so that the former King could marry in the future without requiring the permission of the new King.

On 23 November 1936, before the crisis became public, the British Parliamentary Counsel, Sir Maurice Gwyer, advised the Attorney-General on how to give effect to the possible abdication of the King. He noted that the King should execute an instrument of abdication upon his own motion, not on the advice of Ministers. It could then be framed so as to extend to the whole of the Commonwealth without requiring the signature of the Prime Minister of each of the Dominions. However, he considered that legislation would be necessary and that due to the operation of the *Statute of Westminster* (of which Gwyer was the principal drafter and architect), it would be necessary for the Dominions to declare expressly their request and consent or enact their own

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<sup>62</sup> Note Campbell's observation that if the Queen were to abdicate, a "separate Instrument of Abdication in her capacity as Queen of Australia" might be needed: Enid Campbell, "Changing the Rules of Succession to the Throne" (1999) 1 Constitutional L & Policy R 67, 70.

legislation, as the changes to succession to the throne would otherwise be of no effect in the Dominion.<sup>63</sup>

The main concern was that the Irish Free State would refuse to give its request and consent to the British legislation and would not enact its own law. This would lead to the question of whether Edward VIII remained King of the Irish Free State, while George VI was King of the United Kingdom. Legal advisers ruminated on whether there would be a *de facto* abdication or whether implicit acceptance of the new Sovereign by the Irish Free State would be sufficient.<sup>64</sup> In the end, the possibility of Edward VIII remaining King of the Irish Free State was used as a threat to push it to legislate. British diplomats told Eamon de Valera, President of the Executive Council of the Irish Free State, that unless the Irish Free State enacted its own legislation recognising the change in succession, Edward VIII would remain its King, and Wallis Simpson would become Queen of the Irish Free State once they married. This was too much for a predominantly Catholic country,<sup>65</sup> so the Irish Free State quickly legislated<sup>66</sup> to give effect to the change in succession on 12 December, rather than 10 December (when the instrument of abdication was signed) or 11 December (when the British legislation came into effect).

South Africa also enacted its own legislation, *His Majesty Edward VIII's Declaration of Abdication Act 1937* (SA), which applied with retrospective effect back to 10 December, the date upon which Edward VIII signed the instrument of abdication. Canada, New Zealand, and Australia all consented to the British Act extending to them as part of their law, with effect from 11 December. Hence there were different Kings in different parts of the Empire from 10-12 December 1936, due to the different ways in which the abdication was implemented in the Realms, which was outside of the control of the United Kingdom.

If, after Queen Elizabeth II dies, the new King were to abdicate in favour of the heir apparent, Prince William, it is arguable that no legislation would be

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63 Gwyer Memorandum, *supra* note 51.

64 See, Secret Memoranda on the Legal and Constitutional Position (16 Nov-11 Dec 1936) Kew, United Kingdom, The National Archives of the United Kingdom (DO 121/39).

65 Brendan Sexton, *Ireland and the Crown 1922-1936* (Newbridge, Republic of Ireland: Irish Academic Press, 1989) 163; Joe Garner, *The Commonwealth Office 1925-68* (London: Heinemann, 1978) 70; Malcolm MacDonald, *Titans and Others* (London: Collins, 1972) 69; and Deirdre McMahon, *Republicans and Imperialists — Anglo-Irish Relations in the 1930s* (New Haven, US: Yale University Press, 1984) 200.

66 *Executive Authority (External Relations) Act 1936* (Act 58 of 1936), Act of the Irish Free State.



required<sup>67</sup> and that as long as the abdication was a personal act, without ministerial advice, the rules of succession applying in relation to each of the Realms would make William King. If, while the Queen continued to reign, the Prince of Wales decided to renounce his place in the line of succession, so that Prince William would become the heir apparent, then legislation would be needed,<sup>68</sup> raising the same issues discussed above concerning changes to succession to the Crown.

If, however, the British Parliament legislated unilaterally to change the succession to the British Crown (either because of a scandal or emergency or because it had been invaded by a foreign power and a puppet King or Queen was to be imposed), then this would not change who was the sovereign of Australia or New Zealand, as the British legislation would have no effect in relation to the Australian or New Zealand Crowns. If, however, the Canadian courts ultimately accept that the Sovereign of Canada is whoever is the Sovereign of the United Kingdom, then Canada would be subject to the reign of the new monarch, regardless of whether it assented or not.<sup>69</sup> This would be so at least until such time as it could formally amend its Constitution with regard to the office of the Sovereign and enact different laws of succession.

## Regency

Regency also presents complex, but somewhat different issues. This is because an ongoing regency law was enacted in the United Kingdom in 1937, being subsequently amended in 1943 and 1953. It would apply today in the United Kingdom if a regency was needed because of the physical or mental infirmity of the Sovereign, or because a person became Sovereign while still a minor. The *Regency Act 1937* (UK) was enacted after the *Statute of Westminster 1931* had been enacted, but before its substantive provisions came into force in Australia and New Zealand. There was uncertainty about whether or not the *Regency Act* was intended to apply to any or some of the Dominions. There was no express extension of the law to the Dominions or reference to any request or consent. The only reference to them occurred in a provision requiring them to

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67 Note, however, Blackburn's suggestion that an instrument of abdication would be accompanied by a "Succession to the Throne Bill" if Prince Charles renounced the throne in favour of Prince William: Robert Blackburn, *King & Country — Monarchy and the future King Charles III* (London: Politico's, 2006) 187.

68 Rodney Brazier, "Skipping a Generation in the Line of Succession" (Winter 2000) Public L 568, 570.

69 Note that the requirement of assent in the preamble to the *Statute of Westminster* is no more than a conventional requirement that has no legal force. In 1936, the Irish Free State did not give its 'assent' to the British legislation giving effect to the abdication of Edward VIII, but this did not prevent the Westminster Parliament from enacting the law.

be notified if a regency arose through incapacity (although no such notification was required in relation to a regency due to minority or the appointment of Counsellors of State).

Sir John Simon, in the debate on the *Regency Bill*, observed that it would be up to each Dominion to decide whether it needed to legislate with respect to a regency, but such legislation would not be needed until the occasion arose. This was because the Dominions had Governors General, who could still perform vice-regal functions during a regency and could give royal assent to any Dominion law to give effect to a regency, but in the United Kingdom legislation was needed in advance, because otherwise there would be no one who could give assent to regency legislation if the Sovereign were incapacitated.

It was clear that the provisions of the *Regency Act* would not extend as part of Canadian law, as its request and consent had not been recorded in the Act, as would have been required by section 4 of the *Statute of Westminster*. It was noted in the parliamentary debate on the Bill that its measures did not touch the succession to the throne. Rather, they provided a means for the Sovereign's powers to be exercised when the Sovereign could not otherwise do so in person. Hence, the convention in the second paragraph of the preamble to the *Statute of Westminster* did not apply. However, the convention in the third paragraph, that laws of the United Kingdom would not apply to the Dominions as part of their law without their request and consent, did still apply. This was relevant to Australia and New Zealand, which had not yet adopted the substantive provisions of the *Statute*, including section 4, but were still subject to the conventions set out in the preamble to it. The Canadian Deputy Minister of Justice, in a legal opinion, took the view that this convention applied in relation to all the Dominions, regardless of whether section 4 of the *Statute* also applied, and that the *Regency Act 1937* therefore cannot be taken to extend as part of the law of any of the Dominions.<sup>70</sup>

In 1953, when the Dominions were consulted about proposed changes to the *Regency Act 1937* at a Conference of Commonwealth Prime Ministers, a briefing note was provided to them, based upon advice received from the Lord Chancellor, Lord Simonds.<sup>71</sup> It stated that the *Regency Act 1937* did not apply to Canada or South Africa, and that while the position of Australia and New

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70 Letter from W Stuart Skelton, Deputy Minister of Justice, to O D Skelton, Under-Secretary of State for External Affairs (5 May 1937) in Canadian Privy Council Office, *Manual of Official Procedure of the Government of Canada* vol 2 Appendices (Ottawa: Privy Council Office, 1968), 823.

71 Opinion by Lord Simonds, Lord Chancellor (26 May 1953), Canberra, National Archives of Australia (A1209 1959/213).

Zealand was more doubtful, “the highest legal authorities in this country are inclined to the view that the *Regency Act*, 1937, does not apply ...”<sup>72</sup>

In 1968, Wheeler-Bennett regarded it as well settled that the “*Regency Acts* do not bind the Governments of the Commonwealth, other than the United Kingdom Government, and are operative only in the United Kingdom and the Colonial Empire.”<sup>73</sup> Bogdanor has also argued that neither a Regent nor Counsellors of State appointed under a British law would have any power in relation to other Realms. He considered that the Realms would have to make their own laws to deal with regency if and when the situation arose.<sup>74</sup>

Assuming, therefore, that the British law concerning regency does not apply in relation to the Crowns of Australia, Canada and New Zealand, what action would need to be taken in those countries to deal with the incapacity of the Sovereign to exercise his or her powers? New Zealand has resolved the issue by providing in section 4 of its *Constitution Act 1986* (NZ) that where a law of the United Kingdom provides for royal functions to be performed by a Regent, the royal functions of the Sovereign of New Zealand shall be performed by the same Regent. This occurs by virtue of the application of New Zealand law. Any application of the British *Regency Acts* was repudiated by section 5 of the *Royal Powers Act 1983* (NZ).

In Canada and Australia the position is more difficult because of their entrenched Constitutions and federal systems. In Canada, the approach was taken in 1947 to alter the Letters Patent to delegate to the Governor General the full powers of the King with respect to Canada. This raises the question of whether or not it includes the power to appoint a successor Governor General, and critically, to remove the Governor General, being the two remaining powers of the Sovereign that might need to be exercised during a regency. The 1968 Canadian *Manual of Official Procedures* took the position that the Letters Patent did not deal with the appointment and office of the Governor General.<sup>75</sup>

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72 Sir Norman Brook, Cabinet Secretary and Secretary of the Meeting of Commonwealth Prime Ministers, Briefing Note, ‘The Regency’, (3 June 1953), Canberra, National Archives of Australia (A1209 1959/213).

73 John Wheeler-Bennett, *King George VI — His Life and Reign* (London: Macmillan & Co, 1958) 815. Compare Keith, who considered that the *Regency Act 1937* did bind Australia and New Zealand, but not the other Dominions: A B Keith, *Ridge’s Constitutional Law of England* 7th ed (London: Steven & Sons, 1939) 129-30.

74 Vernon Bogdanor, *The Monarchy and the Constitution* (Oxford: Clarendon Press, 1995) 49-50.

75 Canadian Privy Council Office, *supra* note 70 at 565. Note also 566-7, which discuss the fact that the office of Administrator proceeds to the Chief Justice and then a chain of judges in order of seniority, so that there is always someone capable of fulfilling the office. Nonetheless, it would not be practicable for the Chief Justice to fulfil both offices for a long period.

The Canadian Privy Council Office has also asserted that the power to appoint a Governor General (and presumably to terminate the appointment of a Governor General) was not delegated by the Letters Patent to the Governor General.<sup>76</sup> Lagassé and Baud have argued, on the other hand, that changes to regulations<sup>77</sup> could be made to allow a Governor General to appoint his or her successor in the Queen's name.<sup>78</sup> McCreery, however, has criticised such an outcome, arguing that it is impractical to suggest that a Governor General would remove himself or herself upon ministerial advice,<sup>79</sup> with the consequence that if a prolonged regency occurred, it would remove one of the checks and balances in the Constitution.

Finally, if the “automatic rule of recognition” theory were to be upheld in Canada, so that the Sovereign of Canada is determined by British law, it is not much of a leap to say that British law can also determine who is the regent with respect to Canada. While this would be contrary to the long accepted view in Canada that the *Regency Act 1937* (UK) does not apply with respect to the Crown of Canada, precedent and history did not appear to influence the Canadian Government in 2013, so it is possible that Canada might reverse its position on regency as it has in relation to succession.

In Australia, while it is generally accepted that the *Regency Act 1937* does not apply as part of Australian law (although there are some doubts), the greater problem is the power to legislate with respect to regency. There are difficulties in squeezing it within a head of legislative power allocated to the Commonwealth Parliament. There is also the problem that unilateral Commonwealth legislation may be held invalid if it breaches principles of federalism by affecting the Sovereign's powers under State Constitutions<sup>80</sup> or if it breaches the requirements of section 7 of the *Australia Acts 1986* (UK) and (Cth).<sup>81</sup>

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76 Canada, Privy Council Office, *Open and Accountable Government*, (Ottawa: Privy Council Office, 2015) 52.

77 *Formal Documents Regulations*, CRC, c 1331, s 4.

78 Philippe Lagassé & Patrick Baud, “The Crown and Constitutional Amendment in Canada” in Michel Bédard & Philippe Lagassé, eds, *The Crown and the Parliament* (Montreal: Éditions Yvon Blais, 2015) 203, 225.

79 Christopher McCreery, “Myth and Misunderstanding: The Origins and Meaning of the Letters Patent Constituting the Office of the Governor General, 1947” in Jennifer Smith & D Michael Jackson, eds, *The Evolving Canadian Crown* (Montreal: McGill-Queen's University Press, 2012) 31, 52.

80 *Melbourne Corporation v Commonwealth*, [1947] HCA 26, 74 CLR 31; *Austin v Commonwealth*, [2003] HCA 3, 215 CLR 185; *Clarke v Commissioner of Taxation*, [2009] HCA 33, at para 19 240 CLR 272, [French CJ].

81 See further: Anne Twomey, “Regency in the Realms” (2016) 27 Public LRev 198 at 213-4.

The best way of avoiding these problems is to use the co-operative method set out in section 51(xxxviii) of the Commonwealth Constitution, which requires the enactment of legislation by each State Parliament, requesting the enactment of legislation by the Commonwealth Parliament. This was the method used to implement the recent changes to succession to the Crown. However, a further problem would arise if such a law were regarded as inconsistent with the Commonwealth Constitution, because it permits powers expressly allocated to the Sovereign to be exercised by a person who is not the Sovereign.<sup>82</sup> Resolution of this conundrum would require a court to interpret the meaning of “Queen” in the Commonwealth Constitution in a flexible manner, although this would be consistent with past practice where the Courts have interpreted references to the Queen as now meaning the Queen of Australia, rather than the Queen of the United Kingdom.<sup>83</sup>

## Conclusion

As issues concerning succession, abdication, and regency have rarely arisen in living memory, when they do so there is often a lack of institutional knowledge about how to deal with them. This is exacerbated by the change of conventions over time and the impact upon the Crown of the development of independence by the former self-governing Dominions. Any analysis of how to deal with questions concerning succession, abdication, and regency in the Realms requires a strong understanding of constitutional history, the reception and application of British laws in the colonies, the process of de-colonisation, and the current operation of Constitutions within the Realms, particularly when federal systems apply. Most importantly, fundamental constitutional principles need to be applied and respected, rather than avoided in favour of politically expedient quick-fixes that may prove damaging to the constitutional fabric in the long-term.

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82 Memorandum by J Q Ewens, Acting Secretary, Attorney-General's Dept, Secretary, Prime Minister's Dept (4 August 1953) Canberra, National Archive of Australia (A3710 CO NO6 VOL 90 P112) at 6.

83 *Pochi v Minister for Immigration & Ethnic Affairs*, [1982] HCA 60, 151 CLR 101 at 109, [Gibbs CJ]; *Nolan v Minister for Immigration and Ethnic Affairs*, [1988] HCA 45, 165 CLR 178 at 184, 186, [Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ]; *Sue v Hill*, [1999] HCA 30, 199 CLR 462 at para 57, [Gleeson CJ, Gummow and Hayne JJ], and 169 [Gaudron J]; *Re Patterson; Ex parte Taylor*, [2001] HCA 51, 207 CLR 391 at para 48, [Gaudron J]; *Shaw v Minister for Immigration and Multicultural Affairs*, [2003] HCA 72, 218 CLR 28 at paras 51-52, [McHugh J], at para 97 [Kirby J], at para 177 [Callinan J]; *Singh v Commonwealth*, [2004] HCA 43, 222 CLR 322 at paras 35, 39-41, 57-58, 133 [McHugh J], at para 263 [Kirby J].



# Some Observations on the Queen, the Crown, the Constitution, and the Courts

*Warren J Newman\**

*Canada was established in 1867 as a Dominion under the Crown of the United Kingdom, with a Constitution similar in principle to that of the United Kingdom. The concept of the Crown has evolved over time, as Canada became a fully independent state. However in 2017, Canada remains a constitutional monarchy within what is now the Commonwealth, and the offices of the Queen, the Governor General, and the provincial Lieutenant Governors are constitutionally entrenched. Indeed, in elucidating the meaning of the Crown, an abstraction that naturally gives rise to academic debate and divergent perspectives, it is important not to lose sight of the real person who is Her Majesty, given the importance that our constitutional framework attaches to her role, status, and powers. Canada has played a significant role in influencing developments in the body of law that relates to royal succession, through its continuing adherence to the constitutional convention that requires the Parliament of Canada's assent to any alteration in the law respecting the succession to the Throne or the royal style and titles. Parliament has also enacted legislation which has modernized aspects of Canada's monarchical institutions without modifying their fundamental characteristics. In the Canadian context, the courts have been principled, prudential, and pragmatic in resolving legal disputes in relation to the Queen and the Crown, in a manner that takes due account of both constitutional theory and sound practice. None of this is inconsistent with modern Canada's independent place on the world stage.*

*Le Canada fut fondé en 1867 comme un dominion sous la Couronne du Royaume-Uni, avec une constitution semblable en principe à celle du Royaume-Uni. Le concept de la Couronne a évolué au fil du temps, au fur et à mesure que le Canada est devenu un état entièrement indépendant, mais en 2017 le Canada demeure une monarchie constitutionnelle à l'intérieur de ce qui est maintenant le Commonwealth et les fonctions de la Reine, du gouverneur général et des lieutenants-gouverneurs des provinces ont été constitutionnalisées. En fait, en elucidant le sens de la Couronne, une abstraction qui donne naturellement lieu à des débats théoriques et des points de vue divergents, il est important de ne pas perdre de vue la vraie personne qui est Sa Majesté, étant donné l'importance que notre cadre constitutionnel attache à son rôle, son statut et ses pouvoirs. Le Canada a influé de façon importante sur l'évolution des lois relatives à la succession royale, grâce à son adhésion continue à la convention constitutionnelle qui exige la sanction du Parlement du Canada pour toute modification à la loi visant la succession au trône ou les titres royaux. En outre, le Parlement a édicté des lois qui modernisent des aspects des institutions monarchiques au Canada sans modifier les traits fondamentaux de celles-ci. Dans le contexte canadien, les tribunaux ont agi conformément à des principes, ils ont été prudents et pragmatiques dans le règlement de différends juridiques concernant la Reine et la Couronne, d'une manière qui tient pleinement compte à la fois de la théorie constitutionnelle et de la saine pratique. Rien de cela contredit la place indépendante du Canada moderne sur la scène mondiale.*

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## Introduction

The great commandment for constitutional theoreticians and lawyers alike ought to be *primum non nocere*: first, do no harm.

As Canadians begin to celebrate the sesquicentennial of Confederation, it is timely to remember that the Dominion that came into being on July 1, 1867 did so by proclamation of Her Majesty the Queen.<sup>1</sup> One hundred and fifty years later, the Queen continues to reign over Canada.

Naturally, in 1867 the Queen contemplated by the *British North America Act* was Queen Victoria; in 2017 it is Elizabeth II. Moreover, Canada is no longer a colony of the British Empire, but rather a fully sovereign and independent state. Nonetheless, Canada remains an integral part of the Commonwealth through an act of voluntary association, based on a common allegiance to Her Majesty as head of the Commonwealth and (in Canada's case) as head of state.

The Canadian constitutional framework, as it relates to the monarchy, has changed but little in form since 1867. However, the monarchical principle underlying much of that framework has been modulated by its interaction with other constitutional principles, and its operation, both in Canada and in other Commonwealth countries, has been significantly altered through constitutional conventions and usage.

At the crux of the framework lies a venerable and precious object of striking beauty — the Crown — that has been transformed by constitutional thinkers into an abstract concept to which some would ascribe not just legal and political but also metaphorical and perhaps even metaphysical qualities. In some circles, the Crown has undergone, through an obscure alchemy the formula for which has been largely reserved to initiates and enthusiasts, a transformation into a proliferation of Crowns local and domestic, including the almost lyrical, and entirely virtual, “Crown of Maples.”

The Crown is, of course, a useful and convenient means of conveying, in a word, the compendious formal, executive and administrative powers and apparatus attendant upon the modern constitutional and monarchical state.<sup>2</sup> It

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1 As authorized by section 3 of *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*]. The royal proclamation was issued on May 22, 1867.

2 For a thoughtful treatise on how the Crown and its emanations permeate every facet of governance in Canada, both at the federal and provincial levels, see David E Smith, *The Invisible Crown — The First Principle of Canadian Government* (Toronto: University of Toronto Press, 1995) reprinted with



is also imperative, in a federal state like Canada, that the Crown be distinctly recognizable at not only the central but the provincial level.<sup>3</sup> However, when so employed, the Crown also becomes an abstract concept, and it is in the nature of abstractions to give rise to debate from different quarters and perspectives.

The observations set out in this brief essay have no pretence or ambition of presenting an exhaustive or definitive account on the subject of monarchical institutions in relation to the Constitution of Canada. Rather, they offer some insight into the perspective of a constitutional lawyer who has been in the service of Her Majesty in right of Canada for 35 years, and who has had the privilege of advising on various constitutional matters and appearing before parliamentary committees as an expert witness and before the courts as counsel on behalf of the Crown. Moreover, as certain matters that are touched upon in this essay are still the subject of legal controversy, professional prudence, decorum, and a sense of deference to the court process have dictated a degree of circumspection, if not outright reticence, in formulating these observations. Despite these limitations, it is hoped that these reflections will contribute to the scholarly debate that the study of the Crown in Canada inevitably engenders.

The practice of Canadian constitutional law before the courts is, at bottom, a pragmatic and prudential exercise. In the context of litigation, our courts have generally neither the time nor the inclination to become deeply immersed in broad philosophical and theoretical debates about the divisible and indivisible, corporeal and incorporeal nature of the Crown. It should not be surprising, then, that in the course of adjudicating disputes, the courts may often be content to rely upon a few well-canvassed constitutional principles and conventions, as well as the occasional legal fiction, in construing and applying the terms and provisions of the Constitution of Canada to the extent that it may be relevant or necessary to the case at hand, without striking off in bold new directions. Nor do constitutional anomalies born of historical facts and political compromises necessarily trouble our courts. It is not their role — certainly not in most contexts — to overcome lacunae by over-theorizing the grand scheme of things. Judges, especially those trained in the common-law traditions of public law, work incrementally, through a slow process of accre-

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a new preface, 2013. Professor Smith asserts, not without plausibility, that “the Crown is the organizing force behind the executive, legislature, administration and judiciary in both the federal and provincial spheres of government. . . . Yet, despite this essential place in the constitutional order, its influence remains largely invisible behind the shield of responsible government.” (*ibid* at xiv).

3 Another interesting, colourful, and accessible account of the Crown’s contribution to the functioning of federalism (and much more) is that offered by D Michael Jackson in *The Crown and Canadian Federalism* (Toronto: Dundurn Press, 2013).

tion over time and over a range of cases, in developing the law, notably as it relates to the Crown.

## **The Queen, the Crown, and the Framework of the Constitution**

The Constitution of Canada reserves a central place for the Crown, and more particularly, the Queen and her representatives, the Governor General, and the provincial Lieutenant Governors. The preamble to the *British North America Act* — now styled the *Constitution Act, 1867* — provided that the federating provinces were to be united into “One Dominion under the Crown of the United Kingdom”, with “a Constitution similar in Principle to that of the United Kingdom.” Moreover, it was recorded as “expedient”, not only that legislative authority be provided for in the nascent Canadian Constitution, but also that “the Nature of the Executive Government” in the Dominion be “declared.”

That declaration was accordingly set out in section 9 of the *Constitution Act, 1867*: “The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in *the Queen*.”<sup>4</sup>

The framers of the *Constitution Act, 1867* were prescient in vesting the executive government not in the abstract “Crown of the United Kingdom” mentioned in the preamble of the Act, but rather in the tangible regal person then wearing that Crown, Her Majesty “the Queen.” As Walter Bagehot wrote contemporaneously, unlike more abstruse constitutional arrangements, monarchy is intelligible government: “When you put before the mass of mankind the question, ‘Will you be governed by a king, or will you be governed by a constitution?’ the inquiry comes out thus — ‘Will you be governed in a way you understand, or will you be governed in a way you do not understand?’”<sup>5</sup>

The “Nature of the Executive Government” in the Dominion was thus to be monarchical, in the context of a constitution “similar in Principle to that of the United Kingdom.” Through the preamble, not only was the monarchical principle inherited from the British constitutional tradition, but also the principle of responsible government. The “Queen’s Privy Council for Canada” would “aid and advise in the Government of Canada”, and those Privy Councillors summoned by the Governor General and holding commissions as Ministers

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4 [Emphasis added].

5 Walter Bagehot, *The English Constitution* (Oxford: Oxford University Press, 1929) at 30 (first published in 1867).

of the Crown (and forming the Cabinet under the effective leadership of the Prime Minister) would exercise their powers in accordance with the conventions protecting that fundamental principle. In short, Canada, like the United Kingdom, was to be governed by a constitutional, not an absolute, monarch.

Similarly, although abstract logic and consistency might have suggested to some that the Parliament of Canada should have been constituted as three composite institutions, *viz.*, the Crown, the Senate, and the House of Commons, the framers made certain to vest the legislative power in the very person of “the Queen.” Section 17 of the *Constitution Act, 1867*, provides that “There shall be One Parliament for Canada, consisting of *the Queen*, an Upper House styled the Senate, and the House of Commons.” Section 91 provides, in its opening words, that “It shall be lawful for *the Queen*, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order and good Government of Canada... .”<sup>6</sup>

In 1867, “the Queen” was Her Majesty Victoria, “by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.”<sup>7</sup> This was evident not only from the aforementioned reference in the preamble to Canada being a Dominion under the Crown of the United Kingdom, but also by the express terms of the solemn oath set out in the fifth schedule of the *Constitution Act, 1867*, to be taken by every member of Canada’s federal and provincial legislative houses: “I *A.B.* do swear, That I will be faithful and bear true Allegiance to Her Majesty Queen Victoria.”<sup>8</sup>

Looking back, it may have seemed audacious to repose in the Queen of the United Kingdom the executive authority over, and the legislative power of the Parliament of, a country she would never even have occasion to visit. Of course, that is not just to impose a 21st-century perspective on a 19th-century phenomenon; it is to ignore the pivotal legal and symbolic role of the monarchy in cementing the new Canadian union, and to ignore the genius of the British constitutional model in combining formal and efficient parts of government.

The constitutional arrangements arrived at in 1867 successfully reconciled the physical absence of a geographically-distant monarch with a continuing and pervasive presence through the medium of formal representatives and the manner and forms of legal and conventional rules and behaviour associated

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6 [Emphasis added].

7 An additional title, “Empress of India” was later appended by royal proclamation made pursuant to the *Royal Titles Act, 1876* (39 & 40 Vict, c 10 (UK)). It was abolished in 1947.

8 *Vide* the fifth schedule and s 128 of the *Constitution Act, 1867*, *supra* note 1.

with British parliamentary and monarchical governance. Thus it was made perfectly clear, in the express terms of section 55 of the *Constitution Act, 1867*, for example, that when the Governor General assented to a bill passed by both Houses of the Canadian Parliament, he did so “in the Queen’s Name”; that as a matter of law, he might also withhold “the Queen’s Assent” (even if the exercise of this discretion would be effectively countermanded over time by unwritten convention); or he might reserve the bill for the signification of “the Queen’s Pleasure.” To this day, at the opening of each new session of Parliament, the Government of Canada’s legislative agenda is outlined in the Speech from the Throne, read by Her Majesty’s representative, the Governor General.

Over time, just as the provincial legislatures were recognized by the courts as exercising legislative authority “as plenary and as ample within the limits prescribed by sect. 92 [of the *British North America Act*] as the Imperial Parliament in the plenitude of its power possessed and could bestow”,<sup>9</sup> and it would have required “very express language”, such as was not to be found in the *British North America Act*, “to warrant the inference that the Imperial Legislature meant to vest in the provinces of Canada the right of exercising supreme legislative powers in which the British Sovereign was to have no share”,<sup>10</sup> so too the Lieutenant Governors were recognized as the direct legal representatives of the Crown in respect of the provinces, despite the fact that they were appointed (and removable) by the Governor General:

The Act of the Governor-General and his Council in making the appointment is, within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government.

Thus grew the distinction, based in part on the federal principle, of the Queen in right of the Dominion: — that is to say, Her Majesty acting in her capacity as the sovereign head of the executive government of Canada — and the Queen in right of the Province: — that is, Her Majesty as the sovereign head of each province.

This did not mean that there were suddenly several Queens in respect of Canada and its provinces. There was, as there is today, one Queen, exercising distinct capacities in relation to the Dominion and provincial governments,

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<sup>9</sup> *Hodge v The Queen*, [1883] UKPC 59, [1883] 9 AC 117, per Lord Fitzgerald.

<sup>10</sup> *Liquidators of the Maritime Bank of Canada v Receiver-General of New Brunswick*, [1892] AC 437 at 443 (JCPC, per Lord Watson).

respectively, and acting through her formal constitutional representatives, the Governor General and the Lieutenant Governors.

Nor did the increasingly common usage of the terms, the Crown in right of Canada and the Crown in right of the provinces, seemingly interchangeable with that of the Queen, mean that there was a proliferation of actual Crowns as such. From a constitutional perspective, Canada remained “under the Crown of the United Kingdom”, but the Crown was capable of acting in respect of the Dominion government or in respect of each of the provinces, as the case might be.

Of course, the evolution of the British Empire into the Commonwealth of Nations occasioned further changes, for the most part conventional, in the relations between the Crown and the increasingly autonomous Dominions.<sup>11</sup> The newly “established constitutional position” was carefully expressed in the preamble to the *Statute of Westminster, 1931*, which, from a Canadian perspective, is still a vibrant part of our Constitution:

And whereas it is meet and proper to set out, by way of preamble to this Act that, inasmuch as *the Crown is the common symbol of the free association of the members of the British Commonwealth of Nations*, and as they are *united by a common allegiance to the Crown*, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom;<sup>12</sup>

We can now, and do, speak of the Queen of Canada, but Her Majesty is the Queen of Canada because she is the Queen of the United Kingdom. The *Royal Style and Titles Act of 1953*<sup>13</sup> signified the Parliament of Canada’s assent to Her Majesty’s Royal Proclamation, under the Great Seal of Canada, establishing the following style and titles for Canada: “Elizabeth the Second, by the Grace of God of the United Kingdom, Canada and Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith” / “Elizabeth Deux, par la grâce de Dieu Reine du Royaume-Uni, du Canada et de ses autres royaumes

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11 As the Supreme Court noted in the *Patriation Reference (Re: Resolution to amend the Constitution)*, [1981] 1 SCR 753 at 879, 125 DLR (3d) 1: “Within the British Empire, powers of government were vested in different bodies which provided a fertile ground for the growth of new constitutional conventions unknown to Dicey and from which self-governing colonies acquired equal and independent status within the Commonwealth. Many of these culminated in the *Statute of Westminster, 1931*, 1931 (UK), c 4.”

12 [Emphasis added].

13 RSC 1985, c R-12.

et territoires, Chef du Commonwealth, Défenseur de la Foi.” In other words, the Queen of Canada is the Queen in right of, or in relation to, Canada. This distinction between the Crown in right of the United Kingdom and the Crown in right of Canada crystallized with the evolution of Canada towards the status of an independent state, which began with the Balfour Report in 1926 and the *Statute of Westminster, 1931*, and culminated with the *Canada Act 1982*.<sup>14</sup>

The Queen, as the holder of the executive power of the Crown in Canada, is the sovereign head of state. The office of the Queen is constitutionally entrenched through section 41 of the *Constitution Act, 1982*, and this includes the constitutional status and powers of that office, including the key royal prerogative powers (such as the summoning, proroguing and dissolving of the House of Commons).<sup>15</sup> It stands to reason that in relation to Canada, the Monarch holds, in principle, the same residue of prerogative power as she does in relation to the United Kingdom, subject to local conditions, divergences occasioned by statutory modification or displacement, and the limits imposed by the structure and provisions of the Canadian Constitution, including the federal-provincial distribution of powers.<sup>16</sup>

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14 See notably *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta and others*, [1982] 2 All ER 118 (UK, CA), *per* Lord Denning MR, Kerr and May LJ, leave to appeal to the House of Lords refused; *Manuel and others v Attorney General*; *Nolcho and others v Attorney General*, [1982] 3 All ER 786 (UK, Chancery Div), *per* Megarry V-C [*Manuel*]. In these judgments, which denied the possibility of any legal or equitable fiduciary claim on behalf of the Aboriginal peoples of Canada against the Crown in right of the United Kingdom once the *Canada Act 1982* was enacted by the United Kingdom Parliament and the *Constitution Act, 1982* was proclaimed in force in Canada, much was said about the various contending theories that sought to explain the evolution of the concept of the Crown. Lord Diplock, in brief reasons on behalf of their Lordships in refusing to grant leave to appeal in the *Alberta* case, at [1982] 2 All ER 143, emphasized that “[t]heir refusal of leave is because in their opinion, for the accumulated reasons given in the judgments of the Court of Appeal, it simply is not arguable that any obligations of the Crown in respect of the Indian peoples of Canada are still the responsibility of Her Majesty’s government in the United Kingdom. They are the responsibility of Her Majesty’s government in Canada, and it is Canadian courts and not the English courts that alone have jurisdiction to determine what those obligations are.” Sir Robert Megarry, Vice-Chancellor, commented in *Manuel* (*supra* at 798) that despite the apparent variance in the views expressed by the three justices in the *Alberta* case, “it was plain that there was unanimity on the obligations in question being today those of the Crown in right of Canada and not in right of the United Kingdom. The divergence was merely on how that result was achieved.” The Court of Appeal, Civil Division, *per* Cumming-Bruce, Everleigh and Slade LJ, dismissed the appeal (appeal judgment reported as *Manuel and others v Attorney General*, [1982] 3 All ER 822) and the attack on the validity of the *Canada Act 1982*, Slade LJ averring that Megarry V-C was “plainly right to strike out the statement of claim” because “if this action were to proceed to trial, it would be bound to fail” (*supra* at 832).

15 See WJ Newman, “Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions during a Parliamentary Crisis”, (2009) 27 NJCL 217 at 222-25 [Newman “Maintaining Fundamental Distinctions”].

16 For example, the *Fixed-term Parliaments Act 2011* (UK), c 14 affected Her Majesty’s power to dissolve the United Kingdom Parliament (although not her power to prorogue it: see subsection 6(1)). The

As the crowned and formal executive head of the Canadian state, the Queen may be exceptionally well-placed to recognize, in the exercise of the undoubted prerogatives vested in her, certain national symbols, or to declare and to articulate certain historic Canadian truths, principles, values, and commitments. This Her Majesty has done, for example, formally by royal proclamation, in 1965 to designate the National Flag of Canada,<sup>17</sup> and again in 2003 to designate an annual Day of Commemoration in respect of the Acadian people,<sup>18</sup> and less formally but still meaningfully, by way of the speeches the Queen and the members of the royal family have given during their frequent tours of Canada. Similar actions have been taken by the Queen's representative, the Governor General, whose office is itself constituted by a royal instrument, the *Letters Patent* of 1947.

The purpose of this observation is not to attempt here to catalogue the many ways in which Her Majesty actively participates in the lives of Canadians (not to mention through the high volume of correspondence personally addressed to her by her subjects and attended to on her behalf by her Private Secretaries at Buckingham Palace), but to remind ourselves that often, it is the Queen herself — an actual person, a living human being and, in the ancient terms of fealty, our Sovereign Liege Lady — who may be said to symbolize the Crown at least as much as the Crown may be said to symbolize the Monarch.

To obscure this real and tangible fact in the course of expounding upon the intricacies of our constitutional framework would be to substitute the edification of theory for the practical evidence of our own senses. To put it more succinctly, in expanding one's intellectual appreciation of the many conceptual

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Parliament of Canada, however, conscious of the limits imposed by the constitution of this country, was careful to preserve, in its amendment to the *Canada Elections Act*, SC 2000, c 9 in 2007, the "power of the Governor General to dissolve Parliament at the Governor General's discretion" (s 56.1 of the Act, as amended).

17 The proclamation declaring and appointing the "red flag" with "a white square" and "bearing a single red maple leaf" as the National Flag of Canada "upon, from and after" February 15, 1965, was issued by the Queen, by and with the advice of the Privy Council for Canada, on January 28, 1965, following a resolution of recommendation by the Senate and concurrence in a Special Committee recommendation by the House of Commons adopted on the 17<sup>th</sup> and 15<sup>th</sup> of December 1964, respectively.

18 The proclamation of the Day of Commemoration of the Great Upheaval is reproduced in the *Canada Gazette*, Part II, Vol 137, No 27, SI/2003-188, and was issued on the advice of the Queen's Privy Council for Canada. Both of these solemn instruments can be said to recognize symbols and features of the Canadian federation; both are essentially declaratory or hortatory in nature. A third, more dated but still significant, example is the proclamation of November 21, 1921, by King George V, of armorial bearings for Canada (the royal arms of the Sovereign in right of Canada, and subsequently considered, in light of Canada's constitutional evolution, as arms of dominion and sovereignty).

facets of the Crown, one ought not to lose sight of the Monarch who bears that Crown.

The popular press instinctively recognizes that there is a significant segment of the population that remains interested in the day-to-day doings and lives of the Queen and the members of the royal family, and royal marriages, births, and anniversaries still result in lavishly-printed souvenir and collector's editions of such periodicals. To deny or to denigrate this persistent phenomenon of royal watching and popular fascination with regal celebrity is to miss the vicarious, if perhaps vestigial, connection that many "ordinary" Canadians still feel on occasions of pomp and circumstance, and when a happy event occurs, such as the Queen's Diamond (and now Sapphire) Jubilee celebrations, the royal wedding in April 2011 of Prince William and Catherine Middleton, their royal tours of Canada as the Duke and Duchess of Cambridge, the births of their children, Prince George and Princess Charlotte, and the Queen's 90<sup>th</sup> birthday commemoration.<sup>19</sup>

We live in more progressive, sophisticated, and egalitarian times than 150 years ago. Yet much of Bagehot's analysis remains viscerally true today:

*A family on the throne is an interesting idea also. It brings down the pride of sovereignty to the level of petty life. No feeling could seem more childish than the enthusiasm of the English at the marriage of the Prince of Wales... . A princely marriage is the brilliant edition of a universal fact, and as such, it rivets mankind. We smile at the Court Circular; but remember how many people read the Court Circular! ... Just so a royal family sweetens politics by the seasonable addition of nice and pretty events.*<sup>20</sup>

This is not to suggest that the personified and "dignified" elements of constitutional monarchy, the ones which Bagehot suggested tend to "excite the most reverence", should in all cases be reduced to theatre and ceremony, or that the Crown as a concept is reducible to a "nice and pretty" jewelled headpiece in the Tower of London. Professor Smith's purpose, at least with respect to the Crown in Canada, is "to reclaim the Crown from Bagehot's dignified limbo" and to argue that "the Crown and its prerogatives empower the political executive and make it efficient in the very sense Bagehot intended when he used

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19 The persistent manifestation of popular feeling and of popular periodicals devoted to the Queen and the royal family is clearly a field ripe for empirical (no pun intended) research. This interest, not only for royal-themed magazines in both English and French (despite the general economic collapse of print media) but for all manner of royal-related memorabilia, must exist to some material extent beyond that held by sentimentalists and obsessives, or there would be no sustainable commercial market for these products in Canada.

20 Bagehot, *supra* note 5 at 34.



that term to describe the non-dignified elements of the constitution: that is to produce an effect.”<sup>21</sup> All of that is eminently desirable; but the analytical focus on the Crown need not obscure or attenuate the natural attraction and affection attached to the Queen as a living person with a family, albeit a royal one.

The Constitution of Canada recognizes that the Crown is a “symbol of allegiance” to a monarchical form of constitutional government, and also protects the “office of the Queen” from significant alteration in the absence of a constitutional amendment under the unanimous consent procedure. In other words, that regal office is part of Canada’s constitutionally-entrenched institutional structure, as are the offices of the Queen’s formal representatives, the Governor General and the Lieutenant Governors.<sup>22</sup> That constitutional protection extends to the constitutional status and dignity of the Queen’s (or, depending on the incumbent, the King’s) office as head of the Canadian state, the executive and legislative roles constitutionally conferred upon the Queen and her representatives, and the related constitutional powers and prerogatives of the regal officer and vice-regal representatives.<sup>23</sup>

## The Queen, the Crown, the Accession and the Coronation

As a matter of law, the demise of the Sovereign leads ineluctably and immediately to the accession to the Throne of his or her successor. There has been no *interregnum* between the death of one King or Queen and the accession of the next since at least the reign of Edward I. An Accession Council meets and the new Sovereign is proclaimed. Upon the decease of George VI on February 6, 1952, the Accession Council met the same day at Saint James’ Palace and proclaimed Elizabeth II Queen in these solemn terms:

Whereas it hath pleased Almighty God to call to His Mercy our late Sovereign Lord King George the Sixth of Blessed and Glorious Memory by whose Decease the Crown is solely and rightfully come to the High and Mighty Princess Elizabeth Alexandra Mary : We, therefore, the Lords Spiritual and Temporal of this Realm, being here assisted with these of His late Majesty’s Privy Council, with representatives of other members of the Commonwealth, with other Principal Gentlemen of Quality, with the Lord Mayor, Aldermen, and citizens of London, do now hereby with one Voice and Consent of Tongue and Heart publish and proclaim that the High and Mighty

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21 Smith, *supra* note 2 at xiv-xv.

22 This flows from the express wording of section 41 of the *Constitution Act, 1982*, which protects “the office of the Queen, the Governor General and the Lieutenant Governor of a province” from constitutional amendment otherwise than by the unanimous consent procedure.

23 I employ the term, ‘vice-regal’, here more out of convenience than precision, as strictly understood, the Governor General and the Lieutenant Governors of Canada are not Viceroy.

Princess Elizabeth Alexandra Mary is now, by the Death of our late Sovereign of happy Memory, become Queen Elizabeth the Second, by the Grace of God Queen of this Realm and of all Her other Realms and Territories, Head of the Commonwealth, Defender of the Faith, to whom Her lieges do acknowledge all Faith and constant Obedience, with hearty and humble Affection: beseeching God, by whom Kings and Queens do reign, to bless the Royal Princess Elizabeth the Second with long and happy Years to reign over Us.<sup>24</sup>

The Queen's Privy Council for Canada also met on February 6, 1952 and issued a similar proclamation to the effect that by the death of the previous Sovereign, Princess Elizabeth had "become our only lawful and rightful Liege Lady" Elizabeth the Second, "Supreme Liege Lady in and over Canada".<sup>25</sup>

The coronation ceremony itself is imbued with spiritual meaning and religious tradition as well as ritual symbolism and pageantry, but it is not, as it was in ancient times, synonymous with accession. The coronation occurs several months or more after the accession of the Sovereign. Edward VIII was King but never crowned and anointed before his abdication. The subsequent coronations of George VI in 1937, and certainly that of Elizabeth II in 1953, are still within the living memory of many Canadians.

The major steps in the coronation service include the Recognition (the popular acceptance of the Queen as Sovereign); the taking of the Oath (to govern by and to maintain the laws of her peoples); the Anointing (by which the Queen was consecrated); the Investiture with the Sword of State, the Robe Royal, the delivery of the Orb and Sceptre, the Rod of equity and mercy, and other regalia, all symbols of her royal office; as well the Crowning (with St. Edward's Crown), the Benediction and the Enthroning.

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24 The London Gazette, Supplement Extraordinary, 6 February 1952, No 39458, P 757.

25 The Canada Gazette, Part II, Vol 86, Extra, 6 February 1952. The text of the Canadian proclamation, issued by the Chief Justice of the Supreme Court, acting as the Administrator of Canada in the absence of a Governor General at the time, read more fully as follows: "WHEREAS it hath pleased Almighty God to call to His Mercy Our Late Sovereign Lord King George the Sixth of blessed and glorious memory by whose decease the Crown of Great Britain, Ireland and all other His late Majesty's dominions is solely and rightfully come to the High and Mighty Princess Elizabeth Alexandra Mary, Now Know Ye that I, the said Right Honourable Thibeaudeau Rinfret, Administrator of Canada as aforesaid, assisted by Her Majesty's Privy Council for Canada do now hereby with one voice and consent of tongue and heart, publish and proclaim that the High and Mighty Princess Elizabeth Alexandra Mary is now by the death of Our late Sovereign of happy and glorious memory become our only lawful and rightful Liege Lady Elizabeth the Second by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas QUEEN, Defender of the Faith, Supreme Liege Lady in and over Canada, to whom we acknowledge all faith and constant obedience with all hearty and humble affection, beseeching God by whom all Kings and Queens do reign to bless the Royal Princess Elizabeth the Second with long and happy years to reign over us."

It is well to remember that in taking the Coronation Oath, Her Majesty solemnly promised and swore to govern the peoples of the United Kingdom, Canada, Australia, New Zealand, and her other possessions and territories “according to their respective laws and customs”, and to cause “Law and Justice, in Mercy” to be executed in all her judgements. That promise reminds us that while the Queen’s realms may, up to a point, have similar constitutional institutions and arrangements, the laws, customs, and conventions of countries such as Canada, Australia, and New Zealand are not identical and may require distinct approaches to achieving common ends.

## Parliament, the Queen, and the Constitution

We have already noted that, along the lines of the British model of legislative sovereignty vesting in the Queen-in-Parliament, the Parliament of Canada is composed of the Queen, the Senate, and the House of Commons,<sup>26</sup> and legislative authority is exercised in the name of the Queen, acting by and with the advice and consent of the two Houses.<sup>27</sup>

Parliament, exercising that authority in relation to the peace, order and good government of Canada, has legislated from time to time in respect of the Queen in various ways. The *Interpretation Act* contains several rules of definition and construction that are of interest in this regard. For example, “Her Majesty, His Majesty, the Queen, the King or the Crown” are defined as meaning “the Sovereign of the United Kingdom, Canada and Her or His other Realms and Territories, and Head of the Commonwealth”, and “Her Majesty’s Realms and Territories” or “His Majesty’s Realms and Territories” as meaning “all realms and territories under the sovereignty of Her or His Majesty.”<sup>28</sup> The Act also provides that “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.” Moreover, a demise of the Crown “does not affect the holding of any office under the Crown in right of Canada”; an oath of office or allegiance need not be taken again, and court proceedings continue “as though there had been no such demise.”<sup>29</sup> In similar fashion, the

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26 *Constitution Act, 1867*, *supra* note 1, s 17 which establishes the Parliament of Canada and provides for its composition.

27 *Ibid*, s 91 which is the principal (although not the exclusive) source of Parliament’s law-making powers. Similarly, the enacting clause in federal statutes reads: “Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows.” See subsection 4(1) of the *Interpretation Act*, RSC, 1985, c 1-21.

28 See *ibid*, s 35(1).

29 See *ibid*, s 46 (“Demise of Crown”).

*Parliament of Canada Act* provides that “Parliament shall not determine or be dissolved by the demise of the Crown” and may continue to sit, proceed, and act “as if that demise had not happened.”<sup>30</sup>

The *Crown Liability and Proceedings Act*, which facilitates certain legal proceedings against the Crown by altering the common-law rule against such proceedings except by petition of right, defines “Crown” as meaning “Her Majesty in right of Canada”, and “person” as a natural person “other than Her Majesty in right of Canada or a province.”<sup>31</sup> It is evident that the use of the term the “Crown” throughout the Act is less cumbersome (and in certain circumstances, less incongruous) than repeating each time, “Her Majesty in right of Canada.” Where “Her Majesty in right of Canada” is a party to civil proceedings before a federal court, the *Official Languages Act* requires Her Majesty (or the federal institution otherwise named in the proceedings) to use, as a general rule, the official language chosen by the other parties.<sup>32</sup>

Other statutes have modernized aspects of the vice-regal institution,<sup>33</sup> or, like the *Royal Assent Act*, have facilitated the exercise of a constitutional power. That Act did not attempt to change the fundamental requirement, expressed in section 55 of the *Constitution Act, 1867*, that for a bill to become law, it must receive assent by the Governor General in the Queen’s name. Rather, it provided for different ways of signifying assent, including by written instrument.<sup>34</sup> The amendment to the *Canada Elections Act* that instituted what is commonly called a fixed date, on a four-year cycle, for general elections to the House of Commons, was careful to preserve the prerogative power of the Governor General to dissolve the House, as contemplated by section 50 of the *Constitution Act, 1867* and the *Letters Patent* of 1947.<sup>35</sup>

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30 *Parliament of Canada Act*, RSC, 1985, c P-1, s 2. (Wisely, s 3 goes on to save the royal prerogative in the following terms: “Nothing in section 2 alters or abridges the power of the Crown to prorogue or dissolve Parliament.”)

31 *Crown Liability and Proceedings Act*, RSC 1985, c C-50, s 2.

32 *Official Languages Act*, RSC 1985, c 31 (4th Supp), s 18.

33 *An Act respecting the Governor General*, RSC 1985, c G-9, and paragraph 81(1)(n) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp), were amended by the *Jobs, Growth and Long-Term Prosperity Act*, SC 2012, c 19, ss 3, 16. This was done to subject the Governor General’s salary to income tax and to increase that salary commensurately.

34 *An Act respecting royal assent to bills passed by the Houses of Parliament*, SC 2002, c 15. These and similar statutes are examples of organic or quasi-constitutional legislation that advance constitutional principles and modernize constitutionally-protected institutions without altering their fundamental nature and role or their essential characteristics: see WJ Newman, “Constitutional Amendment by Legislation” in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) at 105-25.

35 For further discussion of this amendment, see Newman, “Maintaining Fundamental Distinctions”, *supra* note 15.

The *Succession to the Throne Act, 2013* signified the Parliament of Canada's assent to an alteration in the law touching the succession to the Throne that was contemplated in a bill that was then in the process of enactment by the United Kingdom Parliament, which, pursuant to the prior agreement of the representatives of those realms "of which Her Majesty is Sovereign", would abrogate the common-law rule of male primogeniture (thereby no longer making royal succession depend on gender), and end the legal disqualification arising from an heir to the Throne marrying a Roman Catholic.

The Canadian statute was enacted in furtherance of the constitutional convention recited in the preamble to the *Statute of Westminster, 1931* (itself a part of the Constitution of Canada) requiring assent to such alterations to the law of royal succession or the royal style and titles not just by the United Kingdom Parliament but also by the Dominion Parliaments, including Canada.

Some, mainly in academic circles,<sup>36</sup> raised concerns about that approach, suggesting that Parliament should enact substantive Canadian rules on royal succession (assuming that substantive legislation is within the purview of the Parliament of Canada); others argued that a formal constitutional amendment in relation to the office of the Queen should have been sought, which would have required authorizing resolutions of not only the federal legislative Houses but also of the legislative assemblies of all ten provinces.<sup>37</sup> Still others pointed to the Australian approach, which was not to amend the constitution but rather to secure the request of the six Australian states to the enactment of legislation by the Commonwealth Parliament of Australia. This, it was thought, was more in keeping with a domesticated Crown (or Crowns) in a federal state, and reflected the direct relationship the Governors of the Australian states have with

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36 Those critical of the Canadian approach have included Professors Patrick Taillon and Geneviève Motard, who appeared as plaintiffs in a challenge to the validity of the statute, seconded by Professor Anne Twomey, as an expert in Australian constitutional law, Julien Fournier, a doctoral student, and André Binette, who, with Quebec practitioner André Jolicoeur, acted as their counsel. Their views are expressed at length in Michel Bédard & Philippe Lagassé, eds, *La Couronne et le Parlement / The Crown in Parliament* (Montreal: Éditions Yvon Blais, 2015). See also Philippe Lagassé & James WJ Bowden, "Royal Succession and the Canadian Crown as a Corporation Sole: A Critique of Canada's *Succession to the Throne Act, 2013*" (2014) 23:1 Const Forum Const 21, and Garry Toffoli & Paul Benoit, "More is Needed to Change the Rules of Succession for Canada" (2013) 36 Can Parliamentary Rev 10.

37 Philippe Lagassé and Patrick Baud have explored the implications that flow from different understandings of the protected constitutional ambit of the "office of the Queen" and have engaged in a speculative but interesting analysis of how the courts might approach some of the potential issues: see Lagassé & Baud, "The Crown and Constitutional Amendment in Canada", in Bédard & Lagassé, *supra* note 36, and "The Crown and Constitutional Amendment after the *Senate Reform* and *Supreme Court References*", in Macfarlane, *supra*, note 34.

the Sovereign, whereas in Canada, it is the Governor General who appoints the Lieutenant Governors.<sup>38</sup>

In the Constitution of Canada, there is no power of legislative inter-delegation similar to the provision in the Australian Commonwealth constitution. The Parliament of Canada, however, unlike the Australian central Parliament, possesses (as we have seen) a general and residuary power to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the provincial legislatures.<sup>39</sup> The Canadian approach was supported, in the view of the Minister of Justice and Attorney General of Canada, not only by sound legal principle but also by Canadian practice and tradition, as manifested in three precedents dealing with changes relating to the succession to the Throne<sup>40</sup> or the royal style and titles,<sup>41</sup> in which the Parliament of Canada had also signified its assent

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38 On the Australian experience, see the *Succession to the Crown Act 2015*, No 23, 2015, which was enacted pursuant to section 51 (xxxvii) of the Australian Constitution, after requesting statutes were enacted between 2013 and 2015 by Queensland, New South Wales, Tasmania, Victoria, South Australia and Western Australia.

39 See the opening words of section 91 of the *Constitution Act, 1867*, *supra* note 1.

40 The *Succession to the Throne Act*, SC 1937, c 16, s 1, signified the Parliament of Canada's assent, in accordance with the convention in the second recital of the preamble to the *Statute of Westminster, 1931*, to the "alteration in the law touching the Succession to the Throne" that had been enacted by *His Majesty's Declaration of Abdication Act, 1936*, a statute of the Parliament of the United Kingdom that gave legal effect to the Instrument of Abdication signed by King Edward VIII.

41 It will be recalled that the second recital of the preamble to the *Statute of Westminster, 1931* affirmed, as a matter of constitutional convention, that "*any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent of the Parliaments of all the Dominions as of the Parliament of the United Kingdom*" [emphasis added]. Consequently, the Parliament of Canada enacted the *Royal Style and Titles Act (Canada)*, 1947, SC 1947, c 72, by which it gave its assent to the omission from the royal style and titles of the words, "India Emperor" and "Emperor of India". (This statute, like its predecessor on the succession to the Throne, ten years earlier, was assented to in the name of King George VI.) At the Commonwealth Prime Ministers Conference of December 1952, it was agreed that the titles of the new Queen, Elizabeth II, could contain a local as well as "a substantial element common to all", and thus it was that the Parliament of Canada, in the *Royal Style and Titles Act of 1953* (RSC 1985, c R-12) gave its assent to the issuance by Her Majesty of a royal proclamation establishing for Canada the present royal style and titles: "Elizabeth the Second, by the Grace of God of the United Kingdom, Canada and Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith." As Professor Vernon Bogdanor has written in *The Monarchy and the Constitution* (Oxford: Oxford University Press, 1995) at 269, the evolution towards a "locally variable title" was one thing, but "[w]ith regard to the succession, however, it was essential to retain a common rule so that the Commonwealth monarchies should not be a personal union over a fortuitous conglomeration of territories... It remains, therefore, a convention that any alteration in these rules must be agreed between all the members of the Commonwealth which recognize the Queen as their head of state." Whilst "the unity of the *title* of the sovereign" might henceforth admit of some adaptation to local conditions, it would have been "constitutionally inappropriate" to deviate from "the unity of the *person* of the sovereign".

by statute.<sup>42</sup> The constitutionality of the Canadian legislation was also maintained by several prominent academics and constitutional lawyers.<sup>43</sup>

Moreover, the Canadian *Succession to the Throne Act, 2013* was, some might say, particularly well-adapted to the Canadian context. It maintained Canada's control over changes to the law of royal succession by maintaining respect for the constitutional convention that had been followed in Canada and the United Kingdom since the enactment of the *Statute of Westminster, 1931* and the Parliament of Canada's first *Succession to the Throne Act* in 1937. It was also, within the gamut of legal options ostensibly available, or perhaps mooted in academic circles as desirable, the one that was clearly within the realm of the possible. The Parliament of Canada, in its wisdom, chose that option.

A pragmatic approach to achieving the modernization of the legal rules of royal succession does not mean it was an unprincipled approach. The Parliament of Canada's assent to the changes to the rules proposed by the United Kingdom's legislation was predicated upon Canadian legal and political constitutionalism, and respect for the principles of hereditary and constitutional monarchy, the rule of law, constitutional convention, parliamentary sovereignty, and democracy. It also advanced Canadian values with respect to ameliorating the equality of status amongst male and female heirs to the Throne as well as reducing religious discrimination. That approach was also based on legislative precedents, and an understanding of the Canadian constitutional framework that acknowledges, as part of the basic institutional structure, a principle of symmetry that is embodied in a rule of automatic recognition or identification of the Sovereign.

Simply put, the Queen of Canada is recognized as such because she is the Queen of the United Kingdom, as determined by the law of succession to the Crown of the United Kingdom, which body of law may be amended from time to time by the Parliament of the United Kingdom. That rule of

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42 See the evidence of the Honourable Robert Nicholson, Minister of Justice and Attorney General of Canada, in the Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs on Bill C-53, An Act to assent to alterations in the law touching the Succession to the Throne, 21 March 2013; the Minister's and government's position is also set out in "Changing the Line of Succession to the Throne", (2013) 36 Can Parliamentary Rev 8. (I disclose that I appeared with the Minister before the Senate Committee as the expert witness on behalf of the Department of Justice of Canada.)

43 Including, in the study of the bill by the Senate Committee, evidence or submissions by Professors Benoît Pelletier, Andrew Heard and Mark Walters; see also Peter W Hogg, "Succession to the Throne" (2014) 33 NJCL 83; Robert E Hawkins, "'The Monarch is Dead: Long Live the Monarch': Canada's Assent to amending the Rules of Succession", (2013) 7:3 JPPL 592; Mark D Walters, "Succession to the Throne and the Architecture of the Constitution of Canada" in Bédard & Lagassé, *supra* note 36.

automatic recognition of the Queen (or, at some future date, the King) as the Sovereign is a basic imperative of Canadian constitutional law, and it is inherent to the structure of our Constitution and its monarchical and parliamentary institutions and tradition. A change to that fundamental rule of symmetry and Sovereign identification might well require a constitutional amendment in Canada, if Canadians were to decide one day to adopt a different rule. Not so a statute like the *Succession to the Throne Act, 2013*, which respects the actual constitutional structure and implements the constitutional convention of parliamentary assent to alterations to the law of royal succession that is expressly contemplated in the preamble to the *Statute of Westminster, 1931*.

Far from “de-Canadianizing” the Crown, “de-patriating” the Canadian constitution or retreating from the implications of Canada’s independence as a sovereign state, as some of its detractors have claimed, the *Succession to the Throne Act, 2013* is a clear expression of that independence: — the signifying of the solemn assent of a sovereign Canadian Parliament to changes agreed to and concurred in by the members of a “free association” of states united by “a common allegiance to the Crown.”

Professor Mark Walters, in a cogent essay, “Succession to the Throne and the Architecture of the Constitution of Canada”, identifies “two basic ways by which a realm may recognize the King or Queen of the United Kingdom as its King or Queen.” The first is by what he calls a rule of Crown identification (and others, as mentioned above, have called a rule or principle of symmetry or recognition) whereby, as in Canada, the King or Queen is “that person who, at the relevant time, is the person who is the King or Queen of the United Kingdom under the laws of royal succession in force there.” “The simple rule of Crown identification” thus renders the enactment of a domestic, substantive law of royal succession “unnecessary.” The second way is where a realm (such as Australia) chooses to have its own law of royal succession by incorporating, as the substance of that domestic law, “the same body of law that governs royal succession in the United Kingdom.” (Professor Walters terms this an “incorporated law of royal succession.”)<sup>44</sup> He adds:

Is a realm with a rule of Crown identification less independent or sovereign than a realm with an incorporated law of Crown succession? No. At any time, the realm with a rule of Crown identification can amend its law to adopt a different rule for identifying its monarch, or to abolish its monarchy altogether. Until then, the effect

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<sup>44</sup> *Ibid* at 267.



of the rule is simply to spare the realm the burden of having to amend its own law each time the law of royal succession in the United Kingdom changes. . . .

Once the commitment is made by a state to recognize the Crown in the United Kingdom as its Crown, the rule of Crown identification seems much simpler and more efficient than having an incorporated law of Crown succession. However, the legacy of the British empire casts a long shadow. For a realm that still feels insecure about its image as an independent state, the symbolic value of changing its own law each time the law of royal succession is changed in the United Kingdom may be important politically. Even so, it should be understood that this symbolism comes at a very high price in terms of constitutional architecture. By adopting an incorporated law of Crown succession, the realm will have to accept into its own constitutional law large swathes of law that really only make sense in light of the social and religious history of England . . . [T]here are sound reasons for why an independent and sovereign state may prefer having a rule of Crown identification over an incorporated law of Crown succession.<sup>45</sup>

Professor Walters goes on to examine the rule of Crown identification in terms of the “architecture” of the Constitution, a metaphor employed by the Supreme Court of Canada in the *Quebec Secession Reference*, the *Supreme Court Act Reference* and the *Senate Reform Reference*.<sup>46</sup> The objective of this normative analysis, he argues, is not to be framed in terms of “what would make the best constitution — what plans an architect would draw up today.” Rather, the objective is “to identify the best interpretation of the existing constitution.” Viewed in this light, the federal government’s position that Canada has a rule of Crown identification is “consistent with a compelling account of Canadian constitutional architecture”<sup>47</sup> and the growth of a distinctive Canadian constitutional narrative. Professor Walters continues:

The facile assumption that because Canada is truly independent it must have its own law of royal succession, but one borrowed from the United Kingdom, may actually hinder the emergence of a coherent and uniquely Canadian theory of the Crown and the Constitution of Canada.<sup>48</sup>

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45 *Ibid* at 269.

46 Reported at [1998] 2 SCR 217, 161 DLR (4th) 385; [2014] 1 SCR 433, 368 DLR (4th) 577; and [2014] 1 SCR 704, 369 DLR (4th) 577, respectively.

47 Walters, *supra* note 43 at 287.

48 *Ibid* at 291.

## **The Courts, the Constitution, and the Crown**

Canadian courts have been careful not to disturb the constitutional balance in the relationship between the Crown and the Constitution. This is not the place, within the confines of this brief essay, to trace the considerable history of the courts' treatment of the prerogatives of the Crown in Canada or the meaning of the Crown as a legal entity in the context of administrative law, which is often the province of Crown law.<sup>49</sup> There is also a rich and still burgeoning jurisprudence that has been developed by the Supreme Court of Canada in respect of the government's duty to consult with Indigenous peoples and accommodate their interests as an incident of the "honour of the Crown", a principle traceable to the history of Aboriginal-Crown relations and requiring the Crown's governmental representatives to act honourably in their dealings with Indigenous peoples, notably through a duty to consult and accommodate where their rights and interests may be at stake.<sup>50</sup> This duty of honour has been said to derive "from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation"<sup>51</sup> and is "not a mere incantation, but rather a core precept that finds its application in concrete practices",<sup>52</sup> and "cannot be interpreted narrowly or technically": the Crown "must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples."<sup>53</sup> This is an area of the law that will continue to develop.

Rather conscious, as I am, of the limits of these observations, I propose simply to touch upon a couple of recent cases that may help to illustrate how Canadian courts are grappling with matters relating to the place of the Queen and the Crown in our current constitutional framework, with its emphasis on institutions, structural principles and Charter values.

A recent case of interest involved a Charter challenge to the requirement under the *Citizenship Act* for permanent residents who wish to become citizens of Canada to swear an oath or make a solemn affirmation "to be faithful and

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49 My fellow panellists at the aforementioned conference on "The Crown in the 21<sup>st</sup> Century", Professor Philippe Lagassé and Department of Justice colleague Jonathan Shanks, covered the relevant jurisprudence with admirable precision, detail and insight.

50 See, for example, the well-known trilogy of decisions, *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*]; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*]; *Mikasew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388. There have been many decisions invoking the honour of the Crown since that trilogy was rendered.

51 *Taku River*, *ibid* at para 24.

52 *Haida Nation*, *supra* note 50 at para 16.

53 *Taku River*, *supra* note 50 at para 24.

bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors.” In *McAteer v Attorney General of Canada*,<sup>54</sup> the Court of Appeal for Ontario upheld the constitutional validity of the statutory requirement to take the oath or affirmation. The oath of allegiance paralleled that which is embedded in the fifth schedule to the *Constitution Act, 1867* and is required (by section 128 of that Act) of all members of the federal legislative houses and provincial legislative assemblies. As the administration of that oath could not be a violation of the *Canadian Charter of Rights and Freedoms*, a similar statutory requirement applying to those wishing to become citizens of Canada ought, the Court reasoned, to be viewed in the same light.

More to the point, the meaning of the oath of allegiance to the Queen had evolved as Canada had evolved, from colony to independent nation. The oath was a “symbolic commitment” to Canada being “governed as a democratic constitutional monarchy unless and until democratically changed.”<sup>55</sup>

That reading may have downplayed or depersonalized, in the eyes of some, the sense of allegiance to the Queen and her heirs and successors that the oath originally intended to articulate, but the Court’s emphasis on the oath being to “the Queen of Canada” and not to the Queen as a foreign sovereign is consistent with a Canadian account or narrative that seeks to reconcile the constitutional status of our Queen, as the regal incumbent of the monarchical office in Canada, with the rights and values protected by the more recent parts of our constitutional framework, including the Charter that was constitutionally entrenched in 1982.

On the rules relating to the succession to the Throne, Canadian courts have rejected arguments that the requirement under the laws of the United Kingdom that the King or Queen must be in communion with the Church of England offends the *Canadian Charter of Rights and Freedoms*; there is no established religion in Canada and the restrictive provisions of the English *Bill of Rights* of 1688 and the *Act of Settlement* of 1701, which are particular to the historical context in England, are not provisions of the Constitution of Canada.<sup>56</sup> Canada has a constitution similar in principle to that of the United Kingdom

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54 2014 ONCA 578, 121 OR (3d) 1.

55 *Ibid* at para 62.

56 *O’Donohue v Canada*, [2003] OJ No 2764, 109 CRR (2d) 1 (ONSC), aff’d [2005] OJ No 965, 137 ACWS (3d) 1131 (Ont CA); *Teskey v Canada (Attorney General)*, 2013 ONSC 6386, 234 ACWS (3d) 571 (decided on grounds of standing and justiciability), aff’d 2014 ONCA 612, 377 DLR (4th) 39, leave to appeal to SCC refused, 36137 (19 February 2015). See also the judgment of the Quebec Superior Court in *Motard and Taillon v Canada (Attorney General)*, 2016 QCCS 588 at paras 151-55, 266 ACWS (3d) 349.

and has inherited, through the preamble to the *Constitution Act, 1867*, such principles as constitutional monarchy and hereditary royal succession, parliamentary sovereignty and parliamentary privilege, judicial independence and the rule of law, which may be said to derive from those venerable English statutes, but that is not the same thing as saying that the statutory provisions themselves apply as part of Canadian constitutional law, without any discernment as respects the Canadian legal, historical, social, and political context.

Still more recently, the constitutional validity of the *Succession to the Throne Act, 2013* has been upheld by the Superior Court of Quebec. Justice Claude Bouchard, writing for the Court, held that the Parliament of Canada possessed the authority, by virtue of its residuary legislative power set out in the opening words of section 91 of the *Constitution Act, 1867*, to enact a law assenting to changes to the British law governing succession to the Throne. Moreover, “there was no need for Canada to amend its laws or its Constitution to enable the British rules of royal succession to be changed and operative; all that was required according to the preamble to the *Statute of Westminster* and the constitutional convention therein was its assent. Besides, under the rule of symmetry, whoever was crowned King or Queen of the United Kingdom was also the King or Queen of Canada.” As well, “the articles of the *Bill of Rights* and the *Act of Settlement* do not form part of the Canadian Constitution” and need not be amended in Canada. It was the principles, not the provisions, of those statutes that “form part of the fabric” of the Constitution of Canada.<sup>57</sup>

Changes to the rules of royal succession in the United Kingdom did not constitute an amendment to the Constitution of Canada in relation to the “office of the Queen.” A distinction needed to be drawn between the 2013 legislative initiative and “changes in relation to the powers, status and constitutional role of the Crown.” The “sole purpose” of the *Succession to the Throne Act, 2013* was “to express Canada’s assent to alterations to the British law on royal succession, in fulfilment of the constitutional convention set out in the second recital of the preamble to the *Statute of Westminster, 1931*.” Finally, “the *Succession to the Throne Act, 2013* did not give force of law to the British statute in Canada or extend it to Canada, either directly or by incorporation by reference.”<sup>58</sup>

As this decision has been appealed to the Quebec Court of Appeal and a hearing is still pending, I will forebear from any comment on the reasoning of the Superior Court, except to say that it was consistent with the arguments

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<sup>57</sup> *Ibid* at paras 143, 146, 148, 152, respectively (an official English translation of the reasons for judgment was issued by the Court).

<sup>58</sup> *Ibid* at paras 138, 155, 158, respectively.

advanced by counsel for the Attorney General of Canada, who defended the validity of the Act,<sup>59</sup> and by the Honourable Serge Joyal, who intervened personally in support of the legislation.<sup>60</sup>

## Conclusion

The Constitution of Canada confers important powers and responsibilities on the Queen and her Canadian representatives, the Governor General, and Lieutenant Governors, and protects the monarchical and vice-regal offices from abolition or fundamental change without a constitutional amendment approved by the federal Houses of Parliament and all provincial legislative assemblies. At the same time, these institutions of the Crown in Canada may be modernized to a certain extent and their roles and functions advanced and implemented by federal and provincial legislation which respects the underlying principles, structure, and essential characteristics of those offices.

As long as Canada remains a constitutional monarchy, and unless and until fundamental change in relation to the regal office and its emanations is contemplated as part of the constitutional agenda, Canadians have an interest in ensuring respect for the constitutional status, dignity, and powers of those formal officers of state, the Queen, the Governor General, and provincial Lieutenant Governors. Canadian values such as legal continuity, certainty, and stability, which are a hallmark of our constitutional experience, as well as constitutional principles, including responsible government, federalism, and the rule of law in a parliamentary democracy, encourage and favour that respect.

Just as strict legality interacts, in our constitutional system, with notions of legitimacy — through the ethos and action of legal and political constitutionalism — so too our monarchical institutions, like our parliamentary and judicial institutions, must remain vibrant. Our Queen and Governor General, as well as our Lieutenant Governors, are not wax effigies or embalmed vestiges

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59 I disclose that I acted, with my colleagues David Lucas and Sébastien Gagné, as counsel for the Attorney General of Canada in pleading the position of the Government of Canada in this case. Dr Peter Oliver of the Faculty of Law of the University of Ottawa, author of *The Constitution of Independence, the Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford: Oxford University Press, 2005), acted as an expert witness on comparative constitutional and Commonwealth law on behalf of the Attorney General of Canada. His report, which was filed with the Court, was entitled “The Commonwealth, Constitutional Independence and Succession to the Throne”.

60 Senator Joyal, Ad E, is a long-time member of the Senate Committee on Legal and Constitutional Affairs. His views are set out in his book chapter, “La monarchie constitutionnelle au Canada: une institution stable, complexe et souple”, in Bédard & Lagassé, *supra*, note 36.

of a colonial past. The Queen (and the royal family) still connect with many of us at a human as well as at an exalted institutional level. There is something modern and cosmopolitan, not inward or backward-looking, about sharing a Monarch with other fully-independent parliamentary democracies, simply because we choose to maintain that common bond, that common allegiance. To speak only of the Crown, and never of the Queen (or the King), is to risk losing the living identity of the Crown in a realm of abstractions and abstruse and often sterile debate. It is all very well, for example, to examine dispassionately the advantages and disadvantages of conceptualizing the Crown as a corporation sole, but erudite discussions may quickly become arcane and inaccessible to all but a handful of initiates.<sup>61</sup>

Of course, none of this would matter if the Crown and our regal and vice-regal institutions were simply the inanimate objects of disinterested academic study, and if our constitutional structure was more archeological than architectural in design and function. However, our Monarch, her representatives and her Ministers of the Crown are real persons exercising, directly or upon advice, real powers, and Parliament and the provincial legislatures exercise legislative authority that not only engages many of the same actors in the law-making process but may also, at times, touch upon the office-holders or institutions themselves. Sometimes disputes arise as to the nature, degree, and limits of those powers or that authority under the Constitution, and to the extent that those disputes raise legal questions, it falls to the courts to adjudicate those disputes in accordance with the law of the Constitution, as informed by underlying principles.

Constitutional lawyers, historians, political scientists, moral philosophers, and theoreticians have a responsibility to the Canadian polity and public to keep the law of the Crown and the monarchy reasonably accessible and tangible. This is not to suggest that debate must be stifled or that positions strongly-held out of conviction and intellectual rigour should be abandoned. It is to say, however, that academic fora can often resemble hot-house environments where rare orchids and other exotic plants may thrive but where the Constitution as a living tree begins to be choked off at the roots.

The challenge is to combine the study of the Crown in Canada with a sense of the practical and the pragmatic whenever theory crosses the confines of the university debating room and enters the threshold of legal adjudica-

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<sup>61</sup> The constitutional historian FW Maitland pointed out the many dangerous flights of fancy attendant upon treating the Crown as “parsonified” more than a century ago in “The Crown as Corporation” (1901) 17 *Law Q Rev* 131.

tion. All thinking persons have an interest in multidisciplinary approaches to solving problems, but they are also wise to acknowledge the limits of their special expertise and to have the professional maturity to recognize that there are times when sustaining an argument of principle may be little more than doggedly maintaining an intellectual conceit that one's position is inherently right, despite context and circumstances. That is precisely when it is time to remember the old maxims — the twin pillars of natural justice — *nemo iudex in sua causa*, and *audi alteram partem*. No one should be a judge in his or her own case, and, especially, hear the other side.

The courts in Canada, like the courts in the United Kingdom, have examined legal and constitutional issues related to the Crown through a generally-cautious lens, and via an approach that is both principled and pragmatic. Thus, for example, if, as in the *Alberta Indians* case, the learned justices diverged in the theories they espoused as to just when and how the transfer of obligation from the Crown in right of the United Kingdom to the Crown in right of Canada (or perhaps in right of Canada and the provinces, respectively, in certain instances) was accomplished, they came together as to the practical legal result achieved, that any continuing obligations were now the responsibility of Her Majesty's government in Canada, rather than Her Majesty's government in the United Kingdom. As the Vice-Chancellor, Sir Robert Megarry, put it: "Just how the doctrine works may seem to be obscure, but that is no doubt due to our frail vision: what the *Alberta* case shows is that somehow it does work, and work beyond a peradventure."<sup>62</sup>

Canada is now a fully-independent state, but that status is in no way inconsistent with its freely-maintained association with other Commonwealth states in continuing to profess a common allegiance to Her Majesty, "of the United Kingdom, Canada, and Her other Realms and Territories, Queen." Canada remains a constitutional monarchy, and the office of the Queen and those of the Governor General and provincial Lieutenant Governors are constitutionally protected. This is no vestige of a colonial past, but a testament to our shared constitutional heritage and the stability of our constitutional development, as well as a living link with a vibrant and cosmopolitan Sovereign.

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62 *Manuel*, *supra* note 14 at 799.





# Royal Treatment: The Crown's Special Status in Administrative Law

*Paul Daly\**

*My focus in this paper is on the treatment of the Crown by the courts, especially Canadian courts, in judicial review of administrative action. In three areas of administrative law, the Crown has been accorded a special status, distinct from that of statutory bodies: administrative powers, justiciability, and remedies.*

*In respect of administrative powers, the Crown qua Crown has inherent capacities that are not available to statutory bodies. In respect of prerogative powers, the grounds of judicial review are restricted. In respect of the remedies that courts may grant, these may be more limited when exercises of the prerogative are involved.*

*In the cases, the special status of the Crown is asserted rather than justified: it is a legal fact in search of a normative justification. The absence of a convincing normative justification for the special status of the Crown in judicial review of administrative action is significant, because the outcome of a case could well turn on whether the power deployed to effect a change in an individual's legal position was exercised by the Crown or by a statutory decision-maker.*

*My discussion of the three areas leads me to suggest that it should be possible to bring the treatment of the Crown into line with that of other administrative decision-makers without creating serious jurisprudential difficulties.*

*Cet article porte sur le traitement de la Couronne par les tribunaux, en particulier les tribunaux canadiens, dans le cadre de la révision judiciaire de mesures administratives. Dans trois domaines du droit administratif, on a accordé un statut spécial à la Couronne, distinct de celui des organismes de droit public : les pouvoirs administratifs, la justiciabilité et les recours.*

*En ce qui concerne les pouvoirs administratifs, la Couronne en tant que telle jouit de capacités intrinsèques qui ne sont pas disponibles aux organismes de droit public. En matière de prérogatives, les motifs de la révision judiciaire sont restreints. En ce qui concerne les recours que peuvent accorder les tribunaux, ceux-ci peuvent être plus limités lorsque l'exercice des prérogatives est en cause.*

*Dans les causes, le statut spécial de la Couronne est affirmé plutôt que justifié : il est un fait juridique à la recherche d'une justification normative. L'absence d'une justification normative convaincante du statut spécial de la Couronne dans le cadre de la révision judiciaire de mesures administratives est significative, car le résultat d'une cause pourrait bien dépendre de ce que le pouvoir déployé pour changer la position juridique d'un individu soit exercé par la Couronne ou par une personne habilitée à prendre des décisions statutaires.*

*Ma discussion de ces trois domaines m'amène à suggérer qu'il devrait être possible de rendre le traitement de la Couronne compatible avec celui d'autres décideurs administratifs sans créer de graves difficultés jurisprudentielles.*

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## Introduction

The Crown remains a mysterious entity in common law thought. H.R.W. Wade wrote that “[t]he legal nature and position of the Crown ... have been the subject of some remarkably contradictory judicial opinions”; although such questions “ought to be very familiar and well settled,” “the nearer they come to the bedrock of the constitution, the less certain the judges seem to be.”<sup>1</sup> F.W. Maitland’s warning that “the crown is a convenient cover for ignorance” remains apposite.<sup>2</sup> So it is that the Crown has been described as a “corporation sole,” but also as a “corporation aggregate”<sup>3</sup> — and if a “corporation” it be, it is one that, by virtue of its imperial history, has many subsidiaries.<sup>4</sup>

My focus in this paper is on the treatment of the Crown by the courts, especially Canadian courts, in judicial review of administrative action (a term I use interchangeably with “administrative law”). As I will demonstrate, through an analysis that will be comprehensive if not necessarily exhaustive, in three areas of administrative law, the Crown has been accorded a special status, distinct from that of statutory bodies: administrative powers, justiciability, and remedies. In respect of administrative powers, the Crown *qua* Crown has inherent capacities that are not available to statutory bodies. In respect of prerogative powers, the grounds of judicial review are restricted. In respect of the remedies that courts may grant, these may be more limited when exercises of the prerogative are involved.

A particular concern is that the special status of the Crown is asserted rather than justified: it is a legal fact in search of a normative justification. It may well be possible to justify the royal treatment of the Crown by the courts, perhaps by reference to the historical evolution of the Westminster-style con-

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1 “The Crown, Ministers and Officials: Legal Status and Liability” in Maurice Sunkin & Sebastien Payne eds, *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999) 23 at 23.

2 *The Constitutional History of England* (Cambridge: Cambridge University Press, 1908) at 418. See further the discussion, below, nn 26-34 of *Canadian Doctors for Refugee Care v Canada*, 2014 FC 651 [*Canadian Doctors for Refugee Care*].

3 *M v Home Office*, [1994] 1 AC 377 (HL) at 424, Lord Woolf: “[The Crown] can be appropriately described as a corporation sole or a corporation aggregate”. See also Cheryl Saunders, “The Concept of the Crown” (2015) 38:3 Melbourne UL Rev 873.

4 See variously *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte The Indian Association of Alberta and others*, [1982] QB 892 (CA); *R (Quark Fishing) v Secretary of State for Foreign and Commonwealth Affairs*, [2006] 1 AC 529 (HL); *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*, [2009] AC 453 (HL). See generally Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford: Oxford University Press, 2005).

stitution or, as a political scientist has put it, “a tacit acceptance” by the other branches of government “of the necessity of an effective, discretionary executive” that operates unfettered so long as the legislature declines to enact statutory provisions encroaching on territory occupied by the executive.<sup>5</sup> But any such justification is absent from the decided cases discussed below and, in any event, these justifications go more to the legitimacy of the continued existence of the prerogative (with which I do not quarrel) than to the legitimacy of the distinctions that have been drawn between the Crown and statutory bodies. The absence of a convincing normative justification for the special status of the Crown in judicial review of administrative action is significant, because the outcome of a case could well turn on whether the power deployed to effect a change in an individual’s legal position was exercised by the Crown or by a statutory decision-maker.<sup>6</sup> My discussion of the three areas leads me to suggest that it should be possible to bring the treatment of the Crown into line with that of other administrative decision-makers without creating serious jurisprudential difficulties.

## Administrative powers

The Supreme Court of Canada has been very clear that administrative decision-makers may exercise only those powers granted by statute. A statutory body “enjoys no inherent jurisdiction.”<sup>7</sup> The leading case on the powers of administrative decision-makers is *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*.<sup>8</sup> There Bastarache J. explained that “in the area of administrative law” decision-makers obtain their powers from only two sources: “(1) express grants of jurisdiction under various statutes (explicit powers); and (2) the common law, by application of the doctrine of jurisdiction by necessary implication (implicit powers).”<sup>9</sup>

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5 Philippe Lagassé, “Parliamentary and judicial ambivalence toward executive prerogative powers in Canada” (2012) 55:2 *Can Public Administration* 157 at 158, citing Harvey C Mansfield, *Taming the Prince: the Ambivalence of Modern Executive Power* (Baltimore: Johns Hopkins University Press, 1993) [Lagassé].

6 I use the term Crown in a catch-all sense in this paper, much as the courts have tended to do; I am comfortable doing so in light of the confusion I referred to at the outset. I appreciate that finer-grained distinctions may be possible — for instance, between powers inhering in the Crown and powers conferred upon the Crown (or its servants) by statute. But my objective in this paper is not to lay out a taxonomy of Crown powers. It is to demonstrate that the Crown has a special status that is not readily justifiable, especially because there are important consequences for individuals depending upon the nature of the power used to alter their legal positions.

7 *AG of Que and Keable v AG of Can et al*, [1979] 1 SCR 218 at 249.

8 2006 SCC 4, [2006] 1 SCR 140 [*ATCO*].

9 *Ibid* at para 38.

Bastarache J.'s reference to the common law is apt to mislead. Implicit powers are not free-standing but must be tied to statutory authority. As Lord Shelborne advised, "this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may *fairly be regarded as incidental to or consequential upon*, those things that the legislature *has authorized* ought not (unless expressly prohibited) to be held by judicial construction, to be ultra vires."<sup>10</sup> Indeed, despite his reference to "the common law," Bastarache J. took a relatively restrictive view of the permissible scope of implied powers: "the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are *practically necessary* for the accomplishment of the object intended to be secured by the statutory regime created by the legislature."<sup>11</sup>

Quite how tightly an implied power must be tethered to statute is uncertain. For instance, in *R (New London College) v Home Secretary*,<sup>12</sup> Lord Sumption and Lord Carnwath took different views on this question. For Lord Sumption, the Home Secretary's authority to change her guidance on immigration sponsorship applications by educational institutions flowed from her "statutory power ... to administer the system of immigration control," which "must necessarily extend to a range of ancillary and incidental administrative powers not expressly spelt out...".<sup>13</sup> For Lord Carnwath, however, an implicit power must be "reasonably incidental" to an express statutory power;<sup>14</sup> here, it was an "adjunct" to the "the specific function of providing for entry for study."<sup>15</sup> But it is clear that, as far as express and implied powers are concerned, a statutory tether is always required.

Where the Crown is concerned, however, the statutory tether can be cast off.<sup>16</sup> Consider *Pharmaceutical Manufacturers Assn of Canada v British*

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<sup>10</sup> *Attorney-General v Great Eastern Railway Co* (1880), 5 AC 473 at 478 (HL).

<sup>11</sup> *ATCO*, *supra* note 8 at para 51 [emphasis added]. For applications of this principle, see *Bell Canada v Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 SCR 1722; *Chrysler Canada Ltd v Canada (Competition Tribunal)*, [1992] 2 SCR 394; *Canadian Pacific Air Lines Ltd v Canadian Air Line Pilots Association*, [1993] 3 SCR 724.

<sup>12</sup> [2013] 1 WLR 2358 (UKSC) [*New London College*].

<sup>13</sup> *Ibid* at para 28. See also *R v Criminal Injuries Compensation Board, ex parte Lain*, [1967] 2 QB 864 (CA) at 886-87 [*ex parte Lain*].

<sup>14</sup> *New London College*, *supra* note 12 at para 33.

<sup>15</sup> *Ibid* at para 37.

<sup>16</sup> The point is controversial. See e.g. Bruce Harris, "The 'Third Source' of Authority for Government Action" (1992) 108 Law Q Rev 626, "The 'Third Source' of Authority for Government Action Revisited" (2007) 123 Law Q Rev 225, and "Government 'Third Source' Action and Common Law Constitutionalism" (2010) 126 Law Q Rev 373; John Howell, "What the Crown May Do" (2010) 15:1 Judicial Rev 36; Lord Lester of Herne Hill & Michael Weait, "The Use of Ministerial Powers

*Columbia (Attorney General)*.<sup>17</sup> At issue here was the province's administration of its "largely non-statutory" Pharmacare program.<sup>18</sup> In order to cut costs, the province classified different but "therapeutically equivalent" prescription medications into "reference categories," creating baseline prices above which patients would not be reimbursed; in exceptional circumstances, physicians could also apply for "special authority" to fully compensate Pharmacare patients for whom more expensive medication was prescribed.<sup>19</sup> There were "no regulations or statutory provisions governing the process by which categories of drugs are deemed to be therapeutically equivalent, or governing the granting of special authorities."<sup>20</sup>

Newbury J.A. accepted as a general matter "the general power of government to make executive decisions regarding the expenditure of public funds to which individual members of the public have no enforceable entitlement."<sup>21</sup> In her view, "the Crown has the capacities and powers of a natural person."<sup>22</sup> Just as a billionaire could set up a Pharmacare scheme and establish criteria for participation, so too could the provincial Crown.<sup>23</sup> In doing so, the Crown would be subject to the law, in the sense that judicial review of the scheme would be available.<sup>24</sup> But the existence of judicial oversight did not affect the "Crown's ability to establish Pharmacare in the first place or to restrict it by means of reference-based pricing in the second place."<sup>25</sup>

More recently, in *Canadian Doctors for Refugee Care v Canada*,<sup>26</sup> the Federal Court held that cuts to refugee healthcare were "cruel and unusual" treatment that violated the *Charter of Rights and Freedoms*.<sup>27</sup> On a preliminary point, Mactavish J. concluded that the funding and consequently the de-

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without Parliamentary Scrutiny: the Ram Doctrine" (2003) Public L 415; Adam Perry, "The Crown's Administrative Powers" (2015) 131 Law Q Rev 652.

17 (1997), 149 DLR (4th) 613 [*Pharmacare*].

18 *Ibid* at para 2.

19 *Ibid* at para 3.

20 *Ibid* at para 4.

21 *Ibid* at para 27.

22 *Ibid*.

23 *Ibid* at paras 27-28. See also *Attorney General of Quebec v Labrecque*, [1980] SCR 1057 at 1082, Beetz J:

The Crown is also the Sovereign, a physical person who, in addition to the prerogative, enjoys a general capacity to contract in accordance with the rule of ordinary law. This general capacity to contract, like the prerogative, is also one of the attributes of the Crown in right of a province.

24 See also *McDonald v Anishinabek Police Service* (2006), 83 OR (3d) 132 (CA).

25 *Pharmacare*, *supra* note 17 at para 30.

26 2014 FC 651.

27 Part 1 of the *Constitution Act 1982* (UK), being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 12: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment".

funding of the healthcare programme for refugees was *intra vires* the federal executive. No statutory authorization was necessary to support the programme given the broad executive authority accorded to the federal executive under the Canadian constitution. Mactavish J. did not clearly identify the source of the power to fund refugee healthcare. She cited Peter Hogg: “[s]ometimes, the term ‘prerogative’ is used loosely, in a wider sense, as encompassing all the powers of the Crown that flow from the common law ... [but] [n]othing practical now turns on the distinction between the Crown’s ‘true prerogative’ powers and the Crown’s natural-person powers, because the exercise of both kinds of powers is reviewable by the Courts.”<sup>28</sup> And she seemingly agreed that any potential distinction was unnecessary in this case, because in the absence of clear statutory language, “the Crown’s prerogative power to spend in an area not addressed by statute remains intact... .”<sup>29</sup>

Given the broad scope of the Crown’s authority to act as a natural person, it was simply unnecessary to determine whether the refugee healthcare scheme was enacted by virtue of the prerogative or of the Crown’s other common-law powers. This conclusion might, however, be criticized. Prerogative powers follow the constitutional division of powers between the federal government and the provinces.<sup>30</sup> However, “health” “is not an enumerated head” of federal or provincial competence,<sup>31</sup> “but instead is an amorphous topic which can be addressed by valid federal or provincial legislation, depending in the circumstances of each case on the nature or scope of the health problem in question.”<sup>32</sup> Although the federal government’s exercises of its spending power and its criminal-law competence have permitted it to exercise a great deal of authority in relation to healthcare, “health” is not a federal competence and, in general, matters of healthcare provision fall more naturally under the broad provincial competences in respect of hospitals, property and civil rights, and local matters.<sup>33</sup> It might even be argued that the prerogative to establish *ex gratia* healthcare schemes is a provincial competence, which would render the refugee healthcare scheme *ultra vires* the federal government. There is, of course, a plausible counter-argument to the effect that a refugee healthcare scheme flows

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28 *Canadian Doctors for Refugee Care*, *supra* note 2 at para 392, citing Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf) at 1-19.

29 *ibid* at para 401.

30 *Bonanza Creek Gold Mining Company v The King*, [1916] 1 AC 566 (PC) at 580.

31 *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 32, LaForest J, dissenting, but not on this point.

32 *Schneider v The Queen*, [1982] 2 SCR 112 at 142, Estey J.

33 *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 92(7), (13), (14), reprinted in RSC 1985, Appendix II, No 5.

from the federal government's authority over immigration.<sup>34</sup> Nonetheless, this constitutional issue only arises if the power is prerogative in nature. If the scheme could be established pursuant to another common-law power, then there would surely be no division-of-powers problem, because the attribution of the "capacities and powers of a natural person" to the federal or a provincial Crown could not be inhibited by the constitutional division of powers. The point is that the distinction could matter and, indeed, may matter more in a different case; Mactavish J.'s ability to glide over the distinction reinforces my observation at the outset that confusion reigns in respect of the Crown.

Despite this quibble, it is clear that the Crown in Canada benefits from some inherent powers that are not granted by statute and that do not necessarily reside in the royal prerogative. It has the capacities of a natural person and, as such, can do those things that a natural person can do. In an incisive recent essay, Adam Perry has cast serious doubt on whether the legal principles just summarized are coherent; in particular, he argues, courts and commentators have tended to conflate permissions (the absence of prohibitions on action) and powers (the ability — including the authority conferred by law — to do something).<sup>35</sup> In any event, such latitude is not afforded to administrative decision-makers. As statutory bodies, they have no inherent capacities and possess only those powers expressly or implicitly conferred by statute.

The stakes of the debate about inherent powers were well explained by Carnwath L.J. in *Shrewsbury & Atcham Borough Council v Secretary of State for Communities & Local Government*.<sup>36</sup> The discussion there focused on the powers of the Crown, rather than those of statutory bodies, but provides a useful entrance point to the discussion. Carnwath L.J. took the view that "the powers of the Secretary of State are not confined to those conferred by statute or prerogative, but extend, subject to any relevant statutory or public law constraints, and to the competing rights of other parties, to anything which could be done by a natural person."<sup>37</sup> He relied on the decision of the Court of Appeal in *R v Secretary of State for Health ex parte C*,<sup>38</sup> where the respondent's power to maintain a non-statutory list of sex offenders was upheld. But he was critical of this decision. In his view, any category of so-called inherent powers "is exceptional, and should be strictly confined": "As a matter of capacity, no doubt, [the Crown] has power to do whatever a private person can do. But as an organ

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34 *Ibid*, s 91(25).

35 "The Crown's Administrative Powers" (2015) 131 Law Q Rev 652 [Perry, "Administrative Powers"].

36 [2008] EWCA Civ 148 [*Shrewsbury & Atcham Borough Council*].

37 *Ibid* at para 44.

38 [2000] 1 FLR 627 (CA) [*Ex parte C*].

of government, it can only exercise those powers for the public benefit, and for identifiably 'governmental' purposes within limits set by the law."<sup>39</sup> Although Carnwath L.J. was concerned there with the Crown and not a statutory body, similar concerns arise in the latter case. On the one hand, to operate effectively statutory bodies must be able to use a wide variety of powers that have not specifically been granted to them. On the other hand, any such additional powers cannot be unlimited; more to the point, unless they are expressly granted or necessarily implicit in specific statutory grants of authority, they cannot be used to "coercive" effect<sup>40</sup> (that is, to modify the legal position of a subject against her will), can only be used to support the attainment of statutory objectives and their exercise must otherwise respect the law.

There is no doubt that this is "a difficult question with far-reaching constitutional implications,"<sup>41</sup> but in my view there is at least an argument for extending the same judicial generosity for inherent Crown powers to administrative decision-makers more generally. Take as a starting point a choice between two different ways of recognizing the powers of statutory decision-makers. One may say that *all* government action (including powers to contract, manage property and so on) must be expressly or impliedly authorized by statute in which case, on the conventional view, only those powers expressly granted by or implicit in a statutory scheme can be used to coercive effect. This is the conventional view laid out by Bastarache J. in the *ATCO* case. Alternatively, one may say that there are three categories of authority: express, implicit, and inherent, the last of which cannot be used to coercive effect.

On its face, option one may seem more attractive because it limits the powers that statutory bodies can claim, whereas option two seems to give them an additional category of powers. Probing further, however, casts doubt on the *prima facie* appeal of option one. The key question is the identification of implied powers. Does the test for an implied power require that the power should be *necessary* to give effect to express statutory provisions, or simply that it should be *reasonably incidental* to the express provisions?

Those who choose option one might prefer a test of necessity to a test of reasonableness because it makes coercive action harder to justify by limiting the range of powers that may be used coercively. But if one takes option one and insists that coercive action must be expressly or implicitly authorized, one will often have to strain to imply a power to carry out a wide range of activ-

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39 *Shrewsbury & Atcham Borough Council*, *supra* note 36 at paras 47-48.

40 *New London College*, *supra* note 12 at para 28.

41 *R (Hooper) v Secretary of State*, [2005] 1 WLR 1168 (HL) at para 6, Lord Nicholls of Birkenhead.



ities not expressly provided for in statute. As long as “[t]he complex process of government includes a vast amount of work in relation to the formulation of policy, drafting new legislation and preparing for its implementation,”<sup>42</sup> judges responding to the felt necessities of administration can be expected to try to accommodate the practical needs of government, including the recognition of powers to contract and manage property. For this reason, the introduction of “any limiting principle” designed to cabin administrative powers would risk being “so wide as to be of no practical utility or would risk imposing an artificial and inappropriate restriction upon the work of government.”<sup>43</sup> Put simply, one who chooses option one will find herself drawn in practice to a test of *reasonably incidental* rather than *necessary*. If the test for implied powers is that they merely be *reasonably incidental*, a great deal of coercive action becomes possible.<sup>44</sup> Casting the net of implied powers wide will legitimate a broad range of governmental action that infringes individuals’ rights and interests. By contrast, a test of necessity would constrain coercive government action.

Rather than straining to shoehorn the many varieties of administrative action into the categories of express and implied powers, judges and jurists would be better to recognize that there are express powers, accompanied by powers *necessarily implicit* in the statutory scheme, and also a residue of inherent powers *reasonably incidental* to statutory functions, which can be used to write contracts, hire staff, issue guidelines and so on; in short, to enable those bodies to fulfil their statutory objectives more effectively.<sup>45</sup> But where a statutory body

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42 *Shrewsbury & Atcham Borough Council*, *supra* note 36 at para 73, Richards LJ.

43 *Ibid* at para 74, Richards LJ.

44 The situation may become even more grave when there is general legislation (such as, for instance, section 7 of the *Financial Administration Act*, RSC 1985, c F-11) that grants administrative powers in broad terms, for any coercive action might (in principle) be authorized by virtue of being reasonably incidental to a broad grant of authority; a very wide range of coercive action would thus be justified (although, the drafter of the *Financial Administration Act* might well have doubted this, for section 7.2(5) provides that the Treasury Board has “the capacity of a natural person,” thereby suggesting that the body’s inherent powers spring from a different source than the general sources provided for in broad terms in section 7). A more restrictive necessity standard would limit the range of powers that could be used by reference to broad grants of authority; additional powers would be recognised as inherent, on my approach, exercisable only in a non-coercive fashion. There would undoubtedly be difficult questions of interpretation in situations where broad statutory powers and inherent statutory powers co-existed (though in the case of the *Financial Administration Act*, a distinction has apparently been made in those terms by the drafter): see also *Canada (Prime Minister) v Khadr (No 2)*, 2010 SCC 3 at para 35, [2010] 1 SCR 44, discussed in Lagassé, *supra* note 5 at 166 [*Khadr (No 2)*].

45 This analysis differs slightly from Adam Perry’s analysis of the Crown’s administrative powers. Perry argues persuasively that certain powers of the Crown exist by virtue of community acceptance: “Ultimately, the Crown’s non-legal powers derive from our willingness as a community to attribute ordinary acts to the Crown”: Perry, “Administrative Powers”, *supra* note 35 at 663. It is doubtful, however, that community acceptance would justify the attribution to statutory bodies of inherent

wishes to change an individual's legal position without her consent, the power employed would have to be express or necessarily implicit.<sup>46</sup>

The *New London College* case juxtaposes options one and two quite nicely. Lord Carnwath went with option one and, predictably, a test of *reasonably incidental*.<sup>47</sup> He tied the issuing of mandatory guidance as to the criteria for becoming a sponsor to a specific provision in the *Immigration Act, 1971*; it was an “adjunct” to the statutory power to regulate admissions for the purposes of study.<sup>48</sup> Perhaps notably, Lord Carnwath's reliance on a test of reasonableness allowed him to imply a power to *revoke* any licences granted;<sup>49</sup> a more robust test of necessity might have required an express power to grant and revoke given the obvious detriment caused by revoking licences.

By contrast, Lord Sumption was more adventurous. For him, the issuing of guidelines could be understood as flowing from the Home Secretary's general power under the legislation: “the statutory power of the Secretary of State to administer the system of immigration control must necessarily extend to a range of ancillary and incidental administrative powers not expressly spelt out in the Act, including the vetting of sponsors.”<sup>50</sup> Subject to a caveat I will discuss momentarily, this is in line with option two. The Home Secretary has inherent powers, just as an “Educational Institutions Immigration Agency” or some similar creature of Parliament would have inherent powers. Beyond those powers that are express or implied, there are other ancillary powers available to the Home Secretary in the discharge of her statutory functions, as long as these powers are reasonably incidental to the attainment of statutory objectives.

Quite properly, however, the last category of powers is not “unlimited”<sup>51</sup>:

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powers that go beyond those reasonably incidental to the achievement of statutory objectives. Indeed, in his discussion of the Crown's administrative powers, Perry leaves open the possibility that these too may legitimately be restricted to those that serve identifiably governmental purposes: “it might be thought that the Crown is capable only of acting in ways that promote governmental purpose” (*ibid* at 667, fn 73). See also *Shrewsbury & Atcham Borough Council*, *supra* note 36. I tend to agree with Perry on this point. The imposition of such a limit would do much to put statutory bodies and the Crown on a similar footing as far as the extent of their respective inherent powers is concerned.

46 There may, in addition, be some rights and interests that can only be interfered with where there is express statutory authority to do so, as *per* the ‘clear statement’ rule: *R v Secretary of State for the Home Department, ex parte Pierson*, [1998] AC 539 (HL).

47 *New London College*, *supra* note 12 at para 33.

48 *Ibid* at para 37.

49 *Ibid* at para 38.

50 *Ibid* at para 28.

51 *Ibid* at para 29.

The Secretary of State cannot adopt measures for identifying suitable sponsors which are inconsistent with the Act or the Immigration Rules. Without specific statutory authority, she cannot adopt measures which are coercive; or which infringe the legal rights of others (including their rights under the Human Rights Convention); or which are irrational or unfair or otherwise conflict with the general constraints on administrative action imposed by public law.<sup>52</sup>

One can argue that Lord Sumption dismisses too quickly the possibility that the scheme at issue was coercive (especially given the ability to revoke licences) but he at least had to demonstrate that the scheme was not coercive, something Lord Carnwath did not have to do because under option one coercion is justifiable once a power has been implied.

Here is my caveat: the prevailing view in England and Wales is that the “third source” of inherent powers lies in the nature of the Crown as a corporation,<sup>53</sup> but if so, third source powers exercisable by ministers spring from the general existence of the Crown, and the 1971 Act, on which Lord Sumption relied, is entirely irrelevant unless proposed exercises of third source powers are inconsistent with it. Lord Sumption’s analysis has been described as “muddled” for this reason, but it would presumably not be so muddled if the respondent had been a statutory body rather than one of Her Majesty’s ministers.<sup>54</sup>

The alternative view that I have been detailing is that all government entities created by statute might enjoy a category of power which is neither express nor implied. Inherent powers, on this reading, spring from the creation of an administrative body and the vesting of statutory authority in it. There are express powers, necessarily implicit powers, and inherent powers that are reasonably incidental to the attainment of statutory objectives. Only express and implicit powers could be used for coercive purposes, inherent powers could not be. Making this doctrinal leap would reduce the range of powers official bodies could use in a coercive manner.<sup>55</sup> In addition, it would ensure a significant degree of consistency in the treatment of Crown powers and those of statutory bodies.<sup>56</sup>

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52 *Ibid.*

53 *Ex parte C*, *supra* note 38 at 476.

54 Mark Elliott, “Muddled thinking in the Supreme Court on the “third source” of governmental authority” (23 July 2013), *Public Law for Everyone* (blog), online: <[www.publiclawforeveryone.com/2013/07/23/muddled-thinking-in-the-supreme-court-on-the-third-source-of-governmental-authority/](http://www.publiclawforeveryone.com/2013/07/23/muddled-thinking-in-the-supreme-court-on-the-third-source-of-governmental-authority/)>.

55 I fully recognize that doing so would require a long line of authorities to be at least revisited.

56 The prevailing view that the Crown has the capacities of a natural person suggests that the Crown’s powers would remain wider than those of statutory bodies, but the prevailing view has been criticized and, as noted in note 45 above, the Crown’s powers could well be limited to those powers that

## Justiciability: judicial review of the prerogative

Nowadays, it is trite law that the exercise of the royal prerogative is subject to judicial oversight.<sup>57</sup> To begin with, the existence and scope of prerogative powers are determined by the courts.<sup>58</sup> And more generally the exercise of those powers is subject to judicial review on the ordinary grounds. To the extent that judicial review is unavailable of certain types of executive action it is because of their “nature,” not their “source”:<sup>59</sup> “Some questions are so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and the other branches of government.”<sup>60</sup>

Yet, on closer inspection, the grounds of judicial review of the exercise of a prerogative power prove to be narrower than they are in respect of a statutory power. For instance, there is “a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the *rights, privileges or interests* of an individual.”<sup>61</sup> The old distinction between reviewable decisions affecting rights and unreviewable decisions affecting mere privileges<sup>62</sup> has been banished from most areas of administrative law. But not from the review of prerogative powers.

The leading Canadian case remains the judgment of the Ontario Court of Appeal in *Black v Canada (Prime Minister)*.<sup>63</sup> Canadian Prime Minister Chrétien had long been at loggerheads with Conrad Black, whose newspapers had been critical of Chrétien. Chrétien advised the British government not to bestow honours upon Black, who commenced claims against Canada and the Prime Minister, to which the defendants invoked the non-justiciability of prerogative powers. Laskin J.A. accepted that making recommendations about honours was an aspect of the prerogative, which extended to “giving advice on,

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serve identifiable governmental objectives, in which case the inherent powers of the Crown and of statutory bodies would be treated very similarly.

57 See also, as to other common law powers, *ex parte Lain*, *supra* note 13 at 888, Diplock LJ.

58 *Attorney General v De Keyser's Royal Hotel*, [1920] AC 508 (HL).

59 *Council of Civil Service Unions v Minister for the Civil Service*, [1985] AC 374, at 417, Lord Roskill [*Council of Civil Service Unions*].

60 *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at para 62, Stratas JA. See Andrew Banfield & Greg Flynn, “Activism or Democracy? Judicial Review of Prerogative Powers and Executive Action” (2015), 68:1 Parliamentary Affairs 135 [Banfield & Flynn].

61 *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at para 14, Le Dain J [emphasis added].

62 *R v Electricity Commissioners, ex parte London Electricity Joint Committee Company*, [1924] 1 KB 171 (CA) at 205.

63 (2001), 54 OR (3d) 215 (ONCA).

even advising against, a foreign country's conferral of an honour on a Canadian citizen",<sup>64</sup> a power properly exercisable by the Prime Minister.<sup>65</sup> But he went on to hold that judicial review of prerogative powers is limited: "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."<sup>66</sup> No rights or legitimate expectations were engaged by the exercise of the honours prerogative:

The refusal to grant an honour is far removed from the refusal to grant a passport or a pardon, where important individual interests are at stake. Unlike the refusal of a peerage, the refusal of a passport or a pardon has real adverse consequences for the person affected. Here, no important individual interests are at stake. Mr. Black's rights were not affected, however broadly "rights" are construed. No Canadian citizen has a right to an honour... . The receipt of an honour lies entirely within the discretion of the conferring body. The conferral of the honour at issue in this case, a British peerage, is a discretionary favour bestowed by the Queen. It engages no liberty, no property, no economic interests. It enjoys no procedural protection. It does not have a sufficient legal component to warrant the court's intervention.<sup>67</sup>

The distinction between rights and privileges again featured prominently in a more recent case involving Lord (by then) Black's membership of the Order of Canada: *Black v Advisory Council for the Order of Canada*.<sup>68</sup> Lord Black was convicted of criminal offences in the United States arising out of his stewardship of Hollinger International. He had previously been appointed to the Order of Canada, but his criminal convictions jeopardized his continuing membership. Members of the Order of Canada are appointed by the Governor-General on the advice of an Advisory Council. Its procedures are regulated by its Constitution and a "Policy and Procedure for Termination of Appointment to the Order of Canada." Pursuant to section 3 of the Policy, termination of membership will be considered in certain circumstances.<sup>69</sup> According to the policy, any termination decision must be made fairly and based on all relevant

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64 *Ibid* at para 37.

65 *Ibid* at para 38.

66 *Ibid* at para 51.

67 *Ibid* at paras 60-62.

68 2012 FC 1234, affirmed 2013 FCA 267 [*Black No (2)*].

69 Where:

- (a) the person has been convicted of a criminal offence; or
- (b) the conduct of the person
  - (i) constitutes a significant departure from generally-recognized standards of public behaviour which is seen to undermine the credibility, integrity or relevance of the Order, or detracts from the original grounds upon which the appointment was based; or
  - (ii) has been subject to official sanction, such as a fine or a reprimand, by an adjudicating body, professional association or other organization.

evidence after having ascertained the facts. Provision is also made in the policy for representations to be made by individuals who have been notified that their membership may be terminated.

The crux of the present case was that Lord Black wanted the opportunity to address the Advisory Council in person, and not simply in writing. Clearly, Lord Black was going to be allowed to make representations. The only question was whether he would be confined to the written word. The first hurdle that Lord Black had to overcome was that presented by his previous case. *de Montigny J.* accepted the government's argument that Lord Black did not have a right which was subject to judicial review:

I fail to see how a person on whom an honour has been bestowed would have any greater right or expectation of keeping it than a person has of receiving it in the first place . . . . The mere fact that a privilege has been conferred, however, absent other external circumstances, does not transform that privilege into a right enforceable in court. Once it is recognized that an honour is granted at the discretion of the Crown and that no one is "entitled" to such an honour, the same must be true of the decision to withdraw it afterwards. That a person may feel his or her reputation will be tarnished by the loss of an honour is no more significant, from a legal perspective, than a person who feels aggrieved by the fact that he or she has not been recognized to be worthy of an honour in the first place. In both instances, the decision is discretionary and highly subjective, based on considerations that have little to do with ascertainable and objective (let alone legal) norms, and for that reason is ill-suited for judicial resolution.<sup>70</sup>

This reasoning nicely illustrates why the distinction between rights and privileges is unworkable. To begin with, there is surely a difference between not receiving an honour — when others might simply think that you had been "passed over" — and being stripped of one — where there can be no doubt that you have been reprimanded. Once an honour has been conferred, it must surely lose its character as a "privilege" and become a "right." Where before it was a mere possibility, now it has vested, and can only be lost in a very public and humiliating fashion. To borrow from Justice Holmes: even Lord Black can distinguish between being stumbled over and being kicked.<sup>71</sup>

Furthermore, the Order of Canada is an aspect of the prerogative to grant honours, but attached to the Letters Patent creating it is a long and detailed Constitution. Determining lawfulness then becomes more a question of inter-

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<sup>70</sup> *Black (No 2)*, *supra* note 68 at para 51.

<sup>71</sup> *The Common Law* (Boston: Little Brown, 1881) at 3.

pretation than a question of pure policy.<sup>72</sup> Indeed, de Montigny J. effectively recognized this. Despite his earlier finding that membership in the Order of Canada was a privilege and not a right, he held that Lord Black had a procedural legitimate expectation that he would be allowed to make representations, based on the Policy. This was enough to overcome the justiciability obstacle: “I fail to see how it can be argued that it does not create an expectation that it will be adhered to, or that the steps it prescribes do not provide an objective basis on which courts may be called upon to determine whether the Council has exercised the role assigned to it and followed the procedure according to which it is to fulfill its mandate.”<sup>73</sup> Unfortunately for Lord Black, de Montigny J. concluded that an oral hearing was not necessary “to ensure that his arguments are dealt with fairly”; written submissions would give him “ample opportunity to present his side of the story.”<sup>74</sup> More generally, it is incongruous to adhere for the most part to the distinction between rights and privileges but to permit judicial intervention where a legitimate expectation has been established, which will typically turn on the essentially semantic issue of whether there has been a “clear, unambiguous and unqualified” statement about the procedure the decision-maker will follow.<sup>75</sup>

Even though judicial review of prerogative powers is nominally on the same footing as judicial review of statutory powers, the distinction between rights and privileges continues to play an important — and unhelpful — role in the review of prerogative powers.<sup>76</sup>

Special judicial treatment for prerogative powers is not a uniquely Canadian phenomenon. Consider *R (Sandiford) v Foreign and Commonwealth Secretary*.<sup>77</sup> A British citizen accused by the Indonesian authorities of drug trafficking, an offence that carries the death penalty in that jurisdiction, wanted the British government to fund her defence. Pursuant to the foreign affairs prerogative,

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72 See similarly *Chaisson v Canada* (2003), 226 DLR (4th) 351 at para 16, Strayer JA:

It is, in my view, arguable that the royal prerogative having been used to create a body (the Canadian Decorations Advisory Committee) to perform a screening function prior to the exercise by the Governor General of her discretion in the grant of honours, that body is bound by the Regulations creating it and its activities may be subject to judicial review... . Even if the Committee’s ultimate opinion given to the Governor-General under paragraph 8(e) of the Regulations, and the Governor-General’s ultimate choices, are not judicially reviewable, this should not necessarily preclude the Court from reviewing the procedure and criteria followed by the Committee to see if they comply with the Regulations.

73 *Black (No 2)*, *supra* note 68 at para 63.

74 *Ibid* at para 85.

75 *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 68, [2011] 2 SCR 504.

76 See also *Drabinsky v Advisory Council of the Order of Canada*, 2014 FC 21, *aff’d* 2015 FCA 5.

77 [2013] EWCA Civ 581, *aff’d* [2014] UKSC 44 [*Sandiford*].

the Foreign Secretary has developed a policy, outlined in a pamphlet entitled *Support for British Nationals Abroad: a Guide*. It contains the following passage:

Although we cannot give legal advice, start legal proceedings, or investigate a crime, we can offer basic information about the local legal system, including whether a legal aid scheme is available. We can give you a list of local interpreters and local lawyers if you want, although *we cannot pay for either*.<sup>78</sup>

In line with the published policy, the respondent refused to defray the applicant's legal expenses.

The question for the courts was whether the published policy fettered the discretion of the minister. At the Court of Appeal, Lord Dyson M.R. concluded that, in matters prerogative, the rule against fettering discretion<sup>79</sup> does not apply.<sup>80</sup> As a previous bench of the Court of Appeal had put it in *R (Elias) v Secretary of State for Defence*, "it is within the power of the decision-maker to decide on the extent to which the power is to be exercised in, for example, setting up a scheme. He can decide on broad and clear criteria and either that there are no exceptions to the criteria in the scheme or, if there are exceptions in the scheme, what they should be."<sup>81</sup> Lord Dyson M.R.'s analysis was endorsed on appeal.<sup>82</sup> Lord Carnwath and Lord Mance put the point this way:

[P]rerogative powers have to be approached on a different basis from statutory powers. There is no necessary implication, from their mere existence, that the State as their holder must keep open the possibility of their exercise in more than one sense. There is no necessary implication that a blanket policy is inappropriate, or that there must always be room for exceptions, when a policy is formulated for the exercise of a prerogative power.<sup>83</sup>

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78 [Emphasis added].

79 *British Oxygen Co Ltd v Board of Trade*, [1971] AC 610 (HL) [*British Oxygen*].

80 [2013] EWCA Civ 581 at paras 53-54.

81 [2006] 1 WLR 3213 at para 191 (CA).

82 *Sandiford*, *supra* note 77.

83 *Ibid* at para 62. See also Lord Sumption at para 83:

A common law power is a mere power. It does not confer a discretion in the same sense that a statutory power confers a discretion. A statutory discretionary power carries with it a duty to exercise the discretion one way or the other and in doing so to take account of all relevant matters having regard to its scope. Ministers have common law powers to do many things, and if they choose to exercise such a power they must do so in accordance with ordinary public law principles, ie fairly, rationally and on a correct appreciation of the law. But there is no duty to exercise the power at all. There is no identifiable class of potential beneficiaries of the common law powers of the Crown in general, other than the public at large. There are no legal criteria analogous to those to be derived from an empowering Act, by which the decision whether to exercise a common law power or not can be assessed. It is up to ministers to decide whether to exercise them, and if so to what extent. It follows that the mere existence of a common law power to do something cannot give rise to any right to be considered, on the part of someone who might



The Court was unanimous in rejecting the application, finding that no legitimate expectation had been established or irrationality demonstrated.

Does this distinction between statutory discretion and prerogative make sense? The distinction is formal and it is underpinned by logic: largesse under the prerogative is entirely in the gift of the executive, something that cannot be said of largesse provided for by statute. In the latter case, the executive cannot ignore the statutory context in exercising its powers.<sup>84</sup> In the former case, the executive is not so constrained (or, at least, has not yet been so constrained).

But in substance, there is less to commend the distinction. Given that the executive has chosen to invoke the prerogative and thereby affect individuals' legal positions, there is much to be said for imposing constraints on its exercise. A positive action invites scrutiny in a way that a failure to act does not. Indeed, the constraint of rationality applies (though the applicant lost on this point).<sup>85</sup>

An additional possible constraint would be a prohibition on enacting a blanket policy. The same considerations that underpin the rule against fettering discretion in the context of a statutory power apply here with equal force: it is unfair to completely shut the door to individual circumstances; and from the point of view of good administration, submissions from individuals might highlight flaws in the policy.<sup>86</sup> And doubtless, the individuals on the receiving (or non-receiving) end of the largesse do not care about its legal provenance. The distinction operates particularly unfairly in a case like *Sandiford*. Deciding to set out a blanket policy that, say, gives everyone the same amount of money or subjects everyone to the same criteria is quite different from deciding to set out a policy of blanket refusal. Not taking account of individual circumstances seems especially likely to lead to unfairness and poor administration in the latter case. In the former case, the executive can at least claim that everyone is better off.

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hypothetically benefit by it. Such a right must arise, if at all, in other ways, usually by virtue of a legitimate expectation arising from the actual exercise of the power.

84 See e.g. *Roncarelli v Duplessis*, [1959] SCR 121 at 140, Rand J; *R v Minister of Agriculture and Fisheries, ex parte Padfield*, [1968] AC 997 (HL).

85 *Sandiford*, UKSC, *supra* note 77 at paras 67-73.

86 See *British Oxygen*, *supra* note 79 at 625:

[A] Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say — of course I do not mean to say that there need be an oral hearing ... . The respondent might at any time change his mind ... .

In summary, in the area of judicial review of exercises of the prerogative, the Crown again benefits from a special status. The “royal” source of the power exerts a significant influence on the nature of judicial control, with unfortunate results. Once more, no normative basis is offered for the special status of the Crown, which is asserted, not explained, and still less justified.<sup>87</sup>

## Remedies

When one turns to remedies against the executive, the same pattern appears. The clearest recent Canadian manifestation is *Canada (Prime Minister) v Khadr (No 2)*.<sup>88</sup> Here, the Supreme Court of Canada concluded that “the remedy sought” by Mr. Khadr was “precluded [in part] by the fact that it touches on the Crown prerogative power over foreign affairs.”<sup>89</sup>

Mr. Khadr was a Canadian citizen detained in Guantanamo Bay, Cuba, by the United States, after his capture in Afghanistan by American military forces. In earlier litigation, Mr. Khadr had successfully established that Canadian officials had violated the *Charter* by working with their American counterparts at Guantanamo Bay, in a process that the Supreme Court of the United States determined to be unlawful and which violated Canada’s international law obligations.<sup>90</sup> He subsequently sought an order directing the Canadian government to seek his repatriation to Canada. At first instance, O’Reilly J. ordered the executive to “present a request to the United States for Mr. Khadr’s repatriation to Canada as soon as practicable.”<sup>91</sup> A majority<sup>92</sup> of the Federal Court of Appeal upheld the order as a reasonable exercise of remedial discretion.<sup>93</sup>

On appeal, the Supreme Court of Canada accepted that “Canada’s active participation in what was at the time an illegal regime has contributed and

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87 Compare Banfield & Flynn, *supra* note 60, who perceive judicial oversight as one accountability mechanism amongst many and welcome the reluctance of the courts to “impose substantive outcomes on the government,” trusting instead “that arbitrary action will be limited through the use of proper procedural processes” (*ibid* at 151). I have no objection to courts deferring to the executive when appropriate (see generally Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge: Cambridge University Press, 2012)) [Daly]; my target in this paper is the distinction between the Crown and other bodies.

88 *Khadr (No 2)*, *supra* note 44.

89 *Ibid* at paras 27, 46. Para 27: (stating the question for resolution), and para 46: (invoking the prerogative as a justification for not granting the remedy sought).

90 *Canada (Justice) v Khadr*, 2008 SCC 28, [2008] 2 SCR 125.

91 *Khadr v Canada (Prime Minister)*, [2010] 1 FCR 34 at para 92.

92 Evans & Sharlow JJA, Nadon JA dissenting.

93 *Canada (Prime Minister) v Khadr*, [2010] 1 FCR 73.

continues to contribute to Mr. Khadr's current detention"<sup>94</sup> and also accepted that there was a sufficient connection between the breach of Mr. Khadr's rights and ordering the Canadian government to seek his transfer to Canada. However, "[a] connection between the remedy and the breach is not the only consideration."<sup>95</sup> In particular, "judicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions within a range of constitutional options."<sup>96</sup>

The remedy sought by Mr. Khadr gave "too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests."<sup>97</sup> Accordingly, the better remedy was to declare that Mr. Khadr's rights had been breached and "to leave it to the government to decide how best to respond to this judgment in light of current information, its responsibility for foreign affairs, and in conformity with the *Charter*."<sup>98</sup>

On one level, this analysis is unproblematic. Mandatory orders that compel the executive to act in a particular way should be a last resort, for separation of powers reasons;<sup>99</sup> and courts should of course be cautious about interfering unduly in complex areas of policy.<sup>100</sup> But these separation of powers reasons and institutional concerns have nothing to do with the prerogative; they relate to the "nature" of the powers, not their "source."<sup>101</sup> The repeated references in *Khadr (No 2)* to the "prerogative" suggest that its presence weighed independently — and heavily — in the balance against according the remedy that Mr. Khadr sought. Had the Supreme Court of Canada mentioned only "complex and ever-changing circumstances," and left it at that, its decision would have

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94 *Khadr (No 2)*, *supra* note 44 at para 21. See also *ibid* at para 26.

95 *Ibid* at para 33.

96 *Ibid* at para 37. Nonetheless, it is worth highlighting a comment made by Zinn J, when Mr. Khadr's case returned to Federal Court after the conclusion of the Supreme Court of Canada proceedings: "In my view, if there is only one available remedy that potentially cures the breach of one person's Charter rights, then that remedy must be ordered by the Court, even if the order involves the exercise of the royal prerogative." *Khadr v Canada (Prime Minister)*, [2010] 4 FCR 36 at para 91.

97 *Khadr (No 2)*, *supra* note 44 at para 39.

98 *Ibid*.

99 Peter Cane, "The Constitutional Basis of Judicial Remedies in Public Law" in Peter Leyland & Terry Woods, eds, *Administrative Law Facing the Future: Old Constraints & New Horizons* (London: Blackstone, 1997),

100 See e.g. Daly, *supra* note 87, ch 3.

101 *Council of Civil Service Unions*, *supra* note 59 at 417, Lord Roskill.

been more convincing; if prerogative is a synonym for policy,<sup>102</sup> it would be better to use the latter phrase, which does not come encumbered with as much historical and metaphysical baggage.

As it is, the invocation of the prerogative seems to be an attempt, rhetorically, to distinguish *Khadr (No 2)* from some of the Court's other remedial decisions, with which it sits uneasily.<sup>103</sup> Two decisions provide a particularly useful contrast, because they involved, respectively, a remedy requiring ongoing judicial supervision of government and a remedy compelling government to act in a particular way in a polycentric policy setting.

Consider, first, *Doucet-Boudreau v Nova Scotia (Minister of Education)*,<sup>104</sup> where a trial judge who had found that the province had failed to respect constitutionally protected language rights retained jurisdiction over the province's implementation of his detailed order. The majority of the Court considered that "the range of remedial orders available to courts in civil proceedings demonstrates that constitutional remedies involving some degree of ongoing supervision do not represent a radical break with the past practices of courts."<sup>105</sup> Ongoing judicial supervision was appropriate in the instant case, because there was no "suggestion ... that the court would, for example, improperly take over the detailed management and co-ordination of the construction projects"; rather, its role of "[h]earing evidence and supervising cross-examinations" was "not beyond the normal capacities of courts."<sup>106</sup> This conclusion was sensitive to the fact that the trial judge "was crafting a fairly original remedy in order to provide flexibility to the executive" in respecting the *Charter* right at issue.<sup>107</sup> It would not have been a great leap from *Doucet-Beaudreau* to the remedy proposed by Mr. Khadr.<sup>108</sup>

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102 See e.g. Banfield and Flynn, *supra* note 60 at 149-50.

103 Kent Roach, Canada's leading scholar of constitutional remedies, has been particularly forthright in his criticism of *Khadr (No 2)*: see e.g. "The Supreme Court at the Bar of Politics: The Afghan Detainee and Omar Khadr Cases" (2010), 28 NJCL 115 at 143-53; "Enforcement of the Charter — Subsections 24(1) and 52(1)" (2013) 62 SCLR (2d) 473 at 483-84.

104 2003 SCC 62, [2003] 3 SCR 3.

105 *Ibid* at para 73.

106 *Ibid* at para 74.

107 *Ibid* at para 85.

108 Indeed, when Mr. Khadr returned subsequently to Federal Court and successfully argued that Canada was still under an obligation to remedy the breach of his Charter rights, Zinn J ordered the executive to propose potential means of curing the breach and "reserve[d] the right[s] to oversee this explorative process, to amend the short time frame set out in the judgment for the steps that are to be taken, and ... to impose a remedy if none is forthcoming from that process." *Khadr*, *supra* note 96 at para 94. Zinn J's order was stayed pending appeal. Blais CJ commented that the case raised "many serious issues" and found the retention of jurisdiction "surprising" in the circumstances: *Canada*

Consider, next, *Canada (Attorney General) v PHS Community Services Society*.<sup>109</sup> Having reached the conclusion that the refusal to extend an exemption from the operation of federal drug laws to a supervised injection site was a breach of section 7 of the *Charter*,<sup>110</sup> the Court took the view that a declaration would be “inadequate.”<sup>111</sup> Rather, it granted “an order in the nature of mandamus,”<sup>112</sup> compelling the minister to exercise his discretion in favour of granting a fresh exemption. Strikingly, its reasons for doing so could easily be transposed to Mr. Khadr’s case:

The infringement at stake is serious; it threatens the health, indeed the lives, of the claimants and others like them. The grave consequences that might result from a lapse in the current constitutional exemption for Insite cannot be ignored. These claimants would be cast back into the application process they have tried and failed at, and made to await the Minister’s decision based on a reconsideration of the same facts. Litigation might break out anew. A bare declaration is not an acceptable remedy in this case.<sup>113</sup>

Here, moreover, the decision to grant the exemption was clearly a polycentric one, with effects on the health of drug users, the role of non-profit organizations, and the duties of the provincial and municipal police forces. Protection of public health and safety is a complex issue, with high stakes. The principal difference between *PHS* and *Khadr (No 2)* would seem to be the presence of the prerogative in the latter and its absence in the former.

## Conclusion

The special status of the Crown in Canadian administrative law has several important implications.

First, the distinction between Crown powers and those exercised by statutory decision-makers is important in Canada. In the different areas surveyed above, the source of a power rather than its nature puts an individual challenging government action at a significant disadvantage. From the perspective of the individual, this is troubling, because the outcome of a case could turn on the characterization of the source — or characterization of the source — of

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*(Prime Minister) v Khadr*, [2012] 1 FCR 396 at para 13. These matters were never fully addressed, however, because the case was ultimately declared to be moot: *Canada v Khadr*, 2011 FCA 92.

109 2011 SCC 44, [2011] 3 SCR 134.

110 *Ibid* at paras 85-94, 126, 136. By, on the one hand, criminalizing the staff of the facility and, on the other, depriving users of life-protecting healthcare.

111 *Ibid* at para 147.

112 *Ibid* at para 150.

113 *Ibid* at para 148.

a particular power, something quite remote from the merits of an individual's case. Moreover, from the individual's perspective, the source of the power used to modify her legal position is quite irrelevant; what matters is its nature and the effects of the resultant decision.

Second, no normative basis is offered in these decisions for the different treatment accorded to the Crown and other bodies. The special status of the Crown is a legal fact in search of a normative justification. In the absence of such a judicially-offered justification, it would be better to remove the Crown's special status from administrative law altogether. That the legislature has left a field open to the Crown to use its common law powers by failing to enact detailed statutory provisions is cold comfort to individuals disadvantaged by the exercise of such powers who would have had access to judicial redress had the powers been statutory in nature.

Third, an end to special treatment for the Crown in administrative law could be accomplished by putting the Crown and statutory decision-makers on the same footing. As I have outlined, the benevolent approach to Crown powers could be extended to statutory decision-makers; the same rules could easily be made applicable to judicial review of exercises of prerogative powers as are already applicable to statutory powers; and there is no need for super-added caution when remedies for breaches of the law might have an effect on executive prerogatives.

Even with such incremental reforms to judicial review doctrine, the Crown would remain distinctive in Canadian law. It would remain the font of executive authority. Responsible government would continue to be a primordial principle of Canadian constitutional law. And so on. Putting the Crown and statutory decision-makers on the same footing in administrative law would bring coherence to the Canadian law of judicial review of administrative action without threatening the Crown's distinctive position in the Canadian constitution.

# On the Formation of Government

*Hugo Cyr\**

*During the last decade, in Quebec and elsewhere in Canada, the media have competed to be the first to declare on election nights who will form the next government. Irrespective of whether they predicted that any political party would be able to obtain a majority of seats, these announcements have been made within only a few hours of the polls closing. These announcements have systematically preceded any public statement by the leaders of the political parties involved. Indeed, the media have developed the unfortunate habit of substituting an entire set of constitutional rules and principles leading to the formation of government by a simplistic heuristic: “The political party that wins the largest number of seats wins the election and has the right to form the next government.” The media present the issue as automatic, merely a matter of arithmetic.*

*Even if this heuristic works well when a party has won a majority of seats, it is completely inadequate as a statement of the constitutional law and conventions related to the formation of government in our parliamentary system.*

*This article thus aims to flesh out the Canadian constitutional rules and principles applicable to government formation and illustrate how constitutional considerations come into play in the variety of possible scenarios. A quick reference tool is appended to the text to facilitate consultation of the applicable rules and principles to those different situations.*

*Lors de chacune des élections générales fédérales ou québécoises ayant mené à la formation d'un gouvernement minoritaire au cours de la dernière décennie, les médias se sont fait concurrence pour annoncer en primeur qui allait former le prochain gouvernement, et ce, avant même que l'un ou l'autre chef de parti se soit exprimé de quelque façon que ce soit sur les résultats des élections. Les médias ont pris la très fâcheuse habitude de remplacer l'ensemble du corpus de règles et principes constitutionnels applicables à la formation du gouvernement par l'application de la maxime simpliste suivante : « le parti politique ayant fait élire le plus grand nombre de députés a gagné les élections et a droit de former le prochain gouvernement ». Les médias présentent la chose comme s'il s'agissait d'un automatisme, d'une simple question d'arithmétique.*

*Or, si cette heuristique ne cause pas de difficultés particulières lorsqu'un parti politique remporte une majorité de sièges, elle est tout à fait inadéquate pour décrire le droit et les conventions applicables en matière de formation du gouvernement dans notre système parlementaire.*

*Cet article vise donc à expliciter les règles et principes constitutionnels canadiens applicables à la formation du gouvernement et à illustrer les différents facteurs constitutionnels devant entrer en ligne de compte en fonction des divers cas de figure possibles. Un aide-mémoire se trouve en annexe du texte de manière à faciliter la consultation de ces règles et principes applicables à ces diverses situations.*

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Note that the principles, rules and practices related to the “Prime Minister” and “Governor General” apply *mutatis mutandis* to “premiers” and “lieutenant governors” unless expressly mentioned.

## Introduction

During each of the federal general elections or Quebec elections that have led to the formation of a *minority* government over the last decade, major television stations have competed to be the first to announce who would form the next government,<sup>1</sup> even before the leader of one party or another spoke out in any way about the election results. Why is there such a competition? Of course, social media have put pressure on traditional media to broadcast information faster, but while that may impact the speed of delivering individual results, it does not necessarily explain the race between themselves to call who would form the new government. Perhaps they are attempting to show that they are more relevant and that they offer higher quality information than other stations. Alternatively, perhaps they are seeking to please an audience eager to hear the results and move on to something else. Who knows? What we do know, however, is that by systematically announcing that the party with the larger number of seats would form the next government, the “fourth estate” practically settles the issue of knowing who should form the next government and as such dismisses the numerous possibilities constitutional law offers the members of Parliament in this matter. In other words, the media pre-empt the role of duly elected parliamentarians in choosing the next government.

Indeed, the media has acquired the unfortunate habit of replacing the entire corpus of constitutional rules and principles applicable to the formation of government by the simplistic maxim: “The political party who gets the largest number of MPs elected wins the elections and has the right to form the next government.” The media present this as if it were automatic, which is to say a simple matter of arithmetic. Not even a few hours after the polling stations close, televised media, with certainty and authority, tell the entire population

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1 For a detailed account of how major television stations raced to announce who would form the next government during the 2004, 2006, 2008, and 2011 federal elections and the 2007 Quebec election, see Hugo Cyr, “De la formation du gouvernement”(2013) 43:2 RGD 381, 385. In 2015 federal election, CBC News (Canada Votes 2015 Election Night, Livestream, online: <[http://live.cbc.ca/Event/Canada\\_Votes\\_2015\\_Election\\_Night/197448957](http://live.cbc.ca/Event/Canada_Votes_2015_Election_Night/197448957)>) and Radio-Canada (Hugo Dumas, “On s’est couché tôt!”, *La Presse+* (20 October 2015) 23) projected a Liberal government at 9:40 P.M. Eastern Time. That was 10 minutes after polls had closed in Ontario and Quebec while polls were still open in British Columbia. TVA did it a minute later (*ibid*). At 10:32 P.M. Eastern Time TVA projected that it would be a majority government and Radio-Canada followed 5 minutes later with the same projection (*ibid*). Same for CBC (CBC, Livestream: Canada Votes 2015). The 2015 Quebec election to an even faster call: CTV projected a Liberal government at 8:18 P.M., TVA at 8:22 P.M., and 3 minutes later, Radio-Canada followed (Richard Therrien, “Des analystes étonnés et sonnés”, *Le Soleil* (8 April 2015) 24). CTV projected a few minutes later, at 8:36 P.M., that it would be a majority government and Radio-Canada was the first French-speaking broadcaster to announce the same at 8:43 P.M. (*ibid*).



who will form the next government. As their only caveat, they allow for the possibility that vote counts could be incorrect. But when no party obtains a majority of seats, they do not *describe* the political situation; consciously or not, they *shape* it.<sup>2</sup> And once electronic media reach a consensus regarding the identity of the next government, it becomes very difficult for political actors to stray from this consensus. This is even truer considering that, should we believe some surveys, Canada's population in general, and Quebec's population in particular, have a very poor understanding of our political system: most citizens even believe they vote *directly* to elect their prime minister!<sup>3</sup>

Yet even if the heuristic according to which "the party having obtained the largest number of seats forms the government" causes no particular difficulty when a political party obtains a majority of seats — as it controls a majority of seats, the party is thus assured that it has the House's confidence, — it is inadequate as a method of describing the applicable law and conventions in relation to government formation. In reality, according to applicable constitutional conventions, when no party obtains a majority of seats,<sup>4</sup> it is impossible to determine who will form the next government by relying only on the number of seats won by one party or another.

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2 The day following general elections, printed media followed suit. All used as their headlines the same conclusions as electronic media. For the 1979 general federal elections, the matter was simpler since the incumbent Prime Minister, Pierre E. Trudeau, had declared that very evening: "I think it's my duty at this time to recommend to my colleagues that we hand the government over . . . . That I recommend to the governor-general that he ask Mr. Clark to form a government." (Claude Henault & Julia Elwell, "Trudeau sees 'duty' to hand it to Clark", *The [Montreal] Gazette* (23 May 1979) 1). Thus newspapers were not taking much of a risk by using headlines such as: "Tories poised to form minority government", *The [Montreal] Gazette* (23 May 1979) 1. Things degenerated, however, for subsequent elections.

The printed media subsequently assumed and declared that the party having won a plurality of seats would form a minority government — notwithstanding the possibility for the other parties to enter into a coalition to form the government. For a detailed account of how francophone newspapers portrayed the situation in subsequent elections, see Hugo Cyr, "De la formation du gouvernement", *ibid*, 386-88.

3 Peter H Russell, "Ignorance of Parliamentary Rules Is Distorting Debate over Legitimacy", *The Star* (3 December 2008); see Ipsos Reid's press release, "In Wake of Constitutional Crisis, New Survey Demonstrates that Canadians Lack Basic Understanding of our Country's Parliamentary System" (15 December 2008), online: Historica Canada <[www.historicacanada.ca/sites/default/files/PDF/polls/dominioninstitutedecember15factum\\_constitutional\\_crisis\\_en.pdf](http://www.historicacanada.ca/sites/default/files/PDF/polls/dominioninstitutedecember15factum_constitutional_crisis_en.pdf)>. According to this last survey, 70% of Quebecers allegedly believe that Canadians directly elect Canada's Prime Minister (*ibid*).

4 We also note that a party can hold a majority of seats without this fact leading to a certainty about who can form the government. This is the case, notably, when a prime minister dies and the rules within their party do not set out a way to immediately choose their successor.

To prove this point, simply think of the federal government formed by Mackenzie King in 1925, when he had obtained 15 fewer seats than the Conservative Party. King, the incumbent prime minister, who had lost his own seat following the elections, was able to cling to power thanks to the support his government received from a third party (the Progressives). Or think of David Peterson's 1985 Ontarian government. Thanks to an alliance with the Ontarian New Democratic Party, Peterson was able, upon a motion of non-confidence, to overturn the incumbent government less than a month after the ballot, and to replace it by forming a minority Liberal government that lasted over two years. Peterson's Liberals had four seats fewer than the Progressive Conservatives.

These are not the only Canadian cases where the government was formed by one or more parties having obtained neither a majority nor even a plurality of the legislative assembly's seats, but they are the best-known examples. We can also refer to 1929, soon after the Saskatchewan general election, when the Liberal minority government (28 seats) fell and was replaced by a government comprised of a coalition formed by the Conservatives (24 seats), Progressives (5 seats), and a few independent representatives.<sup>5</sup> In Quebec, in 1878, Gustave Joly de Lotbinière's incumbent Liberal government remained in power despite the fact that his party only obtained 31 seats during the general election, while Joseph-Adolphe Chapleau's Conservatives had obtained 32. The Liberal Party then enjoyed the support of two "independent conservative" MLAs, allowing it to remain in power for another 14 months.<sup>6</sup> Australian parliamentarism, based on principles similar to ours, is full of examples similar to these,<sup>7</sup> once even going so far as to recognize the authority of the *third* party in the House of Representatives to form the government!<sup>8</sup>

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5 John H Archer, "Saskatchewan: A Political History" (1985) 8:3 Can Parliamentary Rev 7.

6 Quebec, National Assembly, "Chronologie parlementaire depuis 1791 (1878-1879)", online: <[www.assnat.qc.ca/fr/patrimoine/chronologie/chrono41.html](http://www.assnat.qc.ca/fr/patrimoine/chronologie/chrono41.html)>.

7 The Australian government was formed by a party having obtained neither a majority nor even a plurality of seats in 1906, 1922, 1928, 1937, 1940, 1954, 1961, 1969, and 1998. (See University of Western Australia, "Australian Politics and Elections Database", online: <<http://elections.uwa.edu.au/>> [U of WA, "Australian Politics and Elections Database"].)

8 In the 1906 federal election, Alfred Deakin's incumbent Protectionist Party government remained in power with only 16 seats, despite the fact that George Reid's Anti-Socialist Party had 27 elected representatives and the Labour Party had 26, i.e. ten more than the incumbent government. (See *ibid.*, "Commonwealth Parliament, House of Representatives election [ID 0257]", online: <<http://elections.uwa.edu.au/electdetail.lasso?keyvalue=688>>.) Alfred Deakin remained in power until November 1908 when the Labour Party dislodged him. However, after entering into a new coalition with George Reid's party, Alfred Deakin again formed a government in May 1909, before losing power for good following the general election in which a majority of seats went to the Labour Party

In fact, when no party obtains a majority of seats, it is completely possible and legitimate, according to current legal rules and constitutional conventions, for the next government be formed in one of the following ways:

1. The incumbent government, whether it has a plurality of seats or not, remains in power and tries to secure the confidence of the elected Chamber as soon as it opens.
2. The incumbent government, whether it has a plurality of seats or not, remains in power thanks to a support agreement with one or more parties with the goal of ensuring the confidence of the elected Chamber in exchange for certain compromises on policies to be implemented (the fact that the concerned parties asserted before the elections that they were for or against entering into an agreement with a minority government has no constitutional relevance).
3. The incumbent government, whether it has a plurality of seats or not, enters into a coalition with one or more parties, granting them Cabinet positions, to form a majority government (the fact that the concerned parties asserted before the elections that they were for or against forming a coalition after the elections has no constitutional relevance).
4. The incumbent government, whether it has a plurality of seats or not, enters into a coalition with one or more parties, granting them Cabinet positions, to form a minority government which attempts to obtain the confidence of the elected Chamber as soon as it opens (the fact that the concerned parties asserted before the elections that they were for or against forming a coalition after the elections has no constitutional relevance).
5. The incumbent government, whether it has a plurality of seats or not, enters into a coalition with one or more parties, granting them Cabinet positions, to form a minority government that remains in power thanks to a support agreement with one or more other parties with the goal of ensuring the confidence of the elected Chamber in exchange for certain compromises on policies to be implemented (the fact that the concerned parties asserted before the elections that they were for or against forming a coalition or entering into an agreement with a minority government has no constitutional relevance).

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in April 1910. (See *ibid*, "Commonwealth Parliament, House of Representatives election [ID 0258]", online: <<http://elections.uwa.edu.au/elecdetail.lasso?keyvalue=689>>.)

6. The incumbent government eventually fails in its attempt as set out in (1), but again forms the government thanks to one or more agreements as set out in scenarios (2) to (5).
7. The incumbent government concedes its defeat, and another party, whether it has obtained a plurality of seats or not, forms the new government due to the fact that it is the one with the highest chance of obtaining the confidence of the elected Chamber as soon as it opens.
8. The incumbent government concedes its defeat, and another party, whether it has a plurality of seats or not, forms the new government thanks to a support agreement with one or more other parties with the goal of ensuring the confidence of the elected Chamber in exchange for certain compromises on policies to be implemented (the fact that the concerned parties asserted before the elections that they were for or against entering into an agreement with a minority government has no constitutional relevance).
9. The incumbent government concedes its defeat and another party, whether it has a plurality of seats or not, enters into a coalition with one or more parties, granting them Cabinet positions, to form a majority government (the fact that the concerned parties asserted before the elections that they were for or against forming a coalition after the elections has no constitutional relevance).
10. The incumbent government concedes its defeat and another party, whether it has a plurality of seats or not, enters into a coalition with one or more parties, granting them Cabinet positions, to form a minority government that will attempt to obtain the confidence of the elected Chamber as soon as it opens (the fact that the concerned parties asserted before the elections that they were for or against forming a coalition after the elections has no constitutional relevance).
11. The incumbent government concedes its defeat and another party, whether it has a plurality of seats or not, enters into a coalition with one or more parties, granting them Cabinet positions, to form a minority government that will be supported by an agreement with one or more other parties with the goal of ensuring the confidence of the elected Chamber in exchange for certain compromises on policies to be implemented (the fact that the concerned parties asserted before the elections that they were for or against forming a coalition or entering

into an agreement with a minority government has no constitutional relevance).

12. The incumbent government concedes its defeat and another party, whether it has a plurality of seats or not, fails to form the government as set out in scenarios (7) to (11). This same party or another can again attempt to bring about scenarios set out in (7) to (11), or the parties can notify the Governor General that no new government can be formed and that new elections must be held.

As this article will show, many factors must come into play when forming a government, and such factors are completely blotted out by the heuristic used by the media and the public.

Of course, certain politicians have taken advantage of the population's misunderstanding of government formation. The 2008 federal Parliament "prorogation crisis" is a good illustration of this. Only a few days after the parliamentary session opened, Prime Minister Harper, who led a minority government at the time, asked the Governor General to prorogue the session when the opposition parties were getting ready to have a non-confidence motion adopted with the goal of defeating the government and replacing it with a coalition. The government attempted to convince the public that its manoeuvring was legitimate by asserting that democracy required the party having obtained the most seats to "win" the elections.<sup>9</sup> This campaign had the effect of increasing public confusion as to the mechanisms according to which parliamentary democracy functions. The politicians who opposed the government of the time were not in a good position to rectify the erroneous impressions created by the government, since their declarations were automatically assimilated to partisan interests. The media were badly equipped to pick up on this error; they themselves had supported this view with their habit of automatically declaring the party having obtained the most seats during the elections as the "winner", and as a result they were not able to set the record straight in an effective manner. Lawyers and political scientists were also suspected of defending some partisan interest or of seeking to appropriate — through "pseudo-expertise" — the people's democratic power, and were also not able to inform the population adequately about the applicable rules once the political storm was underway.

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9 See, among others: Les Whittington, Bruce Campion-Smith & Tonda MacCharles, "Liberals, NDP and Bloc sign coalition pact", *The Toronto Star* (1 December 2008), online: <[www.thestar.com/news/canada/2008/12/01/liberals\\_ndp\\_and\\_bloc\\_sign\\_coalition\\_pact.html](http://www.thestar.com/news/canada/2008/12/01/liberals_ndp_and_bloc_sign_coalition_pact.html)>.

In 2009, British lawyers and political scientists had anticipated the risks associated with the media and the citizenry's misunderstanding regarding the formation of a minority government. Seeing that the Labour Party ran the risk of not winning a new term in 2010 and that there was a real possibility, for the first time in three decades, that no one party would obtain a majority of seats on its own, academics from the University College London's Constitution Unit and the Institute for Government prepared a detailed document on the rules and conventions pertaining to the formation of governments in minority settings among British-tradition parliaments.<sup>10</sup> Following this report, the British government decided to follow New Zealand's example, which had gathered, in an official document — its *Manual for the Cabinet* — the rules and principles meant to guide the government and public administration's conduct, including during elections and government formation. New Zealand's manual had the advantage of providing explicit rules for government formation when general elections give no party a majority of seats.<sup>11</sup> The United Kingdom government was then able to produce a first draft of the chapter on elections and government formation before the May 2010 election. The British government's *Cabinet Manual* was finished after the election.<sup>12</sup>

The discussions and consultations surrounding the production of the manual, in British academic, political and media circles, prepared the ground adequately for the next election, at the end of which no party won a majority of seats. The media patiently waited to announce the next government for five days, which ended up being necessary to determine the composition of the new government. Such restraint was especially beneficial since the Conservative Party and the Liberal Democratic Party had both declared at various times before the election<sup>13</sup> that they did *not* intend to take part in a coalition government; nevertheless, they concluded that in light of the division of seats fol-

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10 Robert Hazell & Akash Paun, eds, *Making Minority Government Work: Hung Parliaments and the Challenge for Westminster and Whitehall* (London: Institute for Government, 2009).

11 New Zealand, Cabinet Office, *Cabinet Manual, 2008*, online: <<https://cabinetmanual.cabinetoffice.govt.nz/files/manual.pdf>> [NZ, *Cabinet Manual 2008*].

12 United Kingdom, Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and Rules on The Operation of Government* (2011), 1st ed, online: <[www.gov.uk/government/publications/cabinet-manual](http://www.gov.uk/government/publications/cabinet-manual)> [UK, *Cabinet Manual 2011*].

13 A few days only before the 2010 general election, the Tories had said they did not wish to form a coalition government with the Liberal Democrats, but that they were instead ready to form a minority government if they did not succeed in obtaining a majority of seats (Andrew Porter & Robert Winnett, "General Election 2010: Tories Rule out Lib Dem Alliance", *The Telegraph* (2 May 2010), online: <[www.telegraph.co.uk/news/election-2010/7670867/General-Election-2010-Tories-rule-out-Lib-Dem-alliance.html](http://www.telegraph.co.uk/news/election-2010/7670867/General-Election-2010-Tories-rule-out-Lib-Dem-alliance.html)>; James Chapman, "Cameron: I don't need a coalition: Tories Would 'Dare' Lib Dems to Vote Down Their Budget", *Daily Mail* (3 May 2010), online: <[www.dailymail.co.uk/news/article-3548477/Cameron-I-don-t-need-coalition-Tories-would-dare-Lib-Dems-vote-down-their-budget.html](http://www.dailymail.co.uk/news/article-3548477/Cameron-I-don-t-need-coalition-Tories-would-dare-Lib-Dems-vote-down-their-budget.html)>).

lowing the election, it would be wiser to agree among themselves<sup>14</sup> to form a coalition government enjoying a majority of seats.<sup>15</sup> One of the great successes in preparing for this election was the fact that “None of the media declared that the Conservatives had ‘won’ simply by being the largest single party. And none suggested that it was up to the Queen to decide.”<sup>16</sup>

A few years ago, a number of political science and law academics,<sup>17</sup> political actors from all affiliations, and senior public servants met in Toronto at the instigation of Professor Peter Russell to attempt to shed some light on the constitutional conventions surrounding the formation of government in our parliamentary system. The group came to the general conclusion that being able to rely on authoritative guidelines would be most useful, like in New Zealand and the United Kingdom, particularly as regards constitutional conventions dealing with the dissolution of Parliament, caretaker governments at election time, the formation of government, and the vote of confidence.<sup>18</sup> It also came to the conclusion that improvements were required to “assist in informing politicians, academics and voters about the role of such conventions in our parliamentary

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[dailymail.co.uk/news/election/article-1270459/David-Cameron-admits-facing-difficult-tough-decisions-spending-cuts-plug-163bn-deficit.html](http://dailymail.co.uk/news/election/article-1270459/David-Cameron-admits-facing-difficult-tough-decisions-spending-cuts-plug-163bn-deficit.html).

As for the Liberal Democrats, they had first said they did not want to form a coalition if so invited after general elections in which, hypothetically, no party would have a majority of seats (Patrick Wintour & Nicholas Watt, “Lib Dems Rule Out Coalition Government”, *The Guardian* (14 February 2010), online: <[www.theguardian.com/politics/2010/feb/14/liberal-democrats-coalition-hung-parliament](http://www.theguardian.com/politics/2010/feb/14/liberal-democrats-coalition-hung-parliament)>). The Liberal Democrats claimed they would rather enjoy the power of influencing the government with their ability to decide the government’s fate during an eventual vote of confidence. The party then changed its position one month before the elections, showing some openness regarding the possibility of joining a coalition if certain conditions were met (“Clegg Does not Rule out Lib Dems Joining any Coalition”, *BBC News* (13 April 2010), online: <[http://news.bbc.co.uk/2/hi/uk\\_news/politics/election\\_2010/8614630.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/election_2010/8614630.stm)>).

14 Discussions between the incumbent Labour Party and the Liberal Democrats also took place, but failed (“General Election 2010: Talks Between Labour and Liberal Democrats Break Down”, *The Telegraph* (11 May 2010), online: <[www.telegraph.co.uk/news/election-2010/7711447/General-Election-2010-talks-between-Labour-and-Liberal-Democrats-break-down.html](http://www.telegraph.co.uk/news/election-2010/7711447/General-Election-2010-talks-between-Labour-and-Liberal-Democrats-break-down.html)>).

15 Patrick Wintour, “Cameron and Clegg Unveil Final Coalition Agreement”, *The Guardian* (20 May 2010), online: <[www.theguardian.com/politics/2010/may/20/cameron-clegg-unveil-coalition-agreement](http://www.theguardian.com/politics/2010/may/20/cameron-clegg-unveil-coalition-agreement)>.

16 Robert Hazell & Ben Yong, Constitution Unit (University College London), “Lessons from the process of government formation after the 2010 election”, presentation in front of the Political and Constitutional Reform Committee, Commons Select Committee, UK Parliament, October 2010 at 4 (see online at: Constitution Unit Blog, “The Cabinet Manual — At Last a Rough Guide for Ministers”, online: <[www.constitution-unit.com/2011/01/07/the-cabinet-manual-%e2%80%93-at-last-a-rough-guide-for-ministers/](http://www.constitution-unit.com/2011/01/07/the-cabinet-manual-%e2%80%93-at-last-a-rough-guide-for-ministers/)>).

17 Disclaimer: I was part of this group.

18 Peter Russell & Cheryl Milne, “Adjusting to a New Era of Parliamentary Government: Report of a Workshop on Constitutional Conventions” University of Toronto, David Asper Centre for Constitutional Rights, 3-4 February 2011, online at 11: <[www.scribd.com/document/51666494/Adjusting-to-a-New-Era-of-Parliamentary-Government-Workshop-Report-Final-3](http://www.scribd.com/document/51666494/Adjusting-to-a-New-Era-of-Parliamentary-Government-Workshop-Report-Final-3)>.

democracy<sup>19</sup> in order to avoid the useless re-creation of a constitutional-crisis perception like the one we experienced during the event that led to the controversial prorogation of Parliament at the end of 2008.

This text falls in line with the objective of informing various actors about the legal or conventional rules and principles surrounding the formation of government in our parliamentary system, with the goal of making the rules of the game clearer *before a crisis strikes*. Indeed, because of the lack of deep understanding about the constitutional rules and principles that apply to government formation in our Westminster parliamentary system — and since even lawyers and politicians often also tend to rely on the heuristic according to which the party with the largest number of seats forms the government, it seems important to set the record straight. It is necessary to state clearly how the different constitutional rules and principles condition the formation of government in a series of realistic, if unusual, scenarios. In doing so, we should take care to highlight the situations that are the subject of consensus and those around which a certain controversy remains.

And so we will explain who, according to applicable Canadian constitutional rules and principles, should form the government following a general election in which the following scenarios occur:

1. The incumbent government has:
  - a. A majority of MPs; or
  - b. More MPs than each of the other parties taken individually, which is to say that it has the plurality of seats or the same number of MPs as another party.
2. A party other than the incumbent government has more MPs than each of the other parties taken individually.
3. Two or more parties other than the incumbent government have the same number of MPs, a number which is more than the incumbent government.

As a complement, we will examine the potential impact of an agreement between two or more political parties to form a coalition to designate a government following general election, and the percentage of votes expressed to determine who must form the government.

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<sup>19</sup> *Ibid.*



Since the Constitution's formal sources are surprisingly terse on the matter, we will examine each scenario mentioned above to determine who should form a new government in each of these hypothetical situations pursuant to the applicable constitutional conventions and practices. We also thought it would be useful to compile an outline of our conclusions regarding the rules used to determine who can form the government following a general election. Such a document is thus appended to this article.

Let us thus begin this study by specifying the nature of the sources<sup>20</sup> (A) on which we will base our analysis, starting with "constitutional conventions" (1). We will then briefly discuss "constitutional practices" as well as distinctions to be made between these two notions (2), followed by the constitutional conventions and practices of other Commonwealth member States (3). General rules and principles applicable to government formation will then be presented before we examine the application of these standards to a variety of scenarios in which no political party succeeds in securing a majority of seats during general elections (B).

## A. The nature of non-legal constitutional sources

### 1. Constitutional conventions

"Constitutional conventions" are rules that are usually unwritten and *are not* part of constitutional *law*, although they are part of the Constitution and they do govern the operation of political institutions.<sup>21</sup> These rules are perceived as mandatory by relevant actors, either due to their purpose or, perhaps, because

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20 We use the expression "constitutional convention" here because it is a standard technical term in literature. We do however note that legal theory, makes a distinction between a "convention" and an "independent but shared conviction." According to action theory, a "convention" exists when actors obey a rule of conduct because of the fact that other actors also do. Let us take the example of a "coordination convention": the convention according to which we walk on the right side of the sidewalk — here mimicking the rule from traffic regulations — rests on the expectations that others will follow the same rule and that in this way we can coordinate our actions. As for the "independent but shared conviction," it does not depend on others' actions. It rests on a shared belief that a rule constitutes a valid reason for action. We will avoid deciding here on the exact nature of the type of prescription which forms the "constitutional convention"; this issue will require further examination.

21 This section and the next reuse to a large extent the analysis of these two types of constitutional sources presented in our paper: Hugo Cyr, "L'absurdité du critère scriptural pour qualifier la Constitution" (The Absurdity of the Scriptural Qualifier for a Constitution) (2012) 6 JPPL 293, cited with approval by the Supreme Court in *Reference re Senate Reform*, 2014 SCC 32 at para 25, [2014] 1 SCR 704.

of how ancient they are.<sup>22</sup> They constitute a standard that can guide the actions of political actors as well as serve as a standard of performance for such actions.

Constitutional conventions complete and sometimes even *contradict* the “written rules of the written Constitution.” This is notably the case of the constitutional convention according to which the Governor General has no choice but to assent to a bill that has received the House of Commons and the Senate’s assent, notwithstanding the express power to “withhold the Queen’s Assent” or “reserve the Bill for the Signification of the Queen’s Pleasure” set out in section 55 of the *Constitution Act, 1867*.<sup>23</sup> In this sense, the constitutional convention is perceived by the political actors to whom it applies as superseding the written rule of the formal constitution.

Finally, it must be emphasized that the courts can recognize the existence of these conventional rules,<sup>24</sup> but that they will not usually enforce them.<sup>25</sup> The

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22 In *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 at 888, 125 DLR (3d) 1 [*Patriation Reference*], the majority adopts the opinion of Sir Ivor Jennings according to which “A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.”

23 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No. 5. In the United Kingdom, some recently wondered whether Her Majesty had to agree to sanction a bill that had obtained the approval of the House of Commons and the House of Lords but that the (minority) government recommended not to sanction. See Nick Barber, “Can Royal Assent Be Refused on the Advice of the Prime Minister?” (25 September 2013) *Constitutional Law Association* (blog), online: <[www.ukconstitutionallaw.org/blog](http://www.ukconstitutionallaw.org/blog)> and the references found therein.

24 *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 SCR 793 at 803, 140 DLR (3d) 385 [*Quebec Veto Reference*]:

It should be borne in mind however that conventional rules, although quite distinct from legal ones, are nevertheless to be distinguished from rules of morality, rules of expediency and subjective rules. Like legal rules, they are positive rules the existence of which has to be ascertained by reference to objective standards. In being asked to answer the question whether the convention did or did not exist, we are called upon to say whether or not the objective requirements for establishing a convention had been met.

25 *Patriation Reference*, *supra* note 22 at 880 and following (majority) and 853 following (minority). Let us note however that if the courts do not sanction constitutional conventions, they can sometimes take them into account when interpreting and implementing constitutional law. Such was the case notably in the *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 560, 83 DLR (4th) 297 [*Reference Re Canada Assistance Plan (BC)*] where the court considered that:

A restraint on the Executive in the introduction of legislation is a fetter on the sovereignty of Parliament itself. This is particularly true when the restraint relates to the introduction of a money bill. By virtue of s. 54 of the *Constitution Act, 1867*, such a bill can only be introduced on the recommendation of the governor general who by convention acts on the advice of the Cabinet. If the Cabinet is restrained, then so is Parliament.

The text of section 54 at issue only requires that the money bill be introduced by the Governor General in Council; all MPs and senators can present bills that are not financial in nature. Thus it would be false, legally, to say that “[a] restraint on the Executive in the introduction of legislation is a

sanction for violating a constitutional convention is a political one rather than a legal one.

The exercise of the Governor General's constitutional powers is strongly circumscribed by a series of *constitutional conventions*; the Governor General's discretion is reduced to a minimum. These conventions' main reason for being is, of course, the entrenched constitutional principle of democracy.<sup>26</sup> The discretionary margin left to the Governor General is what is called their "reserve powers." The issue of government formation raises several questions that depend on the interpretation we give to these reserve powers and to the conventions that frame them.

## 2. Constitutional practices

*Constitutional practices* are not — strictly speaking — rules, but simply "*customs*" in the exercise of power; as *habits*, they are not understood to be mandatory. We could no doubt speak of "constitutional customs" as the doctrine often does, but we believe this expression hinders the comprehension of the issue at hand. Indeed, a custom is not simply a regular behaviour, it is also supported by a normative aspect that guides actors and offers a standard of evaluation for their behaviour. For that matter, it is to this extent that customs are a source of law in international and civil law. Practices do not possess this normative nature. Let us take for example the issue of whether, prior to the enactment of the *Constitution Act, 1982*, there existed a constitutional convention requiring the *unanimous* agreement of provinces to allow the adoption by the Canadian Senate and House of Commons of a resolution whose object is to request a modification of the Canadian constitution by the London Parliament that would affect the provinces' legislative authority. The Supreme Court of Canada, in the *Quebec Veto Reference*,<sup>27</sup> came to the conclusion that if precedents were favourable to the thesis that unanimous consent was required, "one essential requirement for establishing a conventional rule of unanimity was missing. This requirement was acceptance by all the actors in the precedents. Accordingly, there existed no such convention."<sup>28</sup> Precedents, on their own, thus only constitute "constitutional practices," not conventions.<sup>29</sup> As such, con-

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fetter on the sovereignty of Parliament itself" if our reasoning didn't take into account constitutional conventions.

26 In the *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385, the Supreme Court of Canada recognized that democracy is an entrenched constitutional principle.

27 *Quebec Veto Reference*, *supra* note 24.

28 *Ibid* at 808.

29 The *Reference* did, however, find that there was a constitutional convention requiring "a substantial degree of provincial consent." *Patriation Reference*, *supra* note 22 at 905; *Quebec Veto Reference*, *supra* note 24 at 808.

stitutional practices can serve as guides in decision making without binding the actors involved.

Due to the opaque nature of the beliefs of the actors involved, it is often difficult to distinguish what falls within the conventional realm from what is a simple practice. We will indicate throughout our analysis what seems to be clearly of one type or the other, and we will highlight questionable cases.

### **3. Constitutional conventions and practices from other members States of Commonwealth**

Since the Canadian Constitution is “similar in Principle to that of the United Kingdom,”<sup>30</sup> in answering the questions set out in the introduction, it will be useful to examine parliamentary experience not only of Quebec (which has had only two minority governments over the 20th and 21st centuries<sup>31</sup>) and Canada, but also, to the extent that their parliamentary models are similar, the experience of other Commonwealth member states. Indeed, if the various parliamentary traditions can guide us, those inherited directly from British parliamentary experience are of even greater use than those stemming from presidential traditions. In this regard, it is useful to remember that academic literature on the conventions related to a monarch’s, a Governor General’s, or a Lieutenant-Governor’s powers most often treat these three situations as identical and, subject to the relevant differences between the formal constitutions, the solution chosen in one state is usually considered also applicable in another Member state of the Commonwealth. Because of this, the United Kingdom and New Zealand have done us a great service, since both countries have summarized the current state of their conventions and practices related to the formation of minority governments in manuals for the use of their respective Cabinets.<sup>32</sup> This is even truer since the United Kingdom’s manual, published a few years ago, was the object of several public consultations, including consultations of both Houses of Parliament, and the entirety of these reports has been made public. These consultations have allowed, in particular, a refinement of the language used and an improvement of the anticipated various circumstances in which Her Majesty must call upon a party leader to form a minority government. We will refer to these manuals throughout our analysis.

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30 *Constitution Act, 1867*, *supra* note 23 at preamble.

31 See the 2007 minority Liberal government and the 2012 minority PQ government.

32 UK, *Cabinet Manual 2011*, *supra* note 12; NZ, *Cabinet Manual 2008*, *supra* note 11.

## B. General rules and principles applicable to government formation

A constitutional monarchy such as ours rests on the unwritten principle according to which *the Queen reigns but she does not rule*. The Supreme Court of Canada summarizes this rather simply in the following manner:

The Queen of Canada is our head of state, and under our Constitution she is represented in most capacities within the federal sphere by the Governor General. The Governor General's executive powers are of course exercised in accordance with constitutional conventions. For example, after an election he asks the appropriate party leader to form a government. Once a government is in place, democratic principles dictate that the bulk of the Governor General's powers be exercised in accordance with the wishes of the leadership of that government, namely the Cabinet. So the true executive power lies in the Cabinet. And since the Cabinet controls the government, there is in practice a degree of overlap among the terms "government", "Cabinet" and "executive."<sup>33</sup>

La Reine du Canada est le chef de notre État et, aux termes de notre Constitution, elle est représentée en la plupart de ses qualités, au niveau fédéral, par le Gouverneur général. Les pouvoirs exécutifs de ce dernier s'exercent, bien sûr, conformément à certaines conventions constitutionnelles. Par exemple, à la suite d'une élection, il demande au chef de parti approprié de former un gouvernement. Une fois le gouvernement en place, les principes démocratiques commandent que le gros des pouvoirs du Gouverneur général soient exercés en conformité avec la volonté des dirigeants de ce gouvernement, à savoir le cabinet. C'est donc le cabinet qui détient le véritable pouvoir exécutif. Et comme c'est le cabinet qui contrôle le gouvernement, il en résulte dans la pratique que les termes "gouvernement", "cabinet" et "exécutif" se chevauchent jusqu'à un certain point.

This first principle according to which "the Queen reigns but she does not rule" is completed by the principle of "responsible government." As the Supreme Court emphasizes in the quoted excerpt, the Governor General must ask "the *appropriate* party leader to form a government." According to this second principle, the government is primarily accountable to the elected Chamber and is, as such, not subject to the double responsibility which would require that it also enjoys the confidence of the monarch. Because of the constitutional principle of "parliamentary democracy,"<sup>34</sup> it is important to note that it is the vote of confidence of a majority of elected MPs that gives the

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33 Reference *Re Canada Assistance Plan (BC)*, *supra* note 25 at 546-47.

34 See *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 377-78, 100 DLR (4th) 212 (*per* McLachlin J, as she then was, for L'Heureux-Dubé, Gonthier and Iacobucci JJ).

government its democratic legitimacy. In other words, in our constitutional system, the government has no direct democratic legitimacy because it is not elected by the population; its democratic legitimacy is always derived from the support elected MPs grant it. Without the support of a majority of MPs on a confidence issue, the government no longer enjoys the democratic legitimacy that the constitution requires to fully exercise its functions.

From these principles stem four major consequences which we must keep in mind throughout our analysis:

1. Her Majesty and her representatives (the Governor General and lieutenant governors) are the guardians of the government's *constitutional* legitimacy (as opposed to its democratic legitimacy) and must ensure its continuity.<sup>35</sup>
2. Her Majesty and her representatives normally exercise their powers in accordance with the advice from the prime minister or Cabinet who must *enjoy the confidence of the elected legislative assembly*.
3. When the prime minister loses the elected Chamber's confidence, or following the Chamber's dissolution, the prime minister can no longer bind the Governor General with his or her advice. The incumbent prime minister and government remain in post as a "caretaker government" since the Crown cannot be deprived of a government.
4. When governors general must act without taking into consideration the opinion transmitted by the incumbent prime minister as *decisive*, as occurs during the appointment of a new prime minister, then they exercise their "reserve powers."<sup>36</sup> The governors general then have the

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35 The Honorable Edward Roberts, former Lieutenant-Governor of Newfoundland and Labrador, summarizes this duty thusly: "Chief among the vice-regal constitutional duties — indeed, one could accurately call it the first and most important responsibility of any lieutenant-governor or the governor general — is to ensure that the Queen's government continues to function" (the Honourable Edward Roberts, "Ensuring Constitutional Wisdom During Unconventional Times" (2009) 32:1 Can Parliamentary Rev 13 at 15).

36 Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) at 9.7(b). Henri Brun and Guy Tremblay, constitutionalists at Laval University, interpret the conventional restraints on Her Majesty's representative in such an expansive way that he would practically have no reserve power left except in the event of a coup. During the 2008 prorogation crisis, Brun expressed himself in these categorical terms: [Translation] "We remain in a monarchist system. In a constitutional monarchy, the Queen and her representatives *have no political power and must act in all circumstances in accordance with the elected government's directives*" [emphasis added]. He added: "We're in a classic conflict situation between Parliament and the government. If there is no way for the actors present to compromise and agree, there is only one referee: the people, the electorate" (Malorie Beauchemin, "Vers une crise constitutionnelle? La situation pourrait relancer le débat sur le rôle de la gouverneure

duty of exercising these powers in an impartial, non-partisan manner<sup>37</sup> and must be guided by a duty to protect the constitutional order.<sup>38</sup> As such, they must avoid any appearance of partisanship<sup>39</sup> and must encourage decision making that complies with applicable rules and principles all the while abiding the MPs' will.<sup>40</sup> Even though Her Majesty or her representatives must not act in such a way as to tarnish the Crown's image, the exercise of reserve powers does not necessarily have to enjoy popular support.<sup>41</sup>

What general rules and principles apply to government formation? To illustrate the possible tensions between the powers granted by constitutional law

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générale", *La Presse* (4 December 2008) A7). See also, Guy Tremblay, "La gouverneure générale doit accéder à la demande de Harper", *Le Soleil* (4 December 2008) 33. These statements seem to confuse our parliamentarism with a political system in which the government is elected directly by the population. Contrary to widely held parliamentary conventions throughout the Commonwealth, Professors Brun and Tremblay believed that if the Conservative Party of Canada had been defeated in the confidence vote initially planned, the Governor General would have had no choice but to trigger a new general election — even though the last one had just taken place. Calling upon the "coalition" to form a new government would have been "unconstitutional" according to Professor Brun (Henri Brun, "Michaëlle Jean n'a pas le choix", *La Presse* (4 December 2008) A37). Yet, as Oxford Professor Geoffrey Marshall summarized so well: "[T]o admit an automatic right of any government to dissolve Parliament at any time would run counter to the views expressed by most constitutional authorities" (Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Clarendon Press, 1986) at 37). For example, Sir Ivor Jennings wrote: "The right of dissolution, for instance, is not solely within the competence of the prime minister. A sovereign who thought that the power was being put to serious abuse could refuse to allow a dissolution" (Sir Ivor Jennings, *The British Constitution*, 5th ed (Cambridge: Cambridge University Press, 1966) at 118). For a recent opinion, see also: Andrew Heard, "The Governor General's Suspension of Parliament: Duty Done or a Perilous Precedent?" in Peter H Russell & Lorne Sossin, eds, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009) 47 at 49.

37 Stanley A de Smith, *Constitutional and Administrative Law* (Victoria: Penguin Books, 1971) at 99.

38 Vernon Bogdanor, *The Monarchy and the Constitution* (Oxford: Clarendon Press, 1995) at 74. Bogdanor also notes at page 75 that Her Majesty is not bound by precedents when exercising her reserve powers, but that she must decide in function of what is appropriate in the particular circumstances of the issue she faces.

39 *Ibid* at 74-76. Jennings, *supra* note 36 at 119.

40 The UK *Cabinet Manual 2011*, *supra* note 12 at para 2.9:

Historically, the Sovereign has made use of reserve powers to dismiss a prime minister or to make a personal choice of successor, although this was last used in 1834 and was regarded as having undermined the Sovereign. [William IV had dismissed the government headed by Lord Melbourne which held the support of a majority in the House of Commons.] *In modern times the convention has been that the Sovereign should not be drawn into party politics, and if there is doubt it is the responsibility of those involved in the political process, and in particular the parties represented in Parliament, to seek to determine and communicate clearly to the Sovereign who is best placed to be able to command the confidence of the House of Commons.* As the Crown's principal adviser this responsibility falls especially on the incumbent prime minister, who at the time of his or her resignation may also be asked by the Sovereign for a recommendation on who can best command the confidence of the House of Commons in his or her place [emphasis added].

41 Heard, *supra* note 36 at 59.

and the constraints imposed by constitutional conventions, the Supreme Court of Canada, in the *Patriation Reference*, set out in very broad terms the constitutional conventions guiding the formation of a government following a general election:

... it is a fundamental requirement of the constitution that if the opposition obtains the majority at the polls, the government must tender its resignation forthwith. But fundamental as it is, this requirement of the constitution does not form part of the law of the constitution.

It is also a constitutional requirement that the person who is appointed prime minister or premier by the Crown and who is the effective head of the government should have the support of the elected branch of the legislature; in practice this means in most cases the leader of the political party which has won a majority of seats at a general election ... . Ministers must continuously have the confidence of the elected branch of the legislature, individually and collectively. Should they lose it, they must either resign or ask the Crown for a dissolution of the legislature and the holding of a general election.

...

Another example of the conflict between law and convention is provided by a fundamental convention already stated above: if after a general election where the opposition obtained the majority at the polls the government refused to resign and clung to office, it would thereby commit a fundamental breach of convention, one so serious indeed that it could be regarded as tantamount to a *coup d'état*. The remedy in this case would lie with the Governor General or the Lieutenant-Governor as the case might be who would be justified in dismissing the ministry and in calling on the opposition to form the government.<sup>42</sup>

... selon une exigence fondamentale de la Constitution, si l'opposition obtient la majorité aux élections, le gouvernement doit offrir immédiatement sa démission. Mais si fondamentale soit-elle, cette exigence de la Constitution ne fait pas partie du droit constitutionnel.

Une autre exigence constitutionnelle veut que la personne nommée premier ministre fédéral ou provincial par la Couronne et qui est effectivement le chef du gouvernement ait l'appui de la chambre élue de la législature; en pratique, ce sera dans la plupart des cas le chef du parti politique qui a gagné une majorité de sièges à une élection générale ... . Les ministres doivent continuellement jouir de la confiance de la chambre élue de la législature, personnellement et collectivement. S'ils la perdent, ils doivent soit démissionner, soit demander à la Couronne de dissoudre la législature et de tenir une élection générale.

...

Une convention fondamentale dont on a parlé ci-dessus offre un autre exemple du conflit entre droit et convention : si après une élection générale où l'opposition a obtenu la majorité des sièges, le gouvernement refusait de donner sa démission et s'accrochait au pouvoir, il commettrait par là une violation fondamentale des conventions, si sérieuse d'ailleurs qu'on pourrait la considérer équivalente à un coup d'État. Le remède dans ce cas relèverait du gouverneur général ou du lieutenant-gouverneur selon le cas, qui serait justifié de congédier le ministère et de demander à l'opposition de former le gouvernement.



While this *obiter dictum* is a start, some qualifications are required here. We will do so in the next section, in which we will analyze in more detail the issues raised in the introduction. We can however say right away that there are only *two rules which govern the selection of a prime minister following a general election. Those rules have achieved the status of conventional rules in Canada and Quebec:*

- The incumbent prime minister can keep his position until Parliament is again in session,<sup>43</sup> since he has the *right* to attempt to obtain the confidence

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42 *Patriation Reference*, *supra* note 22 at 877-78, 882 (majority on the conventional issue).

43 A problem can, however, occur if the incumbent prime minister avoids asking the Governor General to summon Parliament for a long period of time after a general election, thus avoiding submission to a vote of non-confidence. Eugene Forsey touches upon this hypothesis in a letter sent to the Governor General on August 15, 1984 (archive made public by Helen Forsey, daughter of the late Senator Forsey (19 January 2009), online: Rabble News <[www.rabble.ca/news/prorogation-revisited-eugene-forsey-parliament-and-governor-generals](http://www.rabble.ca/news/prorogation-revisited-eugene-forsey-parliament-and-governor-generals)>). It is clear that in such a case, the prime minister would not be able to request the dissolution of Parliament *before* a confidence vote was held ("It is well established that the governor general should not allow a prime minister to use dissolution of Parliament to escape facing a vote of confidence in the House, especially when the session is new" (CES [Ned] Franks, "To Prorogue or Not to Prorogue: Did the Governor General Make the Right Decision?" in Russell and Sossin, *supra* note 36 at 33). According to Forsey:

If no party gets a clear majority in the election, and the incumbent Government decides not to resign (as it has a perfect right to do) but attempts to carry on for an extended period without meeting the new House (financing the country's business by means of governor general's special warrants, as provided for in the Financial Administration Act, Section 23), then, at some point, Her Excellency would have the right, indeed the duty, to insist that Parliament should be summoned; the right, the duty, to refuse to sign any more special warrants till it was summoned. She would have to say:

"Prime minister, responsible cabinet government means government by a cabinet with a majority in the House of Commons. I don't know whether you have such a majority. No one knows. The only way to find out is by summoning Parliament and letting it vote. If you will not advise me to summon Parliament forthwith, then I shall have to dismiss you and call on the Leader of the Opposition. It is not for me to decide who shall form the Government. But it is for the House of Commons. I cannot allow you to prevent the House of Commons from performing its most essential function. To permit you to do that would be to subvert the Constitution. I cannot allow you to usurp the rights of the House of Commons."

I have said, "for an extended period", and "at some point". What period? What point?

There can be no precise answer. How many grains make a heap? But if, let us say, for three months, or four, or five, or six, the newly elected Parliament had not been summoned, at some point there would most certainly be a public outcry

...

I must emphasize that the courts could do absolutely nothing.

I must emphasize also that, in law, the Government could stay in office, and finance the ordinary business of government by governor general's special warrants, for a very long time. True, it would have to summon Parliament within twelve months of the last sitting of the previous Parliament. But, having done so, it could then prorogue it, after a session of a few hours, and repeat the performance a year later. (Indeed, it could dissolve Parliament after a session of only a few hours, as Mr King did on January 25, 1940.)

of the new elected Chamber;<sup>44</sup>

- If the incumbent prime minister resigns after the elections — before or after losing a vote of confidence of the newly elected legislative assembly — the Governor General must designate as the new prime minister the party leader who is *most likely to enjoy the confidence of the elected House of Parliament*.<sup>45</sup>

The latter principle is not as simple as it seems. Here are a few explanations on the application of the two principles.

## 1. Conventions regarding the incumbent prime minister

Being appointed by the Crown, a prime minister remains in office until he or she resigns or is dismissed. That being the case, an incumbent prime minister benefits from a constitutional convention allowing him or her to be the first to attempt to obtain the confidence of the elected Chamber following a general election.<sup>46</sup>

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The only protection against such conduct is the reserve power of the Crown, the governor general, to refuse such prorogation or dissolution, and, if necessary, to dismiss the Government which advised such prorogation or dissolution.

44 For example, in the October 1886 election in Quebec, the incumbent Conservative government only obtained 26 seats versus 33 for the Liberal Party. The 3 seats obtained by the National Party and the 3 seats won by independent conservatives must also be counted. The incumbent government attempted to remain in power despite the Liberal majority, but when the session opened, it was defeated in a vote of confidence. The Lieutenant Governor then invited the Liberals to form the new government.

Additionally, on the federal level, in 1925, incumbent Prime Minister Mackenzie King was personally defeated at the general election and the Liberal Party of Canada only obtained 101 seats versus 116 for the Conservative Party (in an elected House comprised of 245 MPs). He nevertheless remained at his post, was re-elected in a partial election and was supported by the House of Commons until the end of June 1926, when the events of the King-Byng affair took place.

45 UK, *Cabinet Manual 2011*, *supra* note 12 at para 2.9: "... who is best placed to be able to command the confidence of the House of Commons."

46 See, for example, the following list of authorities presented by Anne Twomey in support of this statement (Anne Twomey, "The Governor-General's Role in the Formation of Government in a Hung Parliament" Sydney Law School Research Paper No. 10/85 (27 August 2010), online: SSRN <<http://ssrn.com/abstract=1666697>>); the Honourable Eugene A Forsey, "The Courts and The Conventions of The Constitution" (1984) 33 UNBLJ 11 at 15-16; Ian Killey, *Constitutional Conventions in Australia* (Melbourne: Australian Scholarly Publishing, 2009) at 212-13; Peter H Russell, "Learning to Live with Minority Parliaments" in Russell and Sossin, *supra* note 36 at 137; Bogdanor, *supra* note 38 at 148; George Winterton, "Tasmania's Hung Parliament, 1989" (1992) PL 423 [Winterton, "Tasmania"]; Eugene A Forsey, "Introduction — The Present Position of the Reserve Powers of the Crown" in Herbert V Evatt and Eugene A Forsey, *Evatt and Forsey on the Reserve Powers* (Sydney, Legal Books, 1990) at xxv; Denis O'Brien, "Dissolving Parliament" (1990) 1:1 PL 17 at 20; Republic Advisory Committee, *An Australian Republic — The Options*, vol 2 (Canberra: Australian Government Publishing Service, 1993) appendix 6 at 248 [Republic Advisory

As head of a “caretaker government,” an incumbent prime minister cannot ask the Governor General to trigger new elections before Parliament begins its new session.<sup>47</sup> Also, an incumbent prime minister who refuses to resign after the re-elected Chamber votes on a motion of non-confidence can be removed from office by the Governor General.<sup>48</sup> As such, the Governor General would not — in these circumstances — have to grant the prime minister’s request to trigger new elections. Holding new elections should only happen if the Governor General comes to the conclusion that the elected Chamber’s composition is such that it could not function and that there is no alternative government.<sup>49</sup>

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Committee, *The Options*]; Australia, Advisory Committee on Executive Government, Australia Constitutional Commission, Australia Parliament, *Report of the Advisory Committee on Executive Government* (Canberra: Australia Government Publishing Service, 1987) at 40, Practice 3(b) [Constitutional Commission, *Report on Executive Government*]; Geoffrey Marshall, *Constitutional Conventions* (Oxford: Clarendon Press, 1984) at 32 [Marshall, *Constitutional Conventions, 1984*]; David Butler, *Governing Without A Majority*, 2nd ed (Basingstoke: Macmillan, 1983) at 73.

47 It seems that in 1971, the incumbent Newfoundland Premier, Joseph Roberts “Joey” Smallwood, had asked the Lieutenant-Governor, on no less than *five* occasions, to trigger new elections before the legislative assembly began its business. The Lieutenant Governor systematically refused. The incumbent Premier finally resigned before the House resumed its business. See: David E Smith, *The Invisible Crown: The First Principle of Canadian Government* (Toronto: University of Toronto Press, 1995) at 58.

48 See the section quoted above from the *Patriation Reference*, *supra* note 22 at 882.

If the Governor General has never made use of that power in Canada, Canadian provincial Lieutenant Governors did use the power to dismiss the government on at least five occasions (for reasons unrelated to a refusal to resign following a vote of non-confidence). See: the Honourable Ronald I Cheffins, “The Royal Prerogative and the Office of the Lieutenant Governor” (2000) 23:1 *Can Parliamentary Rev* 14.

49 The convention to this effect is magnificently summarized in the famous letter from Sir Alan Lascelles, private secretary to the King, sent to the London *Times* (reproduced in Geoffrey Philip Wilson, *Cases and Materials on Constitutional and Administrative Law*, 2nd ed (Cambridge: Cambridge University Press, 1976) at 22-23:

In so far as this matter can be publicly discussed, it can be properly assumed that no wise Sovereign — that is, one who has at heart the true interest of the country, the constitution, and the Monarchy — would deny a dissolution to his prime minister unless he were satisfied that: (1) the existing Parliament was still vital, viable, and capable of doing its job; (2) a General Election would be detrimental to the national economy; (3) he could rely on finding another prime minister who could carry on his Government, for a reasonable period, with a working majority in the House of Commons. When Sir Patrick Duncan refused a dissolution to his prime minister in South Africa in 1939, all these conditions were satisfied: when Lord Byng did the same in Canada in 1926, they appeared to be, but in the event the third proved illusory... .

On the possibility of another government formation obtaining the confidence of the Lower House as a reason to refuse to trigger elections, see also: Bogdanor, *supra* note 38 at 159-60; Marshall, *supra* note 46 at 39-40; B S Markesinis, *The Theory and Practice of Dissolution of Parliament* (Cambridge: Cambridge University Press, 1972) at 87; de Smith, *supra* note 37 at 105; Eugene A Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (Toronto: Oxford University Press, 1968) at 269; ECS Wade and AW Bradley, eds, *Constitutional Law*, 7th ed (London: Longman, 1965) at 118. On the fact that elections were recently held as a reason to refuse to trigger new elections, see: Heard, *supra* note 36 at 49.

Such would no doubt be the case if the elected Chamber was unable to elect a Speaker of the House.<sup>50</sup>

So if the incumbent prime minister does not obtain the Chamber's confidence or if the prime minister is defeated on a confidence issue relatively early in his or her new term, the Governor General has the duty to find a new prime minister.<sup>51</sup> Looking for this alternative can take several days to a few weeks.<sup>52</sup> However, if the non-confidence motion is "*constructive*" — asserting non-confidence in the government while declaring confidence in one or more other parties for them to form the new government — it seems the Governor General should then follow the Chamber's wishes by asking the incumbent

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50 In 1908, after the Newfoundland elections, the Liberal Party and the People's Party *divided equally among themselves the available seats*. The MPs did not succeed in electing a speaker of the assembly. The incumbent Premier then went to ask the Governor for the House's dissolution. The Governor refused. The incumbent Premier resigned and the Governor invited the leader of the People's Party to form the new government. Unable to have a speaker elected for the Lower House, the People's Party leader in turn went to see the Governor to request the House's dissolution. Having exhausted governmental alternatives, the Governor granted the dissolution. The People's Party won the next election with flying colours. See: Roberts, *supra* note 35 at 15.

51 For example, in May 1985, the incumbent Ontarian Progressive Conservative government obtained 52 seats versus the Ontario Liberal Party's 48 and the Ontario New Democratic Party's 25. The government remained in power briefly until the end of June, when a motion of non-confidence was adopted by the Liberals and New Democrats who had entered into a two-year "confidence and supply" agreement (*infra* note 58). The Lieutenant Governor then called upon the Liberal Party leader to form a new government.

This convention regarding the duty to find a governmental alternative is also illustrated by the events that followed the 1923 British elections, at the end of which Prime Minister Stanley Baldwin lost his majority and found himself with a plurality of seats. He remained in post and went before the Lower House to attempt to gain its confidence. Having failed, he resigned along with his government, and the second formation with the most seats was then called upon to form the new government.

52 After the general election, newly elected British MPs took five days to form a coalition which replaced the incumbent government; various experts considered this timeframe to be rather short:

The five-day government formation period in May 2010 was long in British terms, but remarkably short compared to many other western democracies. Allowing for a slightly slower pace in future might be sensible, since an overly compressed timetable can lead the parties to put to one side difficult decisions or to agree upon policies without sufficient consideration. Certainly, we would not desire months of negotiations as in the Netherlands or Belgium, but two weeks or so, as is common in Scotland, Canada and New Zealand, might strike a sensible balance between the two extreme positions.

(UK, HC, "Political and Constitutional Reform Committee, Lessons from the process of Government formation after the 2010 General Election," HC 528, vol 1 (London: The Stationery Office, 2011), written evidence submitted by the Institute for Government, Ev 66 [UK, "Lessons from the process of Government formation after the 2010 General Election"].)

German observers were horrified at the time taken to form the new UK government. By European standards it was indecently, recklessly short. But even by the standards of other Westminster countries it was rushed. Australia, Canada and New Zealand have typically allowed at least

prime minister to resign and then inviting the persons named in the motion to form the new government.<sup>53</sup>

An incumbent prime minister, seeing that the opposition has obtained a majority of seats, has no obligation to resign “immediately.” Yet the *constitutional practice* is that when another party has obtained a *majority* of seats, the incumbent prime minister resigns before the beginning of the next parliamentary session.<sup>54</sup>

A more challenging question, however, is *whether the incumbent prime minister has a duty not to resign* if they observe that they will not be able to form the next government but that, given the distribution of seats among several political parties, there is no clear alternative as of yet. Views on this issue are divided.<sup>55</sup> There is at least one Canadian case in which such a duty, should it

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10 days for the formation of a new government after an election. It took 17 days before Julia Gillard formed her new minority government after Australia’s September 2010 election.

(*Ibid*, written evidence submitted by Professor Robert Hazell & Ben Yong, Constitution Unit, University College London, Ev 71.)

In modern times, the longest period required for the choice of a party leader having to form the next government following a general election in the United Kingdom was six weeks. That’s how long it took the Labour Party to obtain its first (minority) government in 1923, as discussed in the previous note. (Rodney Brazier, *Constitutional Practice: The Foundations of British Government*, 3rd ed (Oxford: Oxford University Press, 1999) at 30.)

53 Republic Advisory Committee, *The Options*, *supra* note 46 at 249; Constitutional Commission, *Report on Executive Government*, *supra* note 46 at 41, Practice 7; Butler, *supra* note 46 at 132; George Winterton, *Monarchy to Republic* (Sydney: Oxford University Press, 1994) at 43.

54 UK, *Cabinet Manual 2011*, *supra* note 12 at para 2.12.

55 On caretaker conventions, the NZ, *Cabinet Manual 2008*, *supra* note 11 at para 6.16 states:

On occasion, it may be necessary for a government to remain in office for some period, on an interim basis, when it has lost the confidence of the House, or (*after an election*) until a government is sworn in following the government formation process [emphasis added].

The Manual is even more explicit at para 6.43, *ibid*:

Where a government formation process results in a change of administration, Ministers usually remain in office in a caretaker capacity until the new government is sworn in, at which time the incumbent prime minister will advise the Governor-General to accept the resignations of the entire ministry.

However, the UK *Cabinet Manual 2011*, *supra* note 12 at para 2.10 states:

The application of these principles depends on the specific circumstances and it remains a matter for the prime minister, as the Sovereign’s principal adviser, to judge the appropriate time at which to resign, either from their individual position as prime minister or on behalf of the government. Recent examples suggest that previous prime ministers have not offered their resignations until there was a situation in which clear advice could be given to the Sovereign on who should be asked to form a government. It remains to be seen whether or not these examples will be regarded in future as having established a constitutional convention.

A footnote also states the debate having led to this position in the following terms:

It has been suggested in evidence to select committees that the incumbent prime minister’s responsibility involves a duty to remain in office until it is clear who should be appointed in their place (UK, “Lessons from the process of Government formation after the 2010 General

exist, was not performed: It was when Prime Minister St-Laurent resigned following the 1957 general election in which the Liberal Party of Canada had obtained fewer seats than the Progressive Conservative Party. Since no party had obtained a majority of seats,<sup>56</sup> it was not immediately clear whether a change in government was in order. Prime Minister St-Laurent's resignation could have been seen as premature. Yet the Progressive Conservative Party managed to form a minority government which lasted approximately nine months, making it possible to see Prime Minister St-Laurent's resignation as an adequate interpretation of the parliamentary situation.<sup>57</sup>

In the United Kingdom, While Gordon Brown was facing pressure to resign earlier by certain members of the media, and while the Cabinet Office and Buckingham Palace officials wanted him to remain in post a little longer, the Political and Constitutional Reform Committee of the House of Commons came to the conclusion that Brown's decision to resign following the 2010 elections in which the Conservatives had not yet finalized their agreement with the Liberal Democrats was adequate.<sup>58</sup> Nevertheless, since it was already clear that the future government — no matter its final composition — would be headed by Conservative leader David Cameron, no certain precedent was set, except for the possible proposition that if a duty to remain exists, it may last only until

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Election", *supra* note 52 at paras 16-22). Whether the responsibilities of the prime minister in these circumstances amount to a duty and how far they extend has been questioned, and the House of Lords Constitution Committee concluded that an incumbent prime minister has no duty to remain in office following an inconclusive general election until it is clear what form any alternative government might take. (UK, HL, "Constitution Committee — Twelfth Report: The Cabinet Manual", HL107 (London: The Stationery Office, 2011) at para 61) [UK, "Twelfth Report: The Cabinet Manual"].

56 The Conservative-Progressive Party had obtained 111 seats, the Liberals, 104, the Social Democratic Party of Canada (*Co-operative Commonwealth Federation*) had won 25 seats, the Social Credit Party of Canada had 19 seats, and 6 independent MPs ran under various banners more or less associated with the two main parties (Liberal-Labour Party (1), independent Liberal (2), independent Conservative (1) or simply "independent" (2)). See Parliament of Canada, "History of federal ridings since 1867 — General Elections — 23rd Parliament", online: <[www.parl.gc.ca/About/Parliament/FederalRidingsHistory/hfer.asp?Search=Gres&genElection=23&ridProvince=0&submit1=Recherche&Language=E](http://www.parl.gc.ca/About/Parliament/FederalRidingsHistory/hfer.asp?Search=Gres&genElection=23&ridProvince=0&submit1=Recherche&Language=E)>.

57 Hogg, *supra* note 36 at 9.7(b). Let us note, in other respects, that if this Progressive Conservative government lasted only about nine months, that is because Prime Minister Diefenbaker himself asked the governor general to trigger new elections. The Prime Minister then obtained one of the largest majorities in federal parliamentary history, with 208 seats out of 265 (See Parliament of Canada, "History of federal ridings since 1867 — General Elections — 24th Parliament", online: <[www.parl.gc.ca/About/Parliament/FederalRidingsHistory/hfer.asp?Search=Gres&genElection=24&ridProvince=0&submit1=Recherche&Language=E](http://www.parl.gc.ca/About/Parliament/FederalRidingsHistory/hfer.asp?Search=Gres&genElection=24&ridProvince=0&submit1=Recherche&Language=E)>.

58 UK, "Lessons from the process of Government formation after the 2010 General Election", *supra* note 53 at paras 3, 19-25.

the identity of the prime minister's successor is clear.<sup>59</sup> A few months later, the same House of Commons committee concluded in another report that “[t]he evidence indicates that there is a continuing dispute over the extent to which a Prime Minister has a duty to remain in office when it is unclear who else might be best placed to lead an alternative government.”<sup>60</sup>

As a result, in the case where it is not immediately clear who will form the next government, it would be wise on the part of the Governor General to encourage the incumbent prime minister to delay their resignation until the question will have been satisfactorily answered, even if that means temporarily not accepting the prime minister's resignation. It goes without saying that the opinion of the incumbent prime minister who concedes they cannot continue to lead the government could not be binding upon the Governor General on the issue of the formation of the next government. This incumbent prime minister cannot enjoy the presumption that they enjoy the confidence of the elected Chamber. However, such an opinion could be useful in evaluating viable options. The two main advantages in keeping the incumbent prime minister in place in cases where the composition of the government is uncertain are to avoid (1) a government vacancy *and* (2) a hasty decision by the Governor General with regards to the formation of the new government to remedy such a vacancy. We must not forget that it is the Governor General's duty to ensure the Crown has a government at all times and that there is no gap in the exercise of power for a period longer than the few minutes — or, at worst, hours — required for the incumbent prime minister's resignation, its acceptance and the next chosen person's swearing-in.

In light of this, we can draw the following conclusions:

- The incumbent government can, according to the applicable constitutional conventions, attempt, should it so wish (without being obligated to), to obtain the confidence of the elected Chamber in each of the following circumstances: It has more MPs than every other individual party, it has fewer MPs than one or several other parties, or it has the same number of MPs as another party.<sup>61</sup>

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<sup>59</sup> *Ibid.*

<sup>60</sup> UK, HC, “Constitutional implications of the Cabinet Manual: Sixth Report of Session 2010-11,” HC 734, vol 1 (London: The Stationery Office, 2011) at para 74.

<sup>61</sup> See the analysis of the 1908 Newfoundland general election, *supra* note 47.

The latter scenario recently occurred in the 2010 Australian general election and, the same year, in the general election of the State of Tasmania. Indeed, the Australian general election had granted the incumbent Labour government the same number of seats as the Liberal/National Coalition. Through a “confidence and supply” agreement entered into with an MP from the Green Party

- Yet if the incumbent government obtains less than a majority of seats, the result of such an attempt to obtain the elected Chamber's confidence is uncertain and will depend on the decisions made by the other parties represented within the elected Chamber.
- In the scenario where the incumbent government attempts to obtain the confidence of the elected Chamber following a general election and this attempt succeeds, the incumbent government remains in power.
- Should the incumbent prime minister (and thus their government) resign without attempting to obtain the confidence of the elected Chamber following a general election, the incumbent government no longer remains in power.
- Should the incumbent prime minister fail to obtain the confidence of the elected Chamber following a general election, the incumbent government cannot remain in power. This, however, probably does not exclude the possibility for the incumbent government to form a new government following a subsequent "confidence and supply" agreement with one or more other parties or a coalition agreement (these issues will be examined in the next section).

## **2. The convention regarding the duty of the Governor General to appoint the party leader most likely to enjoy the confidence of the elected Chamber as prime minister**

Must the Governor General simply name the leader of the party that has obtained the highest number of seats, whether it consists in a majority or a simple plurality of seats? Or must they name the leader of a party which, although it has not obtained the highest number of seats, is nevertheless in a better position to *obtain* the support of a majority or plurality<sup>62</sup> of the elected Chamber? This

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and four independent MPs, the Labour Party was finally able to control the House with 76 seats versus 74 (one independent MP and another from the National Party of Western Australia took the opposition's side). A little later, one member of the coalition accepted the position of Speaker of the House in replacement of a Liberal MP, thus allowing the latter's party to hold 76 seats versus 73 instead of 75 versus 74.

In the case of the Tasmanian State's general election, the Labour Party and Liberals both won 10 seats while the Green Party secured 5. See Anne Twomey's analysis of this issue, *supra* note 46, at 19-25.

<sup>62</sup> There are essentially five possible forms of support to a minority party for the formation of a government: (1) *ad hoc* support depending on the particular topic covered by the vote; (2) agreement not to vote against the government on confidence issues (favorable vote or abstention); (3) "confidence and supply" agreement in which the ally party undertakes to vote in favour of the minority



question arises because it is possible for the party having obtained a plurality of seats to be unable to count on the support of a sufficient number of MPs from other political parties to ensure a majority support in a vote of confidence.

Commentators have stated that there is a constitutional convention according to which Her Majesty or her representatives should, if the incumbent prime minister is unable to remain in post, automatically invite *the* opposition party having obtained *the highest number of seats* in the general election to form the government.<sup>63</sup> We, however, believe that the practice of naming the leader of the party that has obtained the highest number of seats as prime minister is based on the custom of majority governments. It is merely a heuristic, not a constitutional convention. *In no way whatsoever does it take into account the possibility that some alliance may have a better opportunity to obtain the majority support of the elected Chamber than a single party holding a plurality of seats.* Indeed, Geoffrey Marshall wrote that the “proposition that the Leader of the Opposition must always be sent for is clearly incompatible with the consideration of coalition as being on an equal footing with minority government.”<sup>64</sup> If Sir Ivor Jennings believed such a practice allowed the demonstration that Her Majesty was impartial in determining a new government,<sup>65</sup> this can only be done at the risk of being forced to choose a party that has no chance of obtaining the confidence necessary for the government to function and that is already condemned to fail, as all could know before it even attempts to obtain the assembly’s confidence. The automatic nature of the supposed convention makes its *raison d’être* vanish by imposing governmental instability and undermining the credibility of Her Majesty and her representatives. And as we will see later on, there are many other mechanisms to demonstrate the impartiality of Her Majesty or her representatives during the selection of a new government.

Consequently, although this is a controversial issue, we believe that the practice of naming the leader of the party having obtained a plurality of seats has not transformed into a constitutional convention. In fact, it is our belief that there is no conventional rule automatically dictating which party leader must form the government when no party obtains the majority of Parliament’s elected seats.<sup>66</sup>

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government on these issues; (4) coalition by which members of the ally party gain access to the Cabinet; (5) party fusion.

63 See the list of authors identified by Anne Twomey, *supra* note 46 in fns 15-18 and the accompanying text.

64 Marshall, *Constitutional Conventions*, 1984, *supra* note 46 at 34.

65 Sir I Jennings, *Cabinet Government*, 3rd ed (Cambridge: Cambridge University Press, 1961) at 32.

66 See Brazier, *supra* note 52 at 31:

It seems from all this that there are no “rules” about government formation from a hung

The actual issue revolves around the capacity for one party to secure the elected Chamber's confidence. Which standard applies here? Is it a matter of how predictably the elected Chamber's confidence can be *obtained*, or how predictably it can be *maintained* for a reasonably long period?

The Governor General, to avoid being perceived as taking part in partisan politics, must let those who have been elected solve the issue of figuring "who has the best chance to enjoy the confidence of the legislative assembly" and what interpretation should be made of the maxim's requirement.<sup>67</sup> The *NZ Cabinet Manual 2008* sums up well the steps to take with their necessary adaptations:

By convention, the role of the Governor-General in the government formation process is to ascertain where the confidence of the House lies, based on the parties' public statements, so that a government can be appointed. It is not the Governor-General's role to form the government or to participate in any negotiations (although the Governor-General might wish to talk to party leaders if the talks were to have no clear outcome).

Like the New Zealand manual, the British one highlights that the Sovereign is not limited to the information received from the incumbent prime minister and adds that elected parties have a duty to inform the Palace regarding the negotiations underway:

Where a range of different administrations could potentially be formed, political parties may wish to hold discussions to establish who is best able to command the confidence of the House of Commons and should form the next government. The Sovereign would not expect to become involved in any negotiations, although there are responsibilities on those involved in the process to keep the Palace informed. This could be done by political parties or the Cabinet Secretary. The Principal Private Secretary to the prime minister may also have a role, for example, in communicating with the Palace.

It is also clear that even though the Governor General can communicate with all elected parties and obtain all information deemed necessary, the number of votes obtained by each party should not be considered when making a

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Parliament. Such uncertainty in an area of major importance in the constitution may cry out for regulation, but the only "rule" in such circumstances is open-ended and unhelpful, namely that in choosing a prime minister the Queen should commission that person who appears best able to command the support of a stable majority in the House of Commons, or, failing such a person, that politician who seems able to form a government with reasonable prospect of maintaining an administration in office.

<sup>67</sup> NZ, *Cabinet Manual 2008*, *supra* note 11 at para 6.37: "The process of forming a government is political, and the decision to form a government must be arrived at by politicians."

decision.<sup>68</sup> Hence during the 2010 British elections, the leader of the Liberal Democrat party stated that “whichever party has won the most votes and the most seats, if not an absolute majority, has the first right to seek to govern, either on its own or by reaching out to other parties”; this statement was repeated in footnote 8 in the discussion draft for the *UK Cabinet Manual*, in the section on negotiations between the parties.<sup>69</sup> The inclusion of this note was severely criticized, as it seemed to suggest that this was a convention, while many agreed it was not.<sup>70</sup> The government’s report on the consultation regarding the manual indeed states that “[a] number of responses suggested that footnote 8, which expressed the negotiating position of the Leader of the Liberal Democrats should be removed as it may be confusing.”<sup>71</sup> In response, the government clarified as follows: “The footnote at paragraph 49 of the *Draft Cabinet Manual* was included in the draft to provide some context following the general election last year. The footnote has not been included in the final version of the *Cabinet Manual*.”<sup>72</sup>

As for Prime Minister Stephen Harper, he essentially argued during the events which led Parliament’s prorogation in 2008, that (1) general elections lead to the election of a prime minister; (2) the party having obtained the most seats “has won” and has the right to form the government; (3) the prime minister cannot be replaced by the leader of another political party without new elections being held; and (4) a coalition must have campaigned as such and its members must hold a majority of seats to form the government.<sup>73</sup> Elements (1), (3) and (4) are clearly wrong from a constitutional standpoint, and seem to offer rhetoric to convince the public rather than an assertion of proper constitutional propositions. Point (2) seems to register along the same lines. Given the fact that very few members of the public know how our institutions function,<sup>74</sup> this all seems to support the thesis that these were partisan statements aimed at convincing a volatile public opinion at the time of a possible loss of power to

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68 UK, Cabinet Office, *The Cabinet Manual — Draft: A Guide to Laws, Conventions, and Rules on the Operation of Government* (2010), online at 26: <[www.gov.uk/government/publications/cabinet-manual](http://www.gov.uk/government/publications/cabinet-manual)>.

69 *Ibid.*

70 See, among other documents, the report from the House of Lords on the draft Manual: “We agree that the statement contained in the footnote to paragraph 49 of the draft Manual does not reflect the current constitutional position on which party has the first right to seek to govern. The footnote should therefore be removed” (UK, “Twelfth Report: The Cabinet Manual”, *supra* note 55 at para 63).

71 UK, HM Government, *Government response to comments received on the Draft Cabinet Manual* (October 2011), online at para 44:<[www.gov.uk/government/publications/cabinet-manual](http://www.gov.uk/government/publications/cabinet-manual)>.

72 *Ibid* at para 46.

73 See especially Russell, *supra* note 46 at 141.

74 See Ipsos Reid, *supra* note 3.

a coalition and that these statements in no way reflected the state of Canadian constitutional conventions.

During the 2015 general election, CBC news anchorman Peter Mansbridge interviewed the then-leaders of Opposition and asked them their views on the issue. During the interview, Thomas Mulcair, then Leader of the Official Opposition, was asked: “does the party in a minority situation that winds up with the most seats have the automatic right to govern?”<sup>75</sup> Mulcair replied that “under our system of government, that would normally be the case. But there are constitutional conventions that are, that are complex, that are historically applied differently. I think that my adversaries take the approach that you’ve just described and it’s certainly the one that I would take.”<sup>76</sup> The interviewer tried to clarify by suggesting to Mulcair that “so whoever has the most number of seats should have the right to govern,” but the latter responded that “It’s a complex constitutional convention, as you know. There have been instances in the past where governments have tried to hold on.”<sup>77</sup> As for Justin Trudeau, then leader of the second opposition party, when asked whether it was his belief that “that whatever party has the most number of seats has the right to try to govern at that point” responded “that’s the way it’s always been, whoever commands the most seats gets the first shot at governing” and repeated once again that “[w]hoever gets the most seats gets the first shot at trying to command the confidence of the House.”<sup>78</sup> But, when pressed by Mansbridge who told him that “well actually the first shot goes to the outgoing party,” Trudeau accepted the suggestion by replying “[t]o the outgoing Prime Minister, absolutely.”<sup>79</sup> These ambiguous statements are certainly not sufficient to demonstrate the acceptance of a convention providing that the leader of the party controlling a plurality of seats enjoys the right to first test the confidence of the elected Chamber. The context in which such statements were made also point to partisan propositions directed at delegitimizing a possible attempt by the incumbent government to remain in power if no party were to win a majority. One always has to be careful with self-serving state-

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75 CBC News, “Full text of Peter Mansbridge’s interview with Thomas Mulcair”, *CBC News* (9 September 2015), online: <[www.cbc.ca/news/politics/canada-election-2015-tom-mulcair-full-interview-transcript-peter-mansbridge-1.3221262](http://www.cbc.ca/news/politics/canada-election-2015-tom-mulcair-full-interview-transcript-peter-mansbridge-1.3221262)>.

76 *Ibid.*

77 *Ibid.*

78 CBC News, “Full text of Peter Mansbridge’s interview with Justin Trudeau”, *CBC News* (8 September 2015), online: <[www.cbc.ca/news/politics/canada-election-2015-justin-trudeau-interview-peter-mansbridge-full-transcript-1.3219779](http://www.cbc.ca/news/politics/canada-election-2015-justin-trudeau-interview-peter-mansbridge-full-transcript-1.3219779)>.

79 *Ibid.*

ments when trying to identify to what rules the relevant actors believe themselves to be conventionally bound.

If the Governor General cannot rely on precise rules dictating ahead of time which party should form the government and cannot rely on the number of votes obtained, how can they choose the leader called upon to form the government? The answer is both simple and complex: *The Governor General has the conventional duty to let, to the extent possible, the political parties and their leaders determine among themselves who must form the government following a general election.*<sup>80</sup> The Governor General can encourage the parties to reach an agreement. To incentivise parties to reach a minimally stable government following a general election in which no party has obtained a majority of seats, the Governor General could inform the parties that they have no intention to call again a new general election if the incumbent government so requests,<sup>81</sup> or if the incumbent or newly elected government fails quickly due to its inability to obtain or keep the elected Chamber's confidence. And so the Governor General would only call a new general election if no other alternative were available (and if the elected Chamber is not functional).<sup>82</sup> The parties would then have an incentive to judge which party or combination of parties has the best chance of enjoying confidence over a longer period. If the process draws out, the Governor General can also put pressure on the parties by delaying the signature of decrees submitted by the "caretaker government" until negotiations are concluded.

Although this all seems simple, the convention's application is not without complications. Indeed, what should be done if the parties do not agree among themselves to name the next government? For example, what is to be done if the party holding a plurality of seats says it wants to form a minority government on its own while two or several parties whose combined seats would form a new plurality or even a majority enter into a collaboration agreement and

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80 See NZ, *Cabinet Manual 2008*, *supra* note 11 at para 6.37, text quoted in n 64; the UK, *Cabinet Manual 2011*, *supra* note 12 at para 2.9, text quoted in n 40; Brazier, *supra* note 52 at 33:

In such a situation it is suggested that the guiding light ought to be that the political crisis should if possible be resolved by politicians — in a phrase, that there should be political decisions, politically arrived at.

81 This is precisely what the Governor of Tasmania did following the 1989 general election. The incumbent government's party had only obtained 17 seats versus 15 for the Labour Party and 5 for the Green Party. According to Anne Twomey, *supra* note 46 at 13, the general viewpoints of commentators were favorable to this statement by the Governor. She relies on, among others: Winterton, "Tasmania", *supra* note 46 at 429, and Brian Galligan, "Australia" in David Butler & DA Low, eds, *Sovereigns and Surrogates — Constitutional Heads of State in the Commonwealth* (Basingstoke: Macmillan, 1991) 61 at 92-97.

82 See *supra* note 49.

also want to form the government? Those are not easy questions. In fact, these questions are so problematic that the Governor General should avoid having to answer them personally. As Walter Bagehot famously declared: “The Sovereign has, under a constitutional monarchy such as ours, three rights — the right to be consulted, the right to encourage, and the right to warn.”<sup>83</sup> This list seems to leave out the reserve powers which can be exercised only when the Monarch has no choice but to do so. This is because the principle according to which the Monarch reigns but does not govern, combined to the constitutional principle of parliamentary democracy, gives the Monarch only a minimal role. The solution could be that the Monarch (or its representative) proposes to parties — while staying non-partisan — a mechanism to solve the issue while avoiding a personal choice between all possible solutions. The Governor General could then invite MPs to use a parliamentary procedure of governmental investiture. This procedure is not yet common in Canada, but it has been useful in other Westminster-type parliamentary systems, and it requires no major constitutional or legislative amendment. As Professor Robert Hazell and Akash Paun note:

This conventional mechanism for testing confidence suffers from its obscure nature, which does not facilitate understanding of the process by which the government is formed amongst the general public. It might therefore be preferable for the House of Commons to hold an “investiture vote” as in Scotland and many other countries, which would require MPs to vote on who should lead the new government. This change would not require any legal or constitutional change, as it could be on a motion that simply made a recommendation to the monarch on whom to appoint as PM.

If the election result were very close indeed, such that two party leaders both had plausible grounds to claim the ability to form a government, the debate on the investiture motion would offer an opportunity for the two aspiring PMs to make their cases, and for the parties holding the balance of power to explain their reasons for backing one or other of the candidates. It would therefore also have benefits in terms of accountability and transparency, helping to meet critics’ concerns that government formation following an inconclusive election takes place largely behind closed doors, especially if it involves negotiations with minor or third parties.<sup>84</sup>

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83 Walter Bagehot, *The English Constitution*, 2nd ed (London: Chapman and Hall, 1873) at 85.

84 Hazell & Paun, *supra* note 10 at 83. See *Scotland Act 1998*, c 46 (UK), art 46:

**46 Choice of the First Minister.**

(1) If one of the following events occurs, the Parliament shall within the period allowed nominate one of its members for appointment as First Minister.

(2) The events are —

(a) the holding of a poll at a general election,

(b) the First Minister tendering his resignation to Her Majesty,

This would facilitate a majority decision and would avoid any perception of partisanship on the part of the Governor General.

The use of such a mechanism, no matter how wise, is certainly not a constitutional obligation. So what should be done if the parties refuse to use this process or if the investiture does not succeed in settling on a single governmental option? Ultimately, if political parties are unable to determine who should form the government following general elections, the Governor General, after significant effort to encourage parties to settle the issue, will have to use his or her own judgment regarding the situation as a whole, and comply with their duties to ensure the preservation of the Crown's legitimacy and guard the state's stability. Such a situation is excessively risky for the preservation of the Governor General's legitimacy, and it should be avoided to the extent possible. Yet no one is bound to do the impossible. Here are a few arguments which the Governor General could use as support in making a decision in the hypothetical context where parties represented within the elected Chamber after a general election do not succeed in agreeing among themselves on who should form the government:

- It could be wise to start by inviting the incumbent prime minister to attempt to obtain the elected Chamber's confidence, since he or she has the right to attempt to secure the Chamber's confidence.
- If the incumbent government fails or refuses to obtain the elected Chamber's confidence and resigns, the Governor General must then turn to the other political parties. At this stage, nothing is automatic; no party has a constitutional right or a conventional power to demand to attempt to form a government.

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(c) the office of First Minister becoming vacant (otherwise than in consequence of his so tendering his resignation),

(d) the First Minister ceasing to be a member of the Parliament otherwise than by virtue of a dissolution.

(3) The period allowed is the period of 28 days which begins with the day on which the event in question occurs; but —

(a) if another of those events occurs within the period allowed, that period shall be extended (subject to paragraph (b)) so that it ends with the period of 28 days beginning with the day on which that other event occurred, and

(b) the period shall end if the Parliament passes a resolution under section 3(1)(a) or when Her Majesty appoints a person as First Minister.

(4) The Presiding Officer shall recommend to Her Majesty the appointment of any member of the Parliament who is nominated by the Parliament under this section.

See also *Government of Wales Act, 2006* c 32 (UK), art 47.

- If none of the parties is able to agree with the others to obtain their support,<sup>85</sup> it is plausible that the only remaining solution would be a minority government formed by the party holding the plurality of seats.
- If a party obtains the support of one or more parties and is able to control a majority of seats, it will form the government, as the applicable rules would then be those of a majority government, according to which the party controlling the majority of seats should form the government.
- If however, on one hand, a party succeeds in obtaining the support from one or more other parties, thus controlling a plurality of seats and that, on the other hand, the party which has the largest number of seats of all parties taken individually also seeks to form the government, their competing claims to form the government will be left to the judgment of the Governor General. In exercising this judgment, he or she can no doubt take into account the nature of the support received by the first party, the significance of the plurality thus obtained by that first party compared to the representation of the single largest party, etc. The less significant the plurality obtained by the first party and its allies, the less the nature of the support given to this first party by its allies will be robust, the more elements could favour the party having obtained a plurality of seats on its own. The stability of a government made up of MPs from a single party could then win over the broader representative nature of a government comprised of a larger number of MPs, but which rests on a less certain alliance between various political parties. Conversely, the more significant the plurality obtained by the first party and its allies, the more robust the nature of the support given to this first party by its allies, the fewer the elements could favour the single party with a view to forming the next government. To reiterate: there is no automatic formula in this matter.

The clearer it will be, both for politicians and members of the public, that it is first the responsibility of political parties and their leaders to determine which party or parties can command the elected Chamber's confidence, the more it will be possible for the Governor General to maintain an appearance of impartiality if, in the end, parties are unable to solve the matter and must rely on his or her judgment.

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85 For possible forms of agreement, see *supra* note 59.



## Conclusion

This article has sought to demonstrate the extent to which the heuristic too often used by the media to describe who must form the government in our parliamentary system (“the party which has won the highest number of seats”) is an oversimplification that may cause systematic errors. As we mentioned in the introduction, we hope this paper will contribute to the goal of “informing politicians, academics and voters about the role of . . . conventions in our parliamentary democracy.”<sup>86</sup> A better understanding of logic behind the constitutional rules and principles governing the formation of government is a much better guide than the misleading heuristic which is over-used. Parliamentary democracy, a principle entrenched in our Constitution, demands that the choice of government belongs first and foremost in the hands of all elected MPs, and no one else’s. If everyone better understood all the mechanisms that lead to the formation of government, our democracy could only function better.

This way, the governors general will be able to better accomplish their role, as everyone will understand that their true role in government formation does not follow one extreme belief or the other — that, on one hand, it is false to believe that the Governor General has no role to play whatsoever in selecting the government, the mechanism being automatic and, on the other hand, it is also false to think the Governor General must decide the government’s composition as soon as parties have difficulty reaching an agreement in this regard.

We finish by stressing that although this article has used the political experience of other Commonwealth member states with which we share a Westminster-type parliamentary system, it would be most useful in improving the way our parliaments function to broaden our horizons and take instruction from more recent parliamentary systems which have attempted to avoid the pitfalls our older institutions have encountered. Indeed, our parliaments would benefit from various measures aimed at “rationalizing” our parliamentarism so that not only government formation, but also government survival and falls, are more in harmony with the democratically expressed will of the elected Chamber members who hold democratic legitimacy in our constitutional system.

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<sup>86</sup> See *supra* note 19 and accompanying text.

## **APPENDIX: Outline of the rules applicable to government formation**

According to the applicable constitutional conventions, the incumbent government can attempt, should it so wish (without being obligated to), to obtain the confidence of the legislative assembly in each of the following circumstances:

It has more MPs than each of the other parties individually, it has the same number of MPs as another party, or it has fewer MPs than one or several other parties.

The incumbent government that obtains a majority of seats as part of a general election can remain in power since its majority ensures, in principle, that it will enjoy the Chamber's confidence when the first parliamentary session opens.

Yet if the incumbent government obtains less than a majority of seats following a general election (or if extraordinary circumstances make it lose its majority after elections but before the first parliamentary session opens<sup>87</sup>), the result of an attempt to obtain the legislative assembly's confidence is uncertain and depends on the decisions made by the other parties represented within the Chamber. As such, it will not be possible to know which political party or parties will form the government upon a simple reading of electoral results when these do not correspond to a majority government situation.

In the scenario where the incumbent government attempts to obtain the confidence of the legislative assembly following a general election (whether or not it holds a majority) and this attempt succeeds, the incumbent government remains in power.

In the scenario where the incumbent prime minister resigns following elections, the entire Cabinet resigns as well and the incumbent government no longer enjoys the constitutional benefit of being the first to attempt to obtain the confidence of the legislative assembly. The party that formed the incumbent government then finds itself in the same situation as any other party and is thus subject to the same rules as regards the determination of who should form the next government.

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<sup>87</sup> This could happen in a hypothetical situation in which one or more MPs die or resign between the time of their election and the beginning of the first parliamentary session, making the incumbent government lose the majority of seats at the first vote of confidence it must face.

Should the incumbent government's attempt to obtain the confidence of the new legislative assembly fail, the incumbent government must resign. This does not, however, exclude the possibility for the incumbent government's party to form a new government or to take part in a new ministry following a support agreement with one or more other parties, thus ensuring that the new government enjoys the confidence of the legislative assembly.<sup>88</sup>

In the scenario where the incumbent party does not remain in government for whatever reason, no constitutional convention sets out that the Governor General is bound to automatically invite the leader of the party having obtained the plurality of seats to form a government. Since the process is not automatic, it is not possible to determine who will form the new government simply by looking at the number of seats obtained by each party.

It is therefore impossible to determine ahead of time who will form the new government in the case where a party other than that which formed the incumbent government obtains more seats than each of the other parties taken individually without controlling a majority.

*A fortiori*, it is also impossible to determine ahead of time who will form the government in a scenario where two or more parties other than that of the incumbent government get the same number of MPs elected when this number is higher than that of the incumbent government, since there is no constitutional rule dictating in advance which political party or parties must form the government when no party holds a majority of elected Parliament seats.

In the event where a party that has not obtained a majority of MPs nevertheless obtains the support of one or more parties and is then able to control a majority of seats, it can form the next government, because the constitutional convention according to which the party controlling a majority of seats should form the government will apply. It matters little whether this party is the one which won a plurality of seats; what matters is the fact that it is able to command the confidence of a majority of MPs.

If no party holds a majority of seats, the Governor General has the conventional duty to let the political parties and their leaders determine among themselves who must form the government following a general election. Choosing the party that must form the government is a responsibility lying first with the MPs.

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88 See *supra* note 59 for the various forms of these support agreements.

Should no party obtain a majority of seats and should MPs be slow to determine who should form the new government, the Governor General has certain practical means to encourage the MPs to fulfill their responsibility. He or she can, for example, put pressure on parties by delaying the signature of decrees submitted by the “caretaker government” until a new government is formed.

In the case where an agreement between two or more political parties to form an “alliance”<sup>89</sup> only results in the control of a plurality – not a majority – of seats, it then becomes the responsibility of all political parties represented in the legislative assembly to determine the significance they give to such an agreement in the political process leading to their choice of a new government. No convention determines who should have priority in forming the government between such an alliance holding a plurality of seats and the party which, prior to the alliance, had obtained a plurality of seats. In the end, if political parties are unable to determine who must form the new government, the Governor General will, unfortunately, be forced to decide. In such a context, the Governor General can certainly use his or her judgment to determine who should form the new government, taking into consideration, among other elements, (a) the nature of the support given to a party thanks to a support agreement with allies who bring it a plurality of seats, and (b) the extent of the plurality of seats on which such an alliance can count compared with that of the party having obtained a plurality of seats when each party’s results are considered individually. The less significant the alliance’s plurality and the less robust the nature of the support given, the more elements could favour the party having obtained a plurality of seats on its own. The stability which can be offered by a government made up of MPs from a single party could then win over the broader representation which could be offered by a government comprised of a larger number of MPs, but which would rest on a less certain alliance between various political parties. Conversely, the more significant the alliance’s plurality and the more robust the nature of the support, the less elements could favour the single party with a view to forming the new government. We reiterate that there is no automatic formula in this matter.

In the case where, following negotiations between the parties represented in the legislative assembly, it becomes clear that the parties are unable to determine by themselves who must form the new government, the Governor General must use his or her own judgment, taking into consideration the entire situation, and comply with his or her duties to ensure the maintenance of

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<sup>89</sup> On the diversity of possible alliances and their multiple degrees of integration, see *ibid.*

the Crown's legitimacy and defend the state's stability. He must then invite, in complete impartiality, the leader of the party deemed best poised to obtain the legislative assembly's confidence. It is clear that although the Governor General communicate with all elected parties and obtain all information deemed necessary, the number of votes obtained by each party should not be considered in making a decision.

In the case where parties do not succeed in determining who should form the new government and where the Governor General ultimately comes to the conclusion that no party can obtain the legislative assembly's confidence, the Governor General can, as a last resort, dissolve the assembly and trigger a new general election.

