

**La Couronne et
le Parlement
The Crown and
Parliament**



La Couronne et le Parlement

The Crown and Parliament

Sous la direction de/Edited by
Michel Bédard et Philippe Lagassé

Préface de Son Excellence Le très honorable/
Foreword by His Excellency The Right Honourable
David Johnston
Gouverneur général du Canada/Governor General of Canada

ÉDITIONS YVON BLAIS

© 2015 Thomson Reuters Canada Limitée

MISE EN GARDE ET AVIS D'EXONÉRATION DE RESPONSABILITÉ : Tous droits réservés. Il est interdit de reproduire, de mémoriser sur un système d'extraction de données ou de transmettre, sous quelque forme ou par quelque moyen que ce soit, électronique ou mécanique, photocopie, enregistrement ou autre, tout ou partie de la présente publication, à moins d'en avoir préalablement obtenu l'autorisation écrite de l'éditeur, Éditions Yvon Blais.

Ni Éditions Yvon Blais ni aucune des autres personnes ayant participé à la réalisation et à la distribution de la présente publication ne fournissent quelque garantie que ce soit relativement à l'exactitude ou au caractère actuel de celle-ci. Il est entendu que la présente publication est offerte sous la réserve expresse que ni Éditions Yvon Blais, ni l'auteur (ou les auteurs) de cette publication, ni aucune des autres personnes ayant participé à son élaboration n'assument quelque responsabilité que ce soit relativement à l'exactitude ou au caractère actuel de son contenu ou au résultat de toute action prise sur la foi de l'information qu'elle renferme, ou ne peut être tenu responsable de toute erreur qui pourrait s'y être glissée ou de toute omission.

La participation d'une personne à la présente publication ne peut en aucun cas être considérée comme constituant la formulation, par celle-ci, d'un avis juridique ou comptable ou de tout autre avis professionnel. Si vous avez besoin d'un avis juridique ou d'un autre avis professionnel, vous devez retenir les services d'un avocat, d'un notaire ou d'un autre professionnel. Les analyses comprises dans les présentes ne doivent être interprétées d'aucune façon comme étant des politiques officielles ou non officielles de quelque organisme gouvernemental que ce soit.

**Catalogage avant publication de
Bibliothèque et Archives nationales du
Québec et Bibliothèque et Archives Canada**

Vedette principale au titre :

La Couronne et le Parlement = The Crown
and Parliament

Textes présentés lors d'une conférence
présentée à Ottawa le 23 mai 2014.
Comprend des références bibliographiques.
Textes en français et en anglais.

ISBN 978-2-89730-129-3

1. Canada. Parlement. Chambre des communes - Congrès. 2. Pouvoir législatif - Canada - Congrès. 3. Monarchie constitutionnelle - Congrès. 4. Canada - Politique et gouvernement - Congrès. I. Groupe canadien d'étude des questions parlementaires. II. Titre : Crown and Parliament.

KE4535.C68 2014 328.7105
C2015-940902-0F

**Bibliothèque et Archives nationales du
Québec and Library and Archives Canada
cataloguing in publication**

Main entry under title:

La Couronne et le Parlement = The Crown
and Parliament

Papers presented at a conference held in
Ottawa on May 23rd 2014.
Includes bibliographical references.
Texts in French and English.

ISBN 978-2-89730-129-3

1. Canada. Parliament. House of Commons - Congresses. 2. Legislative power - Canada - Congresses. 3. Monarchy - Congresses. 4. Canada - Politics and government - Congresses. I. Canadian Study of Parliament Group. II. Title: Crown and Parliament.

KE4535.C68 2014 328.7105
C2015-940902-0E

Nous reconnaissons l'aide financière du gouvernement du Canada
accordée par l'entremise du Fonds du livre du Canada (FLC)
pour nos activités d'édition.

Dépôt légal : 2^e trimestre 2015
Bibliothèque et Archives nationales du Québec
Bibliothèque et Archives Canada
ISBN : ISBN 978-2-89730-129-3



THOMSON REUTERS

Éditions Yvon Blais, une division de Thomson Reuters Canada Limitée

75, rue Queen, bur. 4700
Montréal (Québec) H3C 2N6
Canada

Service à la clientèle:
Téléphone : 1-800-363-3047
Télécopieur : 450-263-9256
Site Internet : www.editionsyvonblais.com

PRÉFACE



Les institutions ont toutes leur importance. Au Canada, aucune institution n'est plus importante pour le bon fonctionnement de notre démocratie que le Parlement, qui est composé de la Chambre des communes, du Sénat et de Sa Majesté la reine Elizabeth II, laquelle incarne personnellement la Couronne canadienne.

À titre de représentant de la Reine au Canada, j'exerce les fonctions essentielles de la Couronne au Parlement : convoquer et dissoudre le Parlement, accorder la sanction royale aux projets de loi adoptés par les parlementaires et m'assurer que le Canada a toujours un premier ministre et un gouvernement en place. Depuis mon installation en tant que gouverneur général, en 2010, j'ai appris à mieux comprendre la symbiose qui existe entre ma fonction et celles des élus et des autres fonctionnaires. Bref, le Parlement est essentiel à la Couronne, tout comme la Couronne est au cœur du Parlement.

Le régime canadien de gouvernement responsable est unique. Il comporte plusieurs niveaux et évolue constamment. Je me réjouis donc du présent volume de dissertations portant sur la relation historique et contemporaine entre la Couronne et le Parlement. Remarquablement, cette histoire commence avant la Grande Charte et remonte à plus d'un millénaire, tout en étant demeurée dynamique et évolutive. Cet héritage vivant nous rappelle que lorsqu'il s'agit de la Couronne et du Parlement, nous sommes tous des étudiants qui avons beaucoup à apprendre.

À la lecture de ces dissertations, qui contribuent à former notre pensée actuelle et éclairent un certain nombre de débats courants, nous constatons pourquoi nous devons porter une attention particulière à ce sujet très important. Alors que la Confédération s'apprête à

célébrer son 150^e anniversaire en 2017, j'encourage tous les Canadiens à étudier, à enseigner et à célébrer notre système de gouvernement unique, ainsi qu'à comprendre comment la Couronne et le Parlement sont les clés permettant de faire de ce pays un pays meilleur.

Le gouverneur général et commandant en chef du Canada,
Son Excellence le très honorable David Johnston

Avril 2015

FOREWORD



Institutions matter and, in Canada, no institution matters more to the proper functioning of our democracy than Parliament—itsself comprised of the House of Commons, the Senate and Her Majesty Queen Elizabeth II, who personally embodies the Canadian Crown.

As The Queen's representative in Canada, I perform the Crown's essential duties in Parliament: summoning and dissolving our legislature, granting Royal Assent to bills passed by parliamentarians, and ensuring Canada always has a prime minister and government in place. Since my installation as governor general in 2010, I have developed a deeper appreciation for the symbiotic relationship between the office I hold and those held by our elected representatives and other public servants. Simply put, Parliament is central to the Crown, just as the Crown is vital to Parliament.

Canada's system of responsible government is unique, layered and continually evolving. I therefore welcome the present volume of essays on the historical and contemporary relationship between the Crown and Parliament. Remarkably, it is a history that predates the Magna Carta and can be traced back more than a thousand years. Yet it remains dynamic, adapting to the changes of the present day. This living legacy reminds us that when it comes to the Crown and to Parliament, we are all students with much to learn.

These essays, which make valuable contributions to our current thinking and illuminate a number of contemporary debates, highlight why we should pay close attention to this important subject. As we approach the 150th anniversary of Confederation in

2017, I encourage all Canadians to study, teach and celebrate our unique system of government, and to grasp how the Crown and Parliament are the keys to unlocking the possibilities of a better country.

His Excellency the Right Honourable David Johnston
Governor General and Commander-in-Chief of Canada

April 2015

TABLE DES MATIÈRES/TABLE OF CONTENTS

Introduction (français) Michel Bédard	1
Introduction (English) Michel Bédard	3
Chapitre 1 L'évolution de la relation entre la couronne et le parlement anglais André Émond	5
Chapter 2 Parliament and the Crown: A Canadian Perspective David E. Smith	49
Chapter 3 The Legislative Process and Judicial Review: Royal Functions and their Justiciability John Mark Keyes	61
Chapter 4 The Role of the Crown-in-Parliament: A Matter of Form and Substance Charles Robert	95
Chapter 5 The Royal Recommendation Rob Walsh	133
Chapter 6 The 'Convention' to Consult Parliament on Decisions to Deploy the Military: a Political Mirage? Alexander Bolt	145
Chapter 7 Recovering the Royal Prerogative Paul Benoit	173

Chapter 8 The Crown and Constitutional Amendment in Canada Philippe Lagassé & Patrick Baud	203
Chapter 9 Subtle yet significant innovations: The Advisory Committee on Vice-Regal Appointments and the Secretary's new Royal powers Christopher McCreery	241
Chapter 10 Succession to the Throne and the Architecture of the Constitution of Canada Mark D. Walters	263
Chapitre 11 La monarchie constitutionnelle au Canada: une institution stable, complexe et souple L'honorable Serge Joyal	293
Chapter 12 Succession to the Crown of Canada Anne Twomey	319
Chapitre 13 L'abdication du roi Édouard VIII en 1936: « autopsie » d'une modification de la Constitution canadienne Julien Fournier, Patrick Taillon, Geneviève Motard et André Binette	353
Conclusion (français) Philippe Lagassé	405
Conclusion (English) Philippe Lagassé	411

INTRODUCTION

Michel Bédard*

Le Groupe canadien d'étude des parlements (GCEP) a été fondé en 1978. Organisme sans but lucratif et apolitique, le GCEP a pour mission d'encourager et de favoriser l'étude du Parlement du Canada et des législatures canadiennes ainsi que le processus parlementaire en général. Le GCEP permet le rassemblement d'un groupe varié d'individus : universitaires, fonctionnaires, parlementaires, étudiants ; partageant tous néanmoins ce même intérêt pour le processus et les institutions parlementaires.

Le Groupe s'attèle à sa mission d'encourager et de favoriser l'étude des questions parlementaires par différents programmes et activités. Ainsi, chaque année, il organise trois colloques sur les travaux parlementaires qui examinent différents aspects du système parlementaire canadien, que ce soit, par exemple, le processus législatif, les comités parlementaires ou encore la procédure parlementaire. Le GCEP octroie aussi annuellement la subvention de recherche Mallory, créée en l'honneur du regretté professeur James R. Mallory, pour encourager l'étude des parlements.

Plusieurs activités du Groupe visent spécifiquement la relève étudiante. Organisée conjointement avec l'Association des greffiers parlementaires du Canada, la Tournée de conférences dans les universités canadiennes permet à des étudiants universitaires d'assister à une présentation donnée par un fonctionnaire parlementaire sur le rôle du Parlement et le système de gouvernement de Westminster. Le Groupe tient aussi annuellement le concours national d'essai qui cherche à récompenser un étudiant universitaire du 1^{er} ou du 2^e cycle pour un essai portant sur les questions parlementaires. De plus, le GCEP a récemment mis sur pied une bourse doctorale afin de soutenir les efforts d'un étudiant universitaire de 3^e cycle dont le projet de thèse porte sur le processus ou les institutions parlementaires.

* Président, Groupe canadien d'étude des parlements.

Le 23 mai 2014, le GCEP tenait une conférence intitulée: «La Couronne et le Parlement». Organisée autour de quatre groupes de discussion, cette conférence s'est, dans un premier temps, penchée sur l'évolution historique de la relation entre la Couronne et le Parlement pour ensuite examiner le rôle de la Couronne au cours du processus législatif. S'ensuivit l'examen d'une nouvelle pratique émergente quant à la consultation du Parlement avant l'exercice d'une prérogative royale. Finalement, le dernier groupe de discussion examina les enjeux contemporains concernant la Couronne et la Constitution canadienne, dont ceux reliés aux modifications récentes aux règles de succession au trône. Conformément à une pratique bien établie et chère aux membres du Groupe, chaque groupe de discussion fut suivi d'une période de questions de l'auditoire qui donna lieu à des échanges intéressants et stimulants. Je tiens personnellement à remercier tous ceux qui ont assisté à la conférence ainsi que les participants aux groupes de discussion: lcol Alexander Bolt, M. Paul Benoit, Pr. André Émond, Pr. Philippe Lagassé, Pr. John Mark Keyes, Pre. Carissima Mathen, M. Christopher McCreery, M. Charles Robert, Pr. David E. Smith, M. Rob Walsh, Pr. Mark D. Walters.

Les articles contenus dans le présent ouvrage se basent sur les présentations faites au cours de la conférence. Se sont aussi ajoutés les contributions et articles du sénateur Serge Joyal, M. Patrick Baud, M. Julien Fournier, Pre. Geneviève Motard, Pr. Patrick Taillon et Pre. Anne Twomey. Je remercie tous les auteurs de leur excellente contribution.

Le titre «La Couronne et le Parlement» contient en son sein une contradiction inhérente qui démontre toute la pertinence d'une conférence et d'un ouvrage sur le sujet afin d'en explorer plus à fond les différents contours. Ce titre présente en effet la Couronne et le Parlement comme s'il s'agissait de deux entités distinctes alors que l'une et l'autre sont intrinsèquement reliées. Sans Couronne, il n'y a point de Parlement (*Loi constitutionnelle de 1867*, art. 17). Qui plus est, la Constitution investit la Couronne du pouvoir législatif qu'elle exerce «de l'avis et du consentement du Sénat et de la Chambre des Communes» (*ibid.*, art. 91 *in limine*). Ce titre présente aussi la Couronne comme une seule entité. Certes, il n'y a qu'une seule Couronne au niveau fédéral au Canada, mais cette Couronne exerce selon la Constitution et les conventions tantôt un pouvoir exécutif, la Couronne en conseil, tantôt un pouvoir législatif, la Couronne en son Parlement. Cette dualité intervient au cœur même du processus parlementaire. Le présent ouvrage porte sur cette question ainsi que de façon plus générale sur la relation parfois complexe entre la Couronne et le Parlement.

Bonne lecture.

INTRODUCTION

Michel Bédard*

Founded in 1978, the Canadian Study of Parliament Group (CSPG) is a non-profit, non-partisan organization whose mission consists in encouraging and supporting the study of the Parliament of Canada and Canadian legislatures, and the parliamentary process in general. The CSPG brings together a diverse group of individuals, including academics, public servants, parliamentarians and students, who share an interest in the parliamentary process and parliamentary institutions.

The Group fulfills its mission to encourage and support the study of parliamentary issues by organizing various programs and activities. Each year, the CSPG organizes three parliamentary business seminars that examine various aspects of the Canadian parliamentary system, such as the legislative process, parliamentary committees or parliamentary procedure. Each year, the CSPG also awards the Mallory Research Grant, which is dedicated to the late Professor James R. Mallory and is meant to inspire continued interest in the parliamentary system of government.

Several CSPG activities are specifically geared toward the next generation of students. Jointly organized by the Canadian Association of Clerks-at-the-Table and the Canadian Study of Parliament Group, the speaking tours of Canadian universities allow university students to attend a presentation given by a parliamentary officer on the role of Parliament and the Westminster model of government. The Group also holds an annual national essay competition on a parliamentary theme, which is open to undergraduate and graduate students. In addition, the GCEP recently established a doctoral fellowship to support the efforts of a doctoral student whose thesis focuses on the parliamentary process and parliamentary institutions.

* President, Canadian Study of Parliament Group.

On May 23, 2014, the CSPG held a conference entitled “The Crown and Parliament”. Organized around four discussion panels, the conference examined the historical evolution of the relationship between the Crown and Parliament and the role of the Crown in the legislative process during the first two panels. A third discussion panel examined a new emerging practice regarding the consultation of Parliament before the exercise of royal prerogative. The fourth panel examined contemporary issues pertaining to the Crown and the Canadian Constitution, including recent changes to the rules governing succession to the throne. In accordance with an established practice dearly valued by the members of the CSPG, each discussion panel was followed by a question period, which led to interesting and thought-provoking discussions with the audience. I would personally like to thank everyone who attended the conference, as well as the participants in the discussion panels: LCol Alexander Bolt, Paul Benoit, Prof. André Émond, Prof. Philippe Lagasse, Prof. John Mark Keyes, Prof. Carissima Mathen, Christopher McCreery, Charles Robert, Prof. David E. Smith, Rob Walsh and Prof. Mark D. Walters.

The articles in this book are based on the presentations given at the conference. Also included are articles by Senator Serge Joyal, Patrick Baud, Julien Fournier, Prof. Geneviève Motard, Prof. Patrick Taillon and Prof. Anne Twomey. I thank all the authors for their contributions.

The title “The Crown and Parliament” contains within it an inherent contradiction that illustrates the relevance of a conference and book on the topic to fully explore the various aspects. Although the title presents the Crown and Parliament as two separate entities, both are intrinsically linked. Without the Crown, there can be no Parliament (*Constitution Act, 1867*, s. 17). Moreover, the Constitution invests the Crown with the legislative authority it exercises “with the advice and consent of the Senate and House of Commons” (*ibid.*, s. 91 *in limine*). This title also presents the Crown as a single entity. There is only one federal Crown in Canada; however, under the Constitution and constitutional conventions, this Crown exercises both executive powers (the Crown-in-Council) and legislative powers (the Crown-in-Parliament). This duality lies at the heart of the parliamentary process. This book addresses this issue and, more generally, the sometimes complex relationship between the Crown and Parliament.

I hope you find the book to be an interesting read.

CHAPITRE 1

L'ÉVOLUTION DE LA RELATION ENTRE LA COURONNE ET LE PARLEMENT ANGLAIS

André Émond*

I. INTRODUCTION

Le Parlement du Canada est composé de la reine, d'une chambre haute appelée le Sénat, et de la Chambre des communes, prescrit l'article 17 de la *Loi constitutionnelle de 1867*¹. Élisabeth II, aujourd'hui la Reine du Canada, n'est donc pas séparée du Parlement; elle forme avec lui un seul corps politique.

L'idée que la reine (ou le roi) fait partie intégrante du Parlement remonte à l'Angleterre du XVI^e siècle², à peu près à la même époque où les lords et communes se sont établis pour de bon au palais royal de Westminster³. On parlera dès lors du *roi (ou de la reine) en son Parlement*.

En réalité, il n'y avait là rien de bien nouveau, car le Parlement a toujours été la chose du monarque, son instrument. Un Parlement n'a jamais eu d'existence légale sans roi ou sans reine. C'est lui ou elle qui nomme les lords de sa chambre haute, sanctionne ses projets

* Professeur titulaire, Département de droit et justice, Université Laurentienne.

1. *Loi constitutionnelle de 1867* (R-U), 30 & 31 Vict, c 3 [*Loi constitutionnelle de 1867*].
2. C St-Germain, *The Fyrste Dyaloge in Englysshe with New Addycyons*, London, Sig O, 1531 à la p 4. L'idée que le roi et le parlement ne faisaient qu'un a été reprise par le roi Henri VIII en 1543 : Raphaël Holinshed, *Holinshed's Chronicles of England, Scotland, and Ireland*, vol 3, London, 1808, reproduit par New York, AMS Press, 1965 à la p 824.
3. Les chambres du Parlement, qui siégeaient dans différents établissements auparavant, ont fait du palais royal de Westminster leur lieu de rencontre permanent, depuis 1512 pour les lords, depuis 1550 pour les communes.

de loi, le convoque en session, le proroge, le dissout, forme un nouveau Parlement, autrefois selon son bon plaisir, aujourd'hui selon les canons de la démocratie.

Nous évoquons ici les grands moments qui ont marqué l'histoire du Parlement et de ses liens avec le monarque anglais. Pour en expliquer l'évolution, il faut remonter très loin dans le temps, jusqu'au milieu du Moyen Âge, en 1066, l'année où Guillaume de Normandie a débarqué sur les côtes anglaises.

II. GRAND CONSEIL DU ROYAUME

Guillaume, duc de Normandie, entreprend la conquête de l'Angleterre et se fait couronner roi en 1066. Comme les Anglo-Saxons tolèrent mal le joug de ces envahisseurs venus de l'autre côté de la Manche, Guillaume doit continuer à batailler avec ses compagnons jusqu'en 1075 afin de les soumettre⁴. L'instinct de conservation force alors les nouveaux maîtres de l'Angleterre, peut-être 15 000 hommes de troupe, dont 5 000 chevaliers⁵, à rester soudés les uns aux autres et à vouer une fidélité sans faille à leur bienfaiteur, le désormais roi Guillaume, car ils sont peu pour contrôler un pays hostile peuplé d'environ deux millions d'habitants.

Guillaume I^{er} gouverne son royaume en autocrate. L'étendue de son pouvoir tient autant à ses qualités de chef qu'aux circonstances⁶.

Certes, Guillaume règne entouré du clergé et de la noblesse d'Angleterre, autrement dit de sa cour, comme il est d'usage au Moyen-Âge; en effet, il convoque régulièrement des conseils réunissant les archevêques, évêques, abbés et hauts barons. Toutefois, c'est Guillaume qui a mis sur pied la noblesse et le clergé du royaume, après en avoir écarté les seigneurs et prélats anglo-saxons. Il a effectivement choisi, parmi les lieutenants qui l'avaient assisté dans son aventure, pratiquement tous les évêques et barons d'Angleterre. Il les a dotés de vastes domaines enlevés aux vaincus, ce qui a fait d'eux ses vassaux

4. Il faudra même attendre 1081 pour que Guillaume I^{er} s'empare du Pays de Galles : P Maurice, *Guillaume le Conquérant*, Paris, Flammarion, 2002 à la p 154.

5. Guillaume De Poitier, *Histoire de Guillaume le Conquérant, 1073-1074*, édité et traduit par R Foreville, Société d'édition Les belles lettres, 1952 à la p 150-151, note infrapaginale 5.

6. P Zumtor, *Guillaume le Conquérant, 1073-1074*, Paris, Tallandier éd, 2003 à la p 359-360 [Zumtor].

et leur a conféré le droit de le conseiller. La nouvelle aristocratie du royaume lui doit donc fortune et titres⁷.

L'autorité quasi-absolue de Guillaume I^{er}, autant dans les domaines législatif, exécutif que judiciaire, ne peut se perpétuer chez ses héritiers. Alors que les conseils nationaux convoqués par le Conquérant n'exercent qu'une fonction consultative, parfois purement cérémonielle⁸, ceux des rois Guillaume II (1087-1100), Henri I^{er} (1100-1135), Étienne (1135-1154), Henri II (1154-1189) et Richard I^{er} (1189-1199), tendent à acquérir un caractère institutionnel. En effet, même un monarque à la forte personnalité, comme Henri I^{er} ou son petit-fils Henri II, répugne à contredire les Grands du royaume. La décision finale appartient certes au roi, mais celui-ci, en homme sage, ne peut ignorer trop souvent les avis de ses grands vassaux⁹.

Le conseil national typique peut compter une cinquantaine d'individus accompagnés de leur suite¹⁰. Il s'agit de la cour féodale du roi dans sa formation la plus étendue. On l'appelle le *grand conseil*, ou *magnum concilium*, pour le distinguer du *petit conseil*, soit les proches faisant partie de l'entourage du roi et qui le suivent en toutes occasions. Dans la *Magna Carta* concédée par Jean sans Terre, en 1215, le roi la rebaptise sous le nom de *conseil commun du royaume*, le *commune concilium regni* en latin.

III. MAGNA CARTA (1215)

Les juristes du XII^e siècle, Jean de Salisbury (1115-1180) et Ranulf de Glanville (1112-1190), s'accordent sur l'obligation incombant au roi de respecter le droit et les libertés de son peuple¹¹. Or, le droit de cette époque repose essentiellement sur les coutumes. Et comme les coutumes sont des règles de droit imprécises du fait qu'elles naissent spontanément, et se transmettent oralement d'une généra-

7. H Suhamy, *Guillaume le Conquérant*, Paris, Ellipses, 2008 à la p 144.

8. Zumtor, *supra* note 6 à la p 364.

9. R. Bartlett, *England Under the Norman and Angevin Kings, 1075-1225*, Oxford, Clarendon Press, 2000 aux pp 143-147.

10. L'assemblée tenue à Clarendon en janvier 1164, par exemple, comptait cinquante-deux seigneurs accompagnés de leurs serviteurs : «A.D. 1164 Constitutions of Clarendon», dans W Stubbs (éd), *Select Charters and other Illustrations of English Constitutional History*, 9^e éd, Oxford, Clarendon Press, 1921, p 161-167.

11. J de Salisbury, *Policraticus*, 1150-1180, vol 2, Minerva G M B H, Frankfurt, 1965 aux pp 345-411; R. de Glanville, *The Treatise of the Laws and Customs of the Realm Commonly Called Glanvill*, 1188, traduction anglaise par George Derek Gordon Hall, Oxford, Oxford University Press, 1965 à la p 1.

tion à l'autre¹², leur portée exacte, voire leur existence, demeure une source de conflit. C'est notamment le cas de plusieurs prérogatives régaliennes. Les Anglais se demandent, entre autres, si les coutumes obligent le roi à gouverner en consultation avec l'aristocratie d'Angleterre, ou si celui-ci peut gouverner son royaume sans partage.

Sous le règne de Jean sans Terre (1199-1216), le nœud du litige concerne l'assiette des aides féodales dues au roi, principalement l'*écuage* (aide remplaçant le service militaire) et le *relief* (aide prélevée sur les successions), autrement dit la levée des taxes et des impôts¹³. Le roi Jean prétend pouvoir fixer à sa guise le montant de chaque taxe et la fréquence à laquelle elle est perçue, alors que ses barons rétorquent que toute nouvelle aide, ou toute aide au-delà des sommes prévues par les coutumes, doit être approuvée par eux. Au terme d'un conflit armé, les barons, en 1215, imposent leur lecture du droit du royaume en forçant Jean à signer la *Magna Carta*. Jusque-là, le roi consultait ses hommes quand cela lui était utile. Désormais, il est obligé de les consulter, au moins pour les questions fiscales¹⁴.

Lorsque le roi Jean entend prélever de nouveaux impôts et taxes, il doit donc obtenir le consentement du conseil commun du royaume, autrement dit, il doit s'assurer de l'accord de ses grands vassaux. Apparemment, ce consentement a été demandé et obtenu par son père Henri II et son frère Richard I^{er}, lorsqu'ils ont voulu accroître leurs rentrées d'argent¹⁵. Mais cela avait-il été vraiment nécessaire ou encore auraient-ils simplement respecté une formalité ? Apparemment, les prélats et hauts barons n'auraient eu guère le choix que de se plier aux vœux de ces rois au caractère bien trempé et au règne glorieux. Toutefois, pour Jean, un homme souvent méfiant, arrogant et méprisant, que le sort des armes au surplus défavorise au point qu'il se mérite le nouveau surnom de Jean à l'épée molle (*Softsword*),

12. R. Filohol, « La preuve de la coutume dans l'ancien droit français » dans *Recueils de la Société Jean Bodin pour l'histoire comparative des institutions*, vol 17, Bruxelles, Librairie Encyclopédique, 1965, 357, aux pp 360-371.

13. Voir le texte de la *Magna Carta* (ci-après cité *Magna Carta*), reproduit en version française par A Émond, *Constitution du Royaume-Uni, des origines à nos jours*, Montréal, Wilson & Lafleur, 2009 aux pp 507-516. Lire également R V Turner, *Magna Carta Through the Ages*, Harlow, Pearson Education Ltd, 2003 aux pp 47-48.

14. *Magna Carta*, *ibid* aux articles 12 et 14. Lire aussi J Favier, *Les Plantagenêts, Origines et destin d'un empire*, XI^e au XIV^e siècles, Paris, Librairie Arthème Fayard, 2004 à la p 723.

15. J R Maddicott, *The Origin of the English Parliament, 924-1327*, Oxford, Oxford University Press, 2010 aux pp 103, 104 et 119-121.

le doute n'est désormais plus permis sur l'état du droit : les prélats et les hauts barons ont fait de leur consentement une exigence légale.

La *Magna Carta* est retouchée sous le règne du fils de Jean, le roi Henri III (1216-1272). Quoique les articles 12 et 14, contenant l'obligation de consulter les Grands du royaume en cas de modification aux impôts et taxes, disparaissent de son texte dès 1216, Henri III et ses successeurs en ont respecté l'esprit¹⁶. Un document de 1297, appelé «*Statut concernant la taille*» malgré qu'il n'ait pas reçu la sanction royale¹⁷, proclame tout haut que la levée de toute aide non prévue aux coutumes exige le consentement des archevêques, évêques et abbés, ainsi que celui des comtes, barons, chevaliers, bourgeois et autres hommes libres du royaume, autrement dit du parlement. Il s'agit alors plus d'une revendication des parlementaires que de l'état du droit. Toutefois, la sanction par le roi de véritables statuts du Parlement au même effet, d'abord en 1340¹⁸, puis en 1371¹⁹, confirme la réception de la règle en droit coutumier anglais.

Pourquoi tant se soucier de l'obligation imposée au roi d'obtenir l'approbation du Parlement à la levée d'une nouvelle taxe ou d'un nouvel impôt ? C'est parce que celle-ci est le principal facteur qui explique les avancées du parlement, qu'il s'agisse de l'élargissement de ses compétences, de l'émergence des privilèges de ses membres, de la reconnaissance de la souveraineté de ses lois, comme de l'affaiblissement éventuel de la Couronne et de l'émergence du poste de Premier ministre.

IV. NAISSANCE DU PARLEMENT

Le mot anglais *parliament* vient du vieux français. Déjà, dans la France de l'an mille, un *parlement* désignait une assemblée composée des grands personnages d'un royaume²⁰. Les clercs de la chancellerie anglaise, responsables de l'administration de la justice, l'emploient une première fois en novembre 1236, lorsqu'il leur faut nommer les membres de l'aristocratie convoqués par le roi pour le conseiller sur

16. Turner, *supra* note 13 à la p 92.

17. *Statut concernant la taille (De Tallagio non concedendo)*, 25 Edw 1 (1297).

18. *Statut sur le subside (The subsidy preceeding shall not be had in example)*, 14 Edw 3, stat 2, c 1 (1340).

19. *Statut interdisant de lever des droits de douane sans l'autorisation du Parlement (No imposition shall be set upon without assent of parliament)*, 45 Edw 3, c 4 (1371).

20. LAROUSSE (éd Algirdas Julien Greimas), *Grand Dictionnaire d'Ancien français, La langue du Moyen Âge de 1080 à 1350*, Paris, 2007, *sub verbo* «*parler*».

la gouvernance du pays²¹. C'est l'époque, entre 1154 et 1399, où le français est la langue des souverains d'Angleterre et de ses organes de gouvernement²², incluant le Parlement anglais naissant²³.

a) Élus du parlement

En réalité, rien ne change en 1236 ; ce que l'on appelle de plus en plus le *Parlement* demeure le même grand conseil sous un nouveau nom. Ce n'est que progressivement, au cours du siècle suivant, que de nouveaux usages vont éventuellement transformer la nature de l'institution.

Une première innovation est l'ajout, aux côtés du clergé et de la noblesse, de représentants des communautés du royaume. Ces élus sont des bourgeois des villes et des membres de la petite noblesse des comtés ruraux.

Quelle est l'utilité de les convoquer aux réunions du Parlement ? Les progrès de la société anglaise nous en donnent la clé.

Depuis le X^e siècle, dû principalement à l'essor démographique comme au développement de l'agriculture et du commerce, les places de marché se multiplient pour écouler les surplus. Des associations de marchands et d'artisans s'ébauchent. Le salariat apparaît. Les villes et les ports de mer, ou les bourgs comme on disait autrefois, deviennent des centres de croissance économique. Il se développe un goût pour l'enrichissement et le mieux-être, au point qu'une nouvelle classe sociale émerge : les *bourgeois*²⁴.

Certains bourgeois amassent des fortunes, ce qui suscite l'envie de seigneurs moins riches. Voilà pourquoi des comtes et barons mettent de côté leurs préjugés de caste pour conclure des alliances matrimoniales entre leurs enfants et ceux des bourgeois.

Pour les bourgeois, le bien le plus précieux reste leur autonomie locale, soit le droit de gérer eux-mêmes les intérêts de leur commu-

21. J Field, *The Story of Parliament in the Palace of Westminster*, London, Politico's Publishing, 2002, à la p 45.

22. H Walter, *Honni soit qui mal y pense ; l'incroyable histoire d'amour entre le français et l'anglais*, Paris, Robert Laffont, 2001.

23. On peut voir reproduit un bon nombre de discours prononcés en français au Parlement dans V H Galbraith (éd), *The Anonimale Chronicle 1333 to 1381*, Manchester, 1927.

24. Zumtor, *supra* note 8 à la p 332-336.

nauté, sans interférence indue de l'extérieur. Ils atteignent ce but en arrachant aux seigneurs du lieu des chartes de franchise garantissant l'autonomie recherchée²⁵.

On doit donc désormais compter avec l'opinion des bourgeois. La parole de leurs *leaders* porte, jusqu'au Parlement, où le roi prend soin de les convoquer.

Une autre classe sociale apparaît au XII^e siècle : on l'appelle la *gentry*. Elle se compose des chevaliers, qui forment le cœur de la *gentry*, auxquels s'ajoutent les écuyers (*squires*) et de simples gentilshommes (*gentlemen*). La plupart ont un manoir, sorte de domaine seigneurial propre à l'Angleterre. En 1300, les quelque 10 000 familles qui la composent possèdent ensemble plus de terres que les grands aristocrates²⁶. En 1600, c'est autour de 20 000 familles qui jouiront d'un revenu combiné dix fois supérieur aux pairs d'Angleterre²⁷. Ce facteur illustre à lui seul leur influence grandissante.

On trouve parfois, parmi les membres de la *gentry*, les fils cadets des hauts barons d'Angleterre. D'autres sont d'anciens marchands qui achètent des terres à la campagne une fois retirés des affaires. Les professionnels du droit et de l'administration, avocats, intendants ou baillis, soit des hommes qui travaillent contre rémunération pour les grands seigneurs, y accèdent également. Leur revenu, qu'il provienne de l'agriculture, de l'élevage ou de la pratique d'une profession, leur permet de prétendre aux titres informels de *squire* ou de *gentleman*²⁸.

La fortune, les relations et les talents des membres de la *gentry* leur donnent accès à des positions enviées au sein de l'administration royale, comme celles de shérif, de juge de paix ou d'*escheators*. Ils participent également aux grands jurys d'accusation qui siègent dans chaque comté.

Chevaliers, écuyers et gentilshommes deviennent donc de plus en plus étroitement associés à l'exercice du pouvoir. Tout naturelle-

25. *Ibid* à la p 336. Lire aussi Favier, *supra* note 14 aux pp 438-445, ainsi que M Ballard, J-P Genet et M Rouche, *Le Moyen Âge en Occident*, Paris, Hachette Supérieur, 2003 à la p 163-166.

26. C Dyer, *Making a Living in the Middle Ages: The People of Britain, 850-1520*, London, Yale University Press, 2002 à la p 148.

27. A Woolrych, *Britain in Revolution*, Oxford, Oxford University Press, 2002 aux pp 11-12.

28. J-P Genet, *Les îles britanniques au Moyen Âge*, Paris, Hachette Supérieur, 2005 aux pp 162-166.

ment, le roi éprouve le besoin de connaître leur opinion, en convoquant notamment leurs députés dans le cadre d'un Parlement²⁹.

b) Premières élections

Chevaliers de comté (*knights of the shire*) et bourgeois des villes (*burgesses*) représentent les communautés du royaume. Ceci explique que l'on parle d'eux, au moins depuis 1327, comme étant les *députés des communes*, ou les *communes en court*³⁰.

Malgré l'appellation de *chevalier de comté*, l'élu de la gentry peut être aussi bien un écuyer ou un gentilhomme³¹. Un statut du Parlement de 1444 confirme d'ailleurs que le droit de se porter candidat à une élection est reconnu à tous ceux qui jouissent d'un revenu suffisant, en l'occurrence 20 livres par an, peu importe le titre qu'ils portent³². Environ 1 % de la population des hommes adultes est alors éligible.

Seuls ceux qui possèdent un revenu annuel de 40 shillings jouissent du droit de voter, cette fois d'après un statut de 1429³³, ce qui correspond plus ou moins à 5 % des hommes majeurs³⁴. Les règles applicables aux bourgs sont toutes aussi exigeantes, mais plus variées, car elles dépendent des conditions locales, notamment de leur charte de franchise.

On est donc encore loin d'une véritable démocratie. Il faudra attendre 1832 pour que le Parlement élargisse l'accès au droit de vote. Nous y reviendrons.

Les premières élections de chevaliers se tiennent en 1227. Celles des bourgeois surviennent en 1265³⁵. Ils assistent aux travaux du

29. *Ibid* à la p 164. Lire aussi Dyer, *supra* note 26 aux pp 149-150.

30. A F Pollard, *The Evolution of Parliament*, London, Longmans, 1920 à la p 107-108. Lire aussi G O Sayles, *The Functions of the Medieval Parliament of England*, London, The Hambledon Press, 1988 à la p 48.

31. S L Waugh, *England in the Reign of Edward III*, Cambridge, Cambridge University Press, 1991 à la p 199.

32. *Statut portant sur l'élection des chevaliers au Parlement (Touching Election of Knights for the Parliament)*, 23 Hen 6, c 14 (1444).

33. *Statut portant sur l'élection des chevaliers au Parlement (Touching Election of Knights for the Parliament)*, 8 Hen 6, c 7 (1429).

34. Field, *supra* note 21 à la p 62.

35. *Ibid* aux pp 46, 48 et 49; J C Holt, «The Prehistory of Parliament», dans R G Davis et J H Denton (éds), *The English Parliament in the Middle Ages*, Philadelphia, University of Philadelphia Press, 1981, 1 aux pp 16-21.

Parlement aux côtés des grands seigneurs, les archevêques, évêques, abbés, comtes et hauts barons³⁶. Ces derniers se voient d'abord en dignes représentants de tout le royaume et de ses habitants. Jamais n'aurait-on reconnu un tel rôle aux communes, du moins pas avant le XIV^e siècle. La présence des élus, rare au début, est d'ailleurs à peine remarquée. En effet, les représentants des communes, quand ils rejoignent la chambre unique où le parlement siège, demeurent passifs. Eux-mêmes reconnaissent leur rôle subordonné en se tenant debout, alors que les seigneurs s'assoient, tout comme ils le font encore aujourd'hui quand les lords et les communes s'assemblent pour entendre le discours du monarque à l'ouverture d'une session du Parlement³⁷.

Les rôles respectifs des lords et des communes vont cependant changer après 1311. Mais avant de les commenter, revenons sur l'importance du Parlement comme outil de gouvernement.

c) Formation des deux chambres du Parlement

Le Parlement d'Henri III (1216-1272) avait un caractère très fermé, presque secret. Aucun membre du public n'y était admis, ni ne pouvait communiquer avec lui. Seuls les ministres et les juges du roi accédaient à son enceinte pour veiller à son fonctionnement. En effet, toutes les affaires soumises au Parlement, projets de loi ou litiges, passaient par eux. Les lords et les communes se contentaient de réagir à leurs propositions³⁸.

Édouard I^{er} transforme radicalement l'institution parlementaire dès son avènement en 1275. Des mésaventures de son père Henri III, comme de son grand-père Jean sans Terre, il a appris qu'un roi devait gouverner en consultation avec ses sujets, du moins les plus importants d'entre eux. Il choisit conséquemment de faire du Parlement son outil privilégié pour administrer le royaume en le convoquant à 46 reprises au cours de ses 35 années de règne. L'objectif d'Édouard, outre de démontrer qu'il a à cœur le bien du pays, est de faire connaître ses lois et de favoriser ainsi leur application³⁹.

36. Maddicott, *supra* note 15 à la p 351; Sayles, *supra* note 30 à la p 42; Prestwich, *Edward I*, London, New Haven, Yale University Press, 1997 à la p 467; R Sheperd, *Westminster: A Biography*, London, Bloomsbury, 2012 à la p 67.

37. Sayles, *ibid* à la p 37.

38. Field, *supra* note 21 à la p 49.

39. Maddicott, *supra* note 15 à la p 284.

Un Édouard entreprenant décide même d'entrouvrir les portes du Parlement en permettant aux Anglais d'y présenter des pétitions, une initiative qui lui permet de se tenir au courant des sujets de mécontentement agitant son royaume⁴⁰. Une pétition est un écrit adressé aux pouvoirs publics permettant à des personnes d'exprimer leur opinion sur ce qui les concerne ou sur une question d'intérêt général. Elle comporte une demande, une protestation ou une plainte, à laquelle les pétitionnaires espèrent qu'il sera porté remède. Encore de nos jours, quelque 740 ans plus tard, le droit de pétitionner le Parlement est considéré comme un droit fondamental de tout sujet de Sa Majesté⁴¹.

L'idée du roi Édouard I^{er} se révèle très populaire, au point que les quatre cinquièmes du registre du Parlement, au début du XIV^e siècle, traitent de pétitions. Un grand nombre d'Anglais, qui ignorent la nature exacte de l'institution, croient que le roi a mis sur pied un bureau des plaintes. La réception, le classement et le traitement des pétitions deviennent des priorités. Pour y parvenir, on répartit le travail en plusieurs comités composés d'une vingtaine de parlementaires. Le Parlement ne cessera jamais par la suite de déléguer ainsi le gros de son travail à des comités afin d'en améliorer le fonctionnement⁴².

Après 1292, dans les dernières années du règne d'Édouard I^{er}, et durant tout le règne de son fils Édouard II, jusqu'en 1327, le Parlement se montre de moins en moins docile. Il devient un lieu de confrontation, le forum où les Grands du royaume manifestent leur colère contre des souverains inattentifs à leurs griefs. Certes, ces rois le convoquent alors avec moins de régularité. Il est cependant trop tard pour stopper son élan. Le Parlement fait maintenant partie des mœurs politiques et aucun Anglais n'aurait compris que cette institution cesse de participer à la gouvernance du royaume.

La confrontation entre Édouard II et la noblesse atteint l'ampleur d'une crise en 1311. Édouard semble atteint de la folie des grandeurs ; il dépense sans compter, jusqu'à conduire son royaume au bord de la faillite. Prélats et hauts barons prennent alors sur eux de mettre son gouvernement en tutelle en adoptant une série de décrets⁴³. Ils se posaient déjà en juges suprêmes du pays depuis 1234, même en

40. *Ibid* aux pp 49-50.

41. W Blackstone, *Commentaries on the Laws of England*, vol 1, Oxford, Clarendon Press, 1765 aux pp 138-139.

42. Field, *supra* note 21 à la p 50.

43. M Prestwich, «A New Version of the Ordinances of 1311», (1984) 57 *Historical Research* 188 aux pp 188-203.

l'absence du roi dont le trône, symboliquement présent au Parlement, restait vacant⁴⁴. Leurs membres, collectivement, ou au sein d'un comité judiciaire, joueront d'ailleurs le rôle de cour d'appel de dernière instance jusqu'à tout récemment⁴⁵. Les gestes posés par ces grands seigneurs les rapprochent maintenant trop du trône pour qu'ils prétendent encore parler au nom de toute la nation. La solution, fort simple, consiste alors à confier cette responsabilité aux communes. Ce seront elles qui défendront désormais les intérêts du peuple (*the community of the land*), en présentant notamment ses pétitions au Parlement⁴⁶.

Entre 1311 et 1325, les élus des communes, dont le prestige grandit du fait de leur nouvelle responsabilité, assistent à tous les Parlements, sauf deux. Et après 1325, plus aucune assemblée méritant le nom de *Parlement* n'est convoquée sans leur présence⁴⁷. C'est alors que les archevêques, évêques, abbés, comtes et hauts barons d'un côté, et les chevaliers de comté et bourgeois de l'autre, se séparent pour œuvrer au sein de deux chambres distinctes, une séparation apparemment complétée vers 1332⁴⁸. Ces derniers, considérés comme les seuls représentants du peuple, trouvent ainsi une identité et une vocation propres. Les lords, pour leur part, convoqués individuellement au parlement par un bref du roi, se voient plutôt comme l'organe indispensable du gouvernement, son élite. Au nombre de 88 durant ces années, ils se font appeler les *pairs du royaume* (*peers of the land*)⁴⁹.

V. ÉVOLUTION DU POUVOIR LÉGISLATIF

Les communes de 1325 acceptent avec enthousiasme leur rôle de relayer et de présenter les pétitions des Anglais au Parlement. Il est entendu que ces pétitions permettront d'assurer le bien du royaume, qu'elles serviront donc à corriger les injustices faites au peuple et demanderont d'amender les lois en conséquence. C'est ainsi que l'initiative des projets de loi échappe, du moins en partie, au roi et à ses ministres, au point que la grande majorité des statuts du XIV^e siècle

44. Field, *supra* note 21 aux pp 46-47.

45. Après 1311, la Chambre des lords, soit au complet, soit par un comité composé de lords légistes, a exercé la juridiction d'appel de dernière instance dans le royaume. Elle a été remplacée par la Cour suprême du Royaume-Uni le 1^{er} octobre 2009 : *Loi sur la réforme constitutionnelle de 2005 (Constitutional Reform Act of 2005)*, (R-U) 2005, c 4.

46. Sayles, *supra*, note 30 aux pp 43-44; Maddicott, *supra* note 15 aux pp 340, 355-357.

47. Sayles, *ibid* à la p 45; Field, *supra* note 21 à la p 52.

48. Field, *supra* note 21 à la p 54; F Thompson, *A Short History of Parliament*, Minneapolis, University of Minnesota Press, 1953 à la p 37.

49. Maddicott, *supra* note 15 aux pp 335, 350-351.

résulteront de pétitions provenant des communes⁵⁰. Notons cependant que, malgré la quantité appréciable de statuts adoptés, les sujets traités demeurent triviaux, très loin des grands énoncés de politique⁵¹.

a) Formes des projets de loi: pétitions et *bills*

On ne doit pas s'y tromper; le pouvoir de déterminer le contenu de la législation demeure entre les mains du roi, avant comme après l'avènement du Parlement. En effet, rappelons qu'une pétition, point de départ d'un projet de loi, reste une simple requête faite au souverain d'adopter un statut conforme aux souhaits exprimés dans la pétition. Le roi, ainsi que son conseil restreint, autrement dit ses ministres, décident de la rédaction du statut, de ce qu'ils vont conserver ou écarter⁵², avant de consigner la version finale dans le registre du Parlement⁵³. L'autorité du statut repose alors uniquement sur la sanction royale et son enregistrement⁵⁴.

La mauvaise habitude prise par le roi de choisir ce qui lui plait dans les pétitions des communes irrite ces dernières. Encore en 1414, elles font savoir leur mécontentement au roi Henri V⁵⁵. Mais c'est peine perdue, car le roi se contente de répondre qu'il ne fera rien qui contredira leurs pétitions, sans promettre plus⁵⁶. Henri VII (1485-1509), à la fin du siècle, réitérera le même engagement aussi peu contraignant, presque mot pour mot⁵⁷.

Tant que les projets de lois sont initiés au moyen d'une pétition, rien ne semble empêcher le roi d'en rédiger le libellé, sous réserve de

50. Field, *supra*, note 21 à la p 50; Waugh, *supra* note 31 à la p 203; H M Cam, «The Legislators of Medieval England» dans E B Fryde et E Miller (éds), *Historical Studies of the English Parliament*, vol 1 (Origins to 1399), Cambridge, Cambridge University Press, 1970, 168 à la p 182. C'est en 1309 que, pour la première fois, une pétition, cette fois des lords, a servi pour l'adoption d'un statut: G L Harris, «The Formation of Parliament» dans Davis et Denton, *supra* note 35, 29 à la p 46.

51. Sayles, *supra* note 30 aux pp 54-55.

52. Waugh, *supra* note 31 à la p 203; Harris, *supra* note 50 à la p 45; Thompson, *supra* note 48 aux pp 75-76; T F T Plucknett «Parliament», dans Fryde et Miller (éds.), *supra* note 50, 195 aux pp 229-230.

53. Le parlement ne consignera ses statuts dans un registre (*statute roll*) qu'à partir de 1299: Prestwich, *supra* note 36 à la p 268.

54. Harris, *supra* note 50 à la p 45.

55. Field, *supra* note 21 à la p 62.

56. A L Brown, «Parliament, c. 1377-1422» dans Davies et Denton, *supra* note 35, 109 à la p 128.

57. A R Myers, «Parliament, c. 1422-1509» dans Davis et Denton, *supra* note 35, 141 à la p 142.

ne pas contredire de manière trop ouverte les désirs des communes. On imagine sans peine que le roi interprète librement leur volonté et qu'il ne se gêne pas pour retrancher ce qui lui déplaît.

Une nouveauté, apparue en 1461, permet enfin aux membres des communes d'atteindre leur objectif, autrement dit d'enlever presque toute latitude au monarque dans la rédaction des statuts.

En effet, immédiatement après son couronnement, Édouard IV (1461-1483), premier souverain Plantagenêt de la famille d'York, présente lui-même au parlement un projet de loi d'*attainder* condamnant son prédécesseur, Henri VI de Lancastre (1422-1461), à qui il vient de ravir le trône. L'*attainder*, employé une première fois en 1321, permet au Parlement de conclure à la culpabilité d'une personne sans tenir de procès, donc sans présenter aucune preuve. Son projet de statut, annonce Henri, doit demeurer inchangé. Le roi insiste pour que les lords et les communes votent le texte soumis dans sa version intégrale, soit celle d'une loi achevée, telle qu'elle est normalement rédigée lors de la sanction royale, plutôt que de leur faire voter le texte d'une pétition, soit une humble requête, comme le veut la coutume⁵⁸.

Intéressées, les communes reprennent l'idée à leur compte sous les règnes des Tudors Henri VII (1485-1509) et Henri VIII (1509-1547). Elles-aussi rédigent désormais des projets de loi sous la forme d'une loi achevée du Parlement, *an act of Parliament*, comme on dit encore aujourd'hui. Les seules réponses du roi sont alors de refuser ou d'accorder sa sanction, sans modification. Enfin presque ! Car Henri VII a parfois ajouté des clauses additionnelles aux projets de loi au moment d'apposer sa sanction. Et sa petite fille Élisabeth I^{re} l'a imité à au moins une occasion. Elle a cependant été le dernier monarque anglais à le faire⁵⁹.

Depuis Élisabeth I^{re}, les lois du Parlement ne sont donc plus la réponse du monarque à une pétition, mais plutôt sa sanction à des propositions précises enchâssées dans un texte, un projet de loi appelé un *bill*. Ses réponses, données en français, sont « le roi ou la reine le veut » (pour la sanction), ou encore « le roi ou la reine s'avivra » (pour un refus)⁶⁰.

58. Myers, *supra* note 57 aux pp 161 et 180.

59. *Ibid* à la p 180, note infrapaginale 192.

60. J E Neale, *The Elizabethan House of Commons*, London, Jonathan Cape, 1949 aux pp 425-426.

b) Rôle grandissant des communes

Dans la période formatrice du Parlement, au XIII^e siècle, le roi ne se soucie guère de l'opinion des chevaliers et des bourgeois, sauf lorsqu'il veut puiser de l'argent dans leurs poches. Autrement, il ne prend même pas la peine de les convoquer⁶¹.

Et même encore, les communes doivent insister pour faire valoir leur droit d'approuver, avec les lords, toute augmentation de taxes ou d'impôts. Ils n'y arrivent qu'au siècle suivant; leur présence, en cas de vote sur une question fiscale, semble effectivement essentielle à partir de 1300 pour les aides directes⁶², et à partir de 1371 pour les aides indirectes (*i.e.* les droits de douanes)⁶³.

Richard II (1377-1399), qui sera imité par ses successeurs, jusqu'à Charles I^{er} (1625-1649), réussit néanmoins à contourner l'opposition des communes, voire du Parlement, en réclamant de ses sujets des prêts et dons soit-disant *volontaires* (*sic*), que les infortunés Anglais hésitent évidemment à lui refuser s'ils veulent être bien vus de leur souverain⁶⁴.

Dans les premiers statuts portant sur les questions de finance, les lords et communes disent accorder (*to grant*) à la Couronne ses taxes et ses impôts. Les deux chambres se considèrent alors sur un pied d'égalité en pareilles matières. On remarque cependant une évolution vers les années 1390; seules les communes accordent dorénavant les aides demandées par la couronne, avant que les lords y consentent à leur tour. Si, en règle générale, un projet de loi peut être voté en premier aussi bien par l'une que par l'autre chambre du Parlement, tout *bill* pour l'appropriation d'une partie du revenu public, ou la création de taxes ou d'impôts, doit d'abord avoir été voté par les communes. La prééminence des communes en matière fiscale est finalement reconnue par Henri IV en 1407⁶⁵. On l'observe toujours au parlement de Westminster⁶⁶, ainsi que dans toutes les autres législatures à deux chambres établies sur le modèle anglais⁶⁷.

61. Field, *supra* note 21 à la p 52.

62. Prestwich, *supra* note 36 aux pp 457-458.

63. Thompson, *supra* note 48 aux pp 72-73. Voir aussi *supra*, note 19.

64. *Ibid* à la p 72. A Woolrych, *Britain in Revolution, 1625-1660*, Oxford, Oxford University Press, 2002 à la p 35.

65. Brown, *supra* note 56 à la p 125, relate l'incident à l'occasion duquel le roi Henri IV s'est prononcé. Lire aussi Thompson, *supra* note 48 à la p 74.

66. Blackstone, *supra* note 41 aux pp 163-164.

67. Au Canada, lire l'article 53 de la *Loi constitutionnelle de 1867*, *supra* note 1.

Conscientes de leur importance croissante, les communes prétendent maintenant qu'elles ont toujours fait partie du Parlement, à la fois comme pétitionnaires et comme assesseurs, avec le droit d'approuver chaque nouveau statut⁶⁸. Or, les archives démontrent plutôt que, à l'origine du Parlement, on se passait fort bien de l'approbation des élus. En effet, le libellé des anciens projets de loi indique clairement que les premiers statuts du XIII^e siècle avaient été adoptés «de l'avis et du consentement des lords», alors qu'au moment de la controverse, la formule en usage était devenue «de l'avis et du consentement des lords spirituels et temporels, à la demande (ou à la requête) des communes»⁶⁹.

Cela dit, la revendication des communes, bien que non fondée sur une ancienne coutume, se défend si l'on considère uniquement l'évolution récente ; en effet, en ce début du XV^e siècle, sous le règne d'Henri IV (1399-1413), la pratique, presque sans exceptions, est d'obtenir l'approbation des chevaliers et des bourgeois à quelque projet de loi⁷⁰. La formule d'édiction d'un *bill* est d'ailleurs modifiée en conséquence afin de refléter l'usage parlementaire : tout projet de loi est désormais adopté «de l'avis et du consentement des lords spirituels et temporels et des communes, et par l'autorité du Parlement⁷¹».

Et pourtant, en 1455, lorsque les barons de la Cour de l'Échiquier doivent se faire une idée dans l'*Affaire Pilkington*, on se demande encore si le consentement des communes est vraiment indispensable à l'adoption d'un statut du parlement⁷². Les barons consultent alors le greffier responsable du registre des statuts, ainsi que le secrétaire du Parlement, dont les services sont retenus à titre d'experts de la procédure parlementaire. Or, d'après eux, un projet de loi doit absolument être soumis à l'approbation des deux chambres, peu importe qu'il ait d'abord été présenté à l'initiative d'un lord ou d'un député des communes. La Cour du banc du roi confirmera cette opinion dans un jugement rendu en 1489⁷³.

Les communes commencent à tenir un journal officiel à partir de 1542, ce qui permet de vérifier qu'elles ont bien donné leur consentement à un *bill*. Les lords en avaient fait autant depuis 1510⁷⁴.

68. Brown, *supra*, note 56 à la p 128.

69. *Ibid* à la p 128.

70. *Ibid* à la p 129.

71. Myers, *supra* note 57 à la p 171.

72. *Pilkington's Case* (1455), Year Book 33 Hen. 6, folios 17a-18a, plea 8.

73. *Parties au procès inconnues* (1489), Year Book 4 Hen. 7, folios 10b-12a, plea 6.

74. Field, *supra* note 21 à la p 69.

Il est désormais avantageux, pour les parties intéressées, de s'assurer de l'appui des représentants des communes, dont le prestige continue toujours de grandir dans le royaume⁷⁵.

c) Compétence universelle du parlement

Comme il a été mentionné plus haut, la principale compétence réclamée par le Parlement, dès l'origine, a été d'approuver toute augmentation des contributions fiscales réclamées par le roi. Assez rapidement, toutefois, le Parlement réussit à monnayer l'élargissement de ses attributions, justement parce que le roi veut obtenir de lui de nouvelles sommes d'argent pour remplir ses coffres.

Pendant le Moyen Âge, ce qui veut dire environ jusqu'au règne d'Henri VIII (1509-1547), le roi peut normalement vivre et financer son gouvernement à même ses revenus autonomes⁷⁶. Ces sommes suffisent, en l'absence de déboursés extraordinaires, à défrayer les frais de subsistance du monarque, l'entretien de ses résidences, tout comme les dépenses occasionnées par le salaire des officiers de la Couronne. En effet, le gouvernement anglais du Moyen Âge demeure une affaire modeste : à l'exception de l'Échiquier, responsable des finances, et de la Chancellerie, vouée à l'administration de la justice, le roi gouverne son royaume entouré du personnel de son palais, de ceux qui s'occupent de ses besoins domestiques : les sénéchal (direction du personnel du palais), chambellan (préposé à la garde-robe), bouteiller (préposé aux vins et victuailles) et connétable (charge des écuries)⁷⁷.

Toutefois, quand le roi souhaite entreprendre une campagne militaire, ses revenus courants ne suffisent plus. Il lui faut donc convoquer un Parlement pour obtenir des sommes additionnelles⁷⁸. C'est alors l'occasion, pour les lords et les communes, de réclamer des concessions en retour des aides demandées⁷⁹.

Timides dans les premiers siècles de l'institution⁸⁰, les membres du Parlement se montrent plus gourmands par la suite. Leur appétit

75. Myers, *supra*, note 57 à la p 171.

76. Leur proximité physique avec le souverain en fait les conseillers naturels : Thompson, *supra* note 48 à la p 71.

77. Prestwich, *supra* note 36 à la p 226.

78. Field, *supra* note 21 à la p 67.

79. Waugh, *supra* note 31 aux pp 209-210.

80. Harris, *supra* note 50 à la p 42; Brown, *supra* note 56 aux pp 132-134.

augmente dans les mêmes proportions que les exigences personnelles du monarque et les besoins de son gouvernement. Or, l'administration du pays prend un tournant vers la modernité à partir du règne d'Henri VIII, lorsque son ministre, Thomas Cromwell, met sur pied le Conseil privé du roi dans les années 1530⁸¹. Il devient alors plus difficile de faire vivre l'appareil d'État avec les rentrées habituelles, même en temps de paix⁸². Le long règne d'Élisabeth I^{re} (1558-1603) représente cependant une accalmie au plan des finances. En effet, Élisabeth n'augmente pas les impôts, ce qui lui garantit la paix avec ses sujets les plus fortunés. Elle compense l'augmentation des besoins de l'État en payant peu et mal ses serviteurs, au point de se mériter une réputation de pingrerie. La frugalité du régime d'Élisabeth I^{re}, son conservatisme fiscal, contribue certes à la stabilité de son régime, mais elle habitue aussi les propriétaires fonciers et les commerçants à payer de faibles taux d'imposition. Lorsqu'ils seront appelés à payer plus, sous le règne des souverains de la maison de Stuart, surtout Jacques I^{er} (1603-1625) et Charles I^{er} (1625-1649), cela causera d'énormes difficultés à la Couronne et amorcera le déclin des prérogatives royales⁸³.

Certes, le Parlement connaît aussi des avancées, simplement parce que des rois y voient leur profit. Henri IV (1399-1413), Édouard IV (1461-1483), Richard III (1483-1485) et Henri VII (1485-1509), dont le droit de régner semble incertain, demandent commodément au Parlement de confirmer leur élévation à la magistrature suprême⁸⁴. Henri VIII (1509-1547) comprend que si les lords et les

81. A F Pollard, « Council, Star Chamber, and Privy Council under the Tudors (III. The Privy Council) » (1915) 30 *English Historical Review* 42 aux pp 42-48; T A Morris, *Tudor Government*, London. Routledge, 1999 à la p 40.

82. Morris, *ibid* à la p 131. À la demande du ministre Cromwell, le Parlement, pour la première fois, vote un impôt extraordinaire en temps de paix: *Loi sur le subsidie consenti au roi (An Act containing a Grant of Subsidy unto the King's Highness for a Fifteenth and Tenth)* 26 Hen 8, c 19 (1534).

83. Morris, *supra* note 80 à la p 136.

84. Henri de Lancastre, plus tard Henri IV (1399-1413), usurpe la Couronne à la famille de Clarence (*Statut confirmant le titre d'Henri IV et de ses descendants (The Crown of England and France entailed upon K. Henry and his Sons)*, 7 Hen. 4, c 2 (1405), puis Édouard d'York, futur Édouard IV (1461-1483), en fait autant aux dépens de la famille de Lancastre (*Statut pour confirmer ou invalider les actes posés par Henri IV, Henri V et Henri VI (Which Acts done by King Henry IV, King Henry V, and King Henry VI, or by others during their Reigns, shall continue good, and which not)*, 1 Edw 4, c 1 (1461). Richard d'York, qui devient Richard III (1483-1485), la vole pour sa part à son neveu Édouard V (la loi, qui avait pour titre *Titulus Regis*, est abrogée et toutes les copies existantes sont détruites, ce qui explique qu'elle n'apparaît pas au registre du Parlement), avant de se la faire prendre à son tour par Henri Tudor, qui devient Henri VII (1485-1509) (*Statut confirmant le titre du roi (Titulus Regis)*, 1 Hen 7, c 1 (1485).

communes peuvent cautionner un changement de dynasties, ceux-ci peuvent également modifier l'ordre de la succession⁸⁵. Il réarrange donc sa succession par trois fois, avec leur aide, pour accommoder ses différentes épouses et leurs futurs enfants⁸⁶. Profitant d'un Parlement complaisant, Henri VIII obtient également de lui qu'il le proclame *chef suprême de l'Église d'Angleterre*, en remplacement du pape de Rome⁸⁷.

On pourrait donc croire que le Parlement avait dès lors établi sa compétence, au moins en matière de succession et de pratique religieuse, en plus des traditionnelles questions financières. Mais il n'en est rien. Élisabeth I^{re} (1558-1603), qui considère ces sujets comme relevant de sa seule prérogative, interdit aux lords et aux communes de les aborder, ainsi que son éventuel mariage et les affaires étrangères. Dans le discours d'ouverture qu'elle prononce lors du Parlement de 1571, la reine n'hésite pas à menacer les contrevenants de sa justice⁸⁸.

C'est dire que la liberté de parole reconnue aux représentants de la nation apparaît encore bien fragile et incertaine pendant le règne d'Élisabeth, tout autant que l'étendue des compétences exercées par le Parlement. En effet, ces dernières dépendent nécessairement des matières qui peuvent faire l'objet de discussions dans les chambres de la législature.

La liberté des débats au sein du Parlement redevient un enjeu lors du règne de Jacques I^{er} (1603-1625). Pressé par son fils Charles et par son favori le duc de Buckingham, Jacques envisage une guerre insensée contre l'Espagne. Le roi se voit alors confronté à un dilemme. Il faut que le Parlement lui vote de nouveaux crédits pour se prépa-

85. Émond, *supra*, note 13 à la p 281.

86. *Loi sur la succession (An Act for the Establishment of the King's Succession)*, 25 Hen 8, c 22 (1534); *Loi sur la succession (An Act for the Establishment of the Succession of the Imperial Crown of this Realm)*, 28 Hen 8, c 7 (1536); *Loi sur la succession (An Act concerning the Establishment of the King's Majesty's Succession in the Imperial Crown of the Realm)*, 35 Hen 8, c 1 (1543).

87. *Loi sur la suprématie (An Act concerning the King's Highness to be Supreme Head of the Church of England, and to have Authority to redress all Errors, Heresies, and Abuses in the same)*, 26 Hen 8, c 1 (1534).

88. Auteurs inconnus, *The Parliamentary or Constitutional History of England: Being a Faithful Account of All the Most Remarkable Transactions in Parliament, from the Earliest Times. Collected from the Journals of Both Houses, the Records, Original Manuscripts, Scarce Speeches, and Tracts; All Compared With the Several Contemporary Writers, and Connected, Throughout, with the History of the Times*, vol 4, Thomas Osborne imprimeur, London, 1751 à la p 153.

rer au conflit. Toutefois, s'il veut amadouer les lords et surtout les députés, le roi doit revenir sur ses déclarations précédentes, oublier sa défense zélée de sa prérogative. Il s'y résout. À l'ouverture du Parlement, au début de 1624, Jacques déclare aux deux chambres réunies son souhait de recevoir leurs conseils sur la guerre, le mariage de son fils Charles et l'avancement de la religion, tous des sujets que le roi avait exclus des discussions lors des précédents Parlements. Le roi les assure également de son intention de protéger leur liberté de parole. Afin d'éviter de se contredire ouvertement sur l'état antérieur de la coutume parlementaire, le roi leur confie qu'il étendrait et développerait (*to enlarge and amplify*) au besoin leurs privilèges⁸⁹. C'est effectivement ce que Jacques vient d'accomplir en reconnaissant aux parlementaires une réelle liberté de parole. Un précédent aussi solide pourra désormais être invoqué pour empêcher le roi et ses successeurs d'entraver les discussions des lords et des communes sur quelque sujet que ce soit. À l'avenir, tout ce que pourra faire le monarque, s'il veut gêner le travail des parlementaires en mettant fin à leurs débats, sera d'utiliser les armes de la prorogation ou de la dissolution⁹⁰.

Ce n'est pas seulement la liberté de parole des lords et des communes que Jacques I^{er} vient ainsi de consacrer, mais également la compétence universelle du Parlement sur le territoire anglais, son droit de discuter et de voter des projets de loi dans tous les champs de l'activité humaine. Il s'agit d'une première dans l'histoire de cette institution. Elle confirme par ailleurs l'affaiblissement de la prérogative royale à l'égard du Parlement⁹¹.

d) Suprématie des lois du Parlement

Seul le recul du temps a permis de s'apercevoir que les statuts du Parlement constituaient une nouvelle forme de lois supérieures aux autres. Toutefois, à l'époque, en ce début du XIV^e siècle, le roi, ainsi que les juges des cours royales de justice, ne savent pas trop comment les considérer. À vrai dire, personne ne s'interroge vraiment sur la nature et la portée exacte d'un statut du Parlement⁹².

89. H Hulme, «The Winning of Freedom of Speech by the House of Commons» (1956) 61 *The American Historical Review* 825 aux pp 850-851.

90. *Ibid* à la p 853.

91. Émond, *supra* note 13 à la p 315-316.

92. Plucknett, *supra*, note 52 à la p 238.

– *Suprématie des lois du Parlement sur la common law*

Les juges des cours royales de justice sont les auteurs collectifs de la *common law*, qui elle-même représente la mise en forme des anciennes coutumes du pays⁹³. Or, le rôle des tribunaux, tel qu'ils le perçoivent alors, est d'être le gardien des coutumes, de dire et non de faire le droit que l'époque veut permanent. En effet, le droit, pas plus que les coutumes, la raison ou la justice, ne devrait pas normalement changer⁹⁴.

Est-ce que ces juges auraient été justifiés de ne pas tenir compte d'un statut du Parlement, lorsque celui-ci contredisait ouvertement la *common law*? La réponse, de prime abord, ne semblait pas du tout évidente⁹⁵.

Les juges royaux mettent fin à leur hésitation et reconnaissent la supériorité des statuts du Parlement sur la *common law* au XV^e siècle⁹⁶. Certes, le célèbre juriste Edward Coke la remet en cause dans l'*Affaire du Docteur Bonham*, en 1610⁹⁷. Mais il faut voir cette décision comme un simple hiatus, vu que le même Edward Coke défend également la suprématie des lois du Parlement, 20 ans plus tard, dans son célèbre traité *Institutes of the Laws of England*⁹⁸.

– *Suprématie des lois du Parlement sur les décrets du roi*

Des rois tels Henri III (1216-1272) et Édouard I^{er} (1272-1307), en invoquant leur prérogative, continuent de modifier le droit du

93. Blackstone, *supra* note 41 aux pp 68-69.

94. H de Bracton, *De legibus et consuetudinibus Angliae*, 1220-1250, traduit et édité par S E Thorne sous le titre *Bracton on the Laws and Customs of England*, vol 2, Cambridge, Belknap Press of Harvard University Press, 1968 aux pp 21-23; J H Baker, *An Introduction to English Legal History*, 3^e éd, London, Butterworth, 1990 aux pp 223.

95. Myers, *supra* note 57 aux pp 144-146.

96. *Justices of KB and CP* (1485), Year Book 1 Hen. 7, folios 3b-4b, plea. 4. Lire également BLACKSTONE, *supra* note 41 à la p 89, ainsi que THOMPSON, *supra* note 48 à la p 124.

97. «When an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an Act to be void.» *Affaire du docteur Bonham (Dr. Bonham's Case)* (1608), 8 Coke's Reports 113b, 77 Eng Rep à la p 646.

98. E Coke, *Institutes of the Laws of England*, dans *The Selected Writings and Speeches of Sir Edward Coke*, vol 2, Indianapolis, Liberty Fund, 2003 à la p 1133.

royaume, voire les statuts déjà adoptés, sans faire appel au Parlement⁹⁹. Cela finit par irriter ses sujets.

Désormais méfiants à l'égard de leur souverain, et conscients de la valeur de l'instrument qu'ils ont entre leurs mains, les lords et les communes entendent remédier à ce qu'ils perçoivent comme des abus. Le serment prononcé lors du couronnement des prochains rois contient donc une nouvelle promesse: tant Édouard II (1307-1327) que ses successeurs, jusqu'à Henri VI (1422-1460), doivent jurer, au moment de leur installation, qu'ils défendront et appliqueront les lois que le peuple se choisira¹⁰⁰. L'allusion aux statuts du Parlement apparaît claire.

Le Parlement annonce encore plus distinctement ses intentions dans un statut de 1322 sanctionné par Édouard II; il y est prescrit qu'à l'avenir, et pour toujours, seul le Parlement jouira de l'autorité nécessaire pour modifier le droit du royaume¹⁰¹.

Édouard III (1327-1377) croit néanmoins pouvoir ignorer l'engagement pris par son père et par lui-même. En effet, dans un décret pris le 1^{er} octobre 1341, il prétend annuler un statut qui rogne sur sa prérogative de nommer les ministres de son Conseil restreint¹⁰². Édouard avait bien sûr sanctionné le statut en cause. Il rappelle même son serment de couronnement de respecter les lois du royaume. Son excuse est qu'il avait alors agi sous la contrainte. Édouard conclut: «*(because) the said Statute did not of our free Will proceed, the same be void, and ought not to have the Name nor Strenght of a Statute*»¹⁰³. Le roi ne dit donc pas vouloir, ou même pouvoir annuler un statut adopté en bonne et due forme. Il conteste plutôt la valeur légale du statut visé en raison d'un vice de procédure.

Évidemment, si un roi ou une reine avait pu considérer qu'un statut sanctionné sous la contrainte n'avait aucune valeur légale, le

99. Prestwich, *supra* note 36 à la p 453.

100. Field, *supra* note 21 à la p 52.

101. «*But the Matters which are to be established for the Estate of our Lord the King and of his Heirs, and for the Estate of the Realm and of the People, shall be treated, accorded, and established in Parliaments, by our Lord the King, and by the Assent of the Prelates, Earls, and Barons, and the Commonalty of the Realm.*» *Loi révoquant les nouveaux décrets (Revocation of the New Ordinances)*, (1322) 15 Edw 2, c 1.

102. Thompson, *supra* note 48 à la p 97.

103. C Robinson, *History of the High Court of Chancery and Other Institutions of England*, vol 1, Boston, Little, Brown & Co, 1882 à la p 580.

progrès vers une plus grande démocratie aurait été difficile, car les statuts où un monarque anglais a renoncé à une part de ses prérogatives ont rarement été sanctionnés de bonne grâce.

Quoi qu'il en soit, Édouard III revient à de meilleurs sentiments à l'égard de sa législature. Et puis, les mentalités évoluent et les points de vue des uns et des autres convergent. Vers la fin de son règne, en 1376, les communes, par la voix de leur premier *speaker* Peter de la Mare, peuvent enfin affirmer qu'un statut adopté par le Parlement ne peut être modifié ou abrogé qu'avec l'accord du Parlement¹⁰⁴. Autant le roi Henri IV (1399-1413) que son fils Henri V (1413-1422) le reconnaît dans sa correspondance avec le pape¹⁰⁵. Ce nouvel état du droit ne fait plus l'objet de controverse lorsque John Fortescue écrit son livre *De Laudibus Legum Angliae*, entre 1468 et 1471¹⁰⁶.

Le roi anglais du Moyen Âge n'en devient pas pour autant dépourvu de tout moyen d'action, même après avoir sanctionné un projet de statut et l'avoir inscrit au registre du Parlement pour en faire une loi.

Puisqu'il a été admis, au moins depuis les écrits de Bracton du XIII^e siècle¹⁰⁷, que le roi est la source de toute justice, et qu'une infraction pénale constitue une violation de sa paix, celui-ci, comme tout offensé, peut pardonner au fautif¹⁰⁸. Ce droit de gracier une personne, reconnue coupable d'un crime, n'a jamais été abrogé et fait donc toujours partie de la *common law*¹⁰⁹.

Le pouvoir régalien le plus notable reste cependant celui d'accorder des *dispenses*. Il consiste à autoriser une personne ou un groupe de personnes à accomplir un acte, malgré, ou nonobstant (*non obstante*) une loi qui l'interdit. Son exercice remonte au roi Henri III (1216-1272), dont on dit qu'il aurait été inspiré par une pratique des papes lorsqu'ils émettaient des bulles pontificales¹¹⁰. Toutefois, si la

104. Field, *supra* note 21 à la p 57-58; Waugh, *supra* note 31 à la p 203.

105. Thompson, *supra* note 48 à la p 77; Myers, *supra* note 57 à la p 152-153.

106. J Fortescue, *De Laudibus Legum Angliae*, 1468-1471, traduit par J Selden et publié par T Evans, London, 1775 aux pp 53-55 et 128.

107. H de Bracton, *De Legibus et consuetudinibus Angliae*, 1220-1250, traduit et édité par Samuel E Thorne sous le titre *Bracton on the Laws and Customs of England*, vol 2, Cambridge, Belknap Press of Harvard University Press, 1968 aux pp 166-167.

108. Blackstone, *supra* note 41 aux pp 258-259.

109. Pour le Canada, lire les *Lettres patentes constituant la charge de gouverneur général du Canada*, 1^{er} octobre 1947, art XII.

110. Thompson, *supra* note 48 à la p 79.

dispense royale permet d'agir nonobstant une loi, elle ne permet pas de poser un acte à l'encontre de la justice ou de la *common law*, ont jugé les tribunaux¹¹¹. L'octroi d'un monopole commercial au moyen d'une dispense est donc illégal selon eux¹¹².

Charles II (1660-1685) et Jacques II (1685-1689), qui cherchent à émanciper les catholiques interdits aux charges publiques depuis l'adoption des deux lois sur la mise à l'épreuve (*Test Acts*)¹¹³, abusent du pouvoir de dispense en élargissant sa portée à l'ensemble du peuple anglais, autrement dit en privant de tout effet ces lois votées par le Parlement¹¹⁴. Le *pouvoir de dispense* se trouve ainsi transformé en *pouvoir de suspendre*, ou même en *pouvoir d'abroger* lorsqu'il est employé pour une période indéfinie.

Lords et communes voient là une dangereuse innovation qui met en danger tout leur programme législatif depuis la *Magna Carta*. Ils protestent. Charles II recule. Un Jacques II prévoyant évite pour sa part la contestation en prorogeant son parlement *sine die*, avant d'émettre les décrets suspendant les lois en cause. Il aurait pu épargner sa peine car, lors de la Glorieuse Révolution de 1688-1689, les Anglais suppriment ce qu'ils nomment les soit-disant pouvoirs régaliens d'accorder des dispenses et de suspendre les lois du Parlement¹¹⁵.

La religion, et non l'argent, motive cette fois leur révolte. D'après les sept nobles protestants, surnommés par la suite les *Sept Immortels*, qui prient Guillaume d'Orange d'intervenir pour sauver la religion, l'objectif de leur appel est d'écarter Jacques II (un catholique converti) et son fils nouveau-né Jacques-Édouard, afin d'empêcher que ne s'installe sur le trône d'Angleterre une lignée de souverains catholiques¹¹⁶.

111. *Bozoun's Case* (1584), 4 Coke's Reports 34b, 76 Eng Rep 970.

112. *Darcy v Allein* ou *Case of the Monopolies* (1603), 11 Coke's Reports 84b, 77 Eng Rep 1260.

113. *Loi sur la mise à l'épreuve (Test Act)*, 25 Cha 2, c 2 (1673); *Loi sur la mise à l'épreuve (Test Act)*, 30 Cha 2, stat 2 (1678).

114. *Déclaration d'indulgence de 1662 (Declaration in favour of Toleration)*, *Déclaration d'indulgence de 1672 (Declaration of Indulgence)*, *Déclaration d'indulgence de 1687 (Declaration of Indulgence)*, et *Déclaration d'indulgence de 1688 (Declaration of Indulgence)*, dans D C Douglas et A Browning (éds), *English Historical Documents (1660-1714)*, New York, 1966, Routledge aux pp 371-374, 387-388, 395-397 et 399-400.

115. *La Déclaration des droits (An Act declaring the Rights and Liberties of the Subjects and Settling the Succession to the Crown)*, 1 Will & Mar, sess 2, c 2 (1689), art I, als 1 et 2.

116. «Letter of invitation to William of Orange», 30 juin 1688, dans Douglas et Browning, *supra* note 113 aux pp 110-112.

- *Souveraineté du Parlement*

Après 1871, et le jugement de la Cour des plaid communs dans *Lee v. Bude and Torrington Junction Railway Co.*¹¹⁷, les autorités judiciaires considèrent la souveraineté absolue du Parlement comme un dogme. Celui-ci ne souffre d'aucune contestation sérieuse, du moins jusqu'en 2005¹¹⁸.

VI. UN MONARQUE QUI RÈGNE, MAIS NE GOUVERNE PLUS

Un roi ou une reine d'Angleterre se passait fort bien d'un Parlement durant tout le Moyen Âge, tant qu'il n'encourait pas de dépenses extraordinaires, comme celles occasionnées par une guerre. Ses sujets ne lui en tenaient pas vraiment rigueur. Ils étaient même plutôt reconnaissants que leur souverain se montre économe¹¹⁹. Évidemment, le contraire était également vrai. Toute augmentation substantielle des taxes et des impôts faisait mal aux Anglais. Et les riches, qui étaient aussi les plus puissants, s'en plaignaient amèrement. Cela deviendra un vrai problème à la fin du règne des souverains Tudors, donc après 1603.

Les monarques qui souffrent le plus de la dégradation des finances publiques sont Jacques I^{er} et surtout son fils Charles I^{er}, dont les jours s'achèvent sur l'échafaud en 1649¹²⁰. Certes, leur administration survit pendant plusieurs années sans Parlement, mais seulement au prix d'expédients : impôts et taxes de toutes sortes levés sans droit, ainsi que des prêts et dons dits *volontaires*¹²¹. Le régime, tel qu'il a vécu depuis Guillaume le Conquérant en 1066, n'est pas encore mort, mais il semble déjà moribond. En effet, un gouvernement ne peut plus administrer efficacement le royaume sans la mise en place d'un impôt direct et régulier¹²². Il faut néanmoins encore du temps pour s'en rendre compte, car l'acte de décès de l'ancien régime n'est rédigé qu'au tournant du siècle, après la Révolution Glorieuse de 1688-1689, lorsque Guillaume III (1689-1702) et Marie II (1689-1694) montent

117. *Lee v Bude and Torrington Junction Railway Co.* (1871) LR 6 CP 576 à la p 582. Lire également *Pickin v British Railways Board*, [1974] AC 765.

118. *Jackson v Attorney General*, [2005] UKHL 56.

119. Myers, *supra* note 57 aux pp 143-146.

120. Lire ce qui a été écrit plus haut, dans la partie V c).

121. Émond, *supra* note 13 aux pp 311, 312, 320, 322 et 324-325.

122. D H Pennington, «A Seventeenth-century Perspective», dans Davies et Denton, *supra* note 35, 185 aux pp 195-196.

ensemble sur le trône d'Angleterre, un évènement qui marque assurément une fracture dans l'histoire du royaume anglais¹²³.

a) Apparition de la fonction de Premier ministre

Guillaume III, qui hérite de la guerre de Neuf Ans (1688-1697) dans sa corbeille de mariage avec l'Angleterre, souhaite que le Parlement lui accorde des revenus à vie¹²⁴. Mais rendre la Couronne financièrement indépendante permettrait au roi de se passer du Parlement, ce qui ne plait guère aux Anglais. Un député des communes, William Sacheverell, a commenté la situation en ces termes, le 29 janvier 1689 : «*Secure this House, that parliaments be duly chosen and not kicked out at pleasure, which never could be done without such an extravagant revenue that they (les rois et reines) might never stand in need of parliaments*¹²⁵.» Un autre, Joseph Williamson, a ajouté le 25 mars 1690 : «*When princes have not needed money they have not needed us*¹²⁶.» Le Parlement choisit donc de voter des revenus tout juste suffisants pour financer le gouvernement, l'armée et la marine, durant quelques mois, parfois un an, parfois un peu plus. Un Guillaume penaud doit se résoudre à vivre presque toujours à court d'argent, jusqu'au prochain budget que les députés et les lords lui consentent. Cela force le roi à les rappeler fréquemment, avec pour résultat que le Parlement devient une institution permanente.

Après 1689, le Parlement sera convoqué à chaque année, au moins la durée d'une session¹²⁷. Lords et communes codifient la nouvelle pratique dans la *Loi triennale* de 1694¹²⁸. Cette loi, adoptée après une longue opposition de Guillaume III avant qu'il n'appose sa sanction, prescrit qu'aucun Parlement ne peut durer plus de trois ans, et surtout qu'il doit siéger au moins une fois par an, et qu'en cas de dissolution par le roi, un nouveau Parlement doit être convo-

-
123. J S Roskell, «Perspectives in English Parliamentary History», dans E B Fryde et E Miller (éds), *Historical Studies of the English Parliament*, vol 2 (1399-1603), Cambridge, Cambridge University Press, 1970, aux pp 321-322.
124. E A Reitan, «From Revenue to Civil List, 1689-1702: The Revolution Settlement and the "Mixed and Balanced"», (1970) 13 *The Historical Journal* 571 à la p 575.
125. W Cobbett, *Cobbett's Parliamentary History of England, from the Norman Conquest, in 1066, to the Year 1803*, vol 5, T C Hansard, London, 1809 à la p 55.
126. *Ibid*, à la p 554.
127. G Burnet, *History of his Own Time*, vol IV, Edinburgh, Hamilton, Balfour and Neild, 1753 à la p 359; M Knights, *Representation and Misrepresentation in Later Stuart Britain*, Oxford, Oxford University Press, 2005 à la p 12.
128. *Loi triennale (An Act for the frequent Meeting and calling of Parliaments)*, 6 & 7 Will and Mar, c 2 (1694).

qué dans l'année suivante. C'est la première fois qu'on arrête une durée maximale pour la vie d'une législature et la tenue d'élections automatiques lorsqu'elle arrive à son terme. On augmentera cette durée à sept ans en 1715¹²⁹, avant de la fixer définitivement à cinq ans en 1911¹³⁰.

Non seulement le Parlement vote-t-il de fréquents budgets pour financer les opérations régulières de l'État et les dépenses militaires occasionnées par la guerre, il s'arroge également le droit, dès 1690, au moyen d'une commission parlementaire mise en place par les députés des communes, d'effectuer un audit sur l'utilisation des taxes et impôts consentis à l'administration¹³¹.

Certes, le Parlement de 1698 accepte d'accorder au roi, à vie, un revenu de 700 000 livres pour défrayer le coût de la *Liste civile*, soit les sommes qui correspondent, plus ou moins, au financement des opérations régulières du gouvernement, incluant les dépenses de la famille royale¹³². Mais le Parlement conserve le contrôle des dépenses militaires et de celles associées à la dette publique, de loin les plus importantes. En outre, on s'aperçoit assez tôt que les montants accordés en vertu de la liste civile ne correspondent pas nécessairement aux dépenses courantes¹³³, d'où le besoin de nombreux correctifs¹³⁴.

Dorénavant, la Couronne doit donc collaborer étroitement avec le Parlement, dans la mesure où celle-ci souhaite accomplir les objectifs qu'elle entend poursuivre.

129. *Loi sur le septennat (An Act for Enlarging the Time of Continuance of Parliaments, appointed by an Act made in the Sixth Year of the Reign of King William and Queen Mary, intituled An Act for the frequent meeting and calling of Parliaments)*, 1 Geo 1, stat 2, c 38 (1715).

130. *Loi sur le Parlement (Parliament Act)*, 1 & 2 Geo 5, c 29 (1911).

131. D C North et B R Weingast, «Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth-Century England», (1989) 49 *The Journal of Economic History* 803 à la p 816.

132. *Loi sur la liste civile (An Act for Granting to his Majesty a further Subsidy of Tunnage and Poundage, towards raising the Yearly Sum of Seven hundred thousand Pounds, for the Service of his Majesty's Household, and other Uses therein mentioned, during His majesty's Life)*, 9 Will 3, c 23 (1698).

133. En 1713, la dette encourue sur la liste civile se montait à près d'un million de livres sterling: R Hatton, *George I*, London, Yale University Press, 1978 à la p 145.

134. Reitan, *supra* note 123 à la p 588; E A Reitan, «The Civil List in Eighteenth-Century British Politics: Parliamentary Supremacy versus the Independence of the Crown» (1966) 9 *The Historical Journal* 318 aux pp 319-320.

Une mécanique implacable s'installe: réduits à dépendre des votes du Parlement pour obtenir les moyens de gouverner, les rois et reines d'Angleterre, de Grande-Bretagne (à partir de 1707) et du Royaume-Uni (à partir de 1801), sont fatalement contraints, à terme, à céder la réalité du pouvoir aux chefs des partis politiques dominants issus des élections¹³⁵.

Un nouveau personnage s'impose alors sur la scène politique. On l'appellera assez tôt le *Premier ministre*. Il se laisse entrevoir sous le règne d'Anne (1702-1714), dernière souveraine de la maison de Stuart. On devra cependant attendre le siècle suivant pour que sa fonction achève le plus gros de son évolution.

Mais d'abord, qu'est-ce qu'un Premier ministre ?

Le Premier ministre est celui qui, parmi les ministres du Cabinet, est le seul à conseiller le monarque. Ce dernier lui confie le patronage, ainsi que la direction de l'administration de l'État. Il doit sa position, comme chef du gouvernement, au fait qu'il contrôle le vote d'une majorité de députés. En pratique, cela revient à dire qu'il est normalement le chef du plus grand parti politique présent aux communes¹³⁶.

Revenons à la reine Anne. Celle-ci laisse en place les institutions héritées de son prédécesseur, le roi Guillaume III. Elle gouverne avec un Cabinet non partisan, bien que les *torys* (les *conservateurs* à partir de 1834) y sont mieux représentés que les *whigs* (les *libéraux* à partir de 1868)¹³⁷. Son Cabinet est dominé en début de règne par Sidney Godolphin, baron du même nom, auquel la reine confie le poste de trésorier, et John Churchill, comte et futur duc de Marlborough, qui devient le capitaine général de ses armées. Godolphin exerce cependant le *leadership* au sein du Cabinet.

En effet, Godolphin fait davantage que s'occuper des finances du royaume, il gère également le dossier des affaires étrangères.

135. M Duchein, *50 années qui ébranlèrent l'Angleterre; Les deux Révolutions du XVIIe siècle*, Paris, Fayard, 2010 à la p 420.

136. C Roberts donne cette définition du Premier ministre dans *The Growth of Responsible Government in Stuart England*, Cambridge, Cambridge University Press, 1966 à la p 402.

137. Sur l'origine des partis politiques en Angleterre, lire B de Cottret et M-M Martinet, *Partis et factions dans l'Angleterre du XVIIIe siècle*, Paris, Presses de l'Université de Paris-Sorbonne, 1991, ainsi que B W Hill, *The Growth of Parliamentary Parties 1689-1742*, London, George Allen & Unwin Ltd, 1976.

Il parvient à imposer la nomination et à forcer le congédiement de ministres composant le Cabinet. Sa réussite dépend d'une nouvelle tactique qui servira ses successeurs : il menace la reine Anne de remettre sa démission si elle ne suit pas ses avis. Or, en perdant son ministre le plus influent, Anne sait qu'elle perd également les alliés de Godolphin au Parlement. Elle ne peut se le permettre, car aucun autre ministre ne jouit d'un appui suffisant aux communes pour faire voter les projets de loi de finance, à commencer par le budget annuel qui sert à défrayer les dépenses du gouvernement. L'argent, à cette époque, demeure donc l'argument déterminant.

Sans qu'on puisse encore parler de Godolphin comme d'un véritable Premier ministre, on emploie parfois cette expression pour le désigner à partir de 1704. Elle deviendra d'usage courant lorsque Godolphin sera écarté du Cabinet, en 1710¹³⁸.

Le politicien le plus marquant du XVIII^e siècle reste Robert Walpole. Il est nommé par le roi pour un second mandat en 1721. Walpole ne rate pas sa chance ; il assure la direction du gouvernement pendant 21 ans, jusqu'en 1742. Son autorité devient telle, surtout vers la fin de cette période, qu'il est généralement considéré par les historiens comme le premier véritable Premier ministre¹³⁹.

En effet, Walpole concentre entre ses mains presque tout le pouvoir exécutif. Pour être en mesure de conduire les affaires de l'État, il demande d'être le seul à conseiller les rois George I^{er} (1714-1727) et George II (1727-1760). Pratiquement toutes les nominations aux emplois publics passent par lui. La loyauté, et non la compétence, demeure la vertu cardinale. Pour s'en assurer, Walpole soumet son entourage à une surveillance constante. Il intervient dans tous les ministères en y plaçant des hommes de confiance indépendants des ministres, mais dépendants de lui. Ceux qui s'opposent à ses mesures peuvent être privés de faveurs, voire simplement congédiés. Walpole a l'oreille du roi. Et tous le savent¹⁴⁰. Cet avantage, la première source du pouvoir de Walpole, permet également au Premier ministre de main-

138. En général, sur les débuts de la fonction de *Premier ministre*, incluant le rôle de Godolphin, lire M Silbert, *Étude sur le Premier ministre en Angleterre depuis ses origines jusqu'à l'époque contemporaine*, Paris, Librairie Nouvelle de Droit et de Jurisprudence, 1909.

139. R J Parker, *British Prime Ministers*, The Hill, Stroud (Gloucester), Amberly Publishing, 2011 à la p 13.

140. Hatton, *supra* note 132 aux pp 236-260 ; Hill, *supra* note 136 aux pp 189-190 ; R Eccleshall et G Walker (éds), *Biographical Dictionary of British Prime Ministers*, London, Rotledge, 1998 aux pp 6-7 et 10.

tenir un début de discipline à l'intérieur de ses Cabinets composés de whigs et de transfuges venant du Parti tory. La seconde source du pouvoir de Walpole est la majorité ferme dont le Premier ministre dispose au Parlement. On doit cependant prendre garde de ne pas la mettre sur le même pied que l'appui de George I^{er}. En effet, Walpole n'aurait pas pu gouverner sans d'abord obtenir et conserver la confiance de son roi¹⁴¹.

Walpole exploite les dysfonctions du système électoral britannique pour consolider sa majorité whig au Parlement. Rappelons qu'environ cinq pour cent des Anglais possèdent le droit de voter. Les nombreux bourgs pourris et bourgs de poche, représentés aux communes sur un pied d'égalité avec les plus grandes circonscriptions, comptent moins de 100 électeurs. Ces circonscriptions ont chacune leur prix. Il suffit d'être assez riche pour se les offrir en corrompant les électeurs ou en exerçant des pressions sur eux. Le vote à main levée, qui a cours jusqu'en 1872¹⁴², permet de vérifier si ceux-ci respectent la consigne donnée. Au début du premier mandat de Walpole, en 1715, une centaine de sièges aux communes sont la propriété ou sous le contrôle d'une grande famille. Deux fois plus, soit 40 % des sièges, le seront avant la fin de son second mandat, en 1742, sous le règne de George II (1727-1760)¹⁴³.

Pour l'anecdote, mentionnons que Robert Walpole réside depuis 1732 au 10 Downing Street, une résidence offerte par George II à son Premier ministre afin que celui-ci puisse vivre à distance de marche du siège du Parlement, au palais de Westminster. Walpole refuse d'en accepter la propriété, mais l'habite néanmoins comme résidence de fonction, ce qui deviendra la tradition chez ses successeurs jusqu'à nos jours¹⁴⁴.

Si l'on résume, le roi (ou la reine), à cette époque, choisit son Premier ministre. Ce dernier doit donc d'abord gagner l'estime de son souverain. Mais pour se maintenir au pouvoir, le Premier ministre doit aussi obtenir et conserver la confiance d'une majorité à la Chambre des communes. Le choix du roi, dans la mesure où celui-ci existe, se fixe donc normalement, par nécessité, sur une personne susceptible de rallier les députés¹⁴⁵. Toutefois, aidé par le vaste patronage entre les

141. Hill, *ibid*; A H Dodd, *The Growth of Responsible Government, from James the First to Victoria*, London, Routledge & Kegan Paul, 1956 aux pp 104-105.

142. *Loi sur le bulletin de vote (Ballot Act)*, 35 & 36 Vict, c 33 (1872).

143. Field, *supra* note 21 aux pp 141-145.

144. Parker, *supra* note 138 à la p 14.

145. Voir, notamment, J Black, *The Hanoverians: The History of a Dynasty*, London, Hambledon, 2004 aux pp 47-48.

mains du roi, bénéficiant d'un système électoral où moins de 5 % de la population possède le droit de voter, comme d'une carte électorale bien fournie en bourgs pourris ou bourgs de poche et autres circonscriptions sous le contrôle de la Couronne ou de ses alliés, un Premier ministre fraîchement nommé peut espérer gagner ses élections, puis rester en poste indéfiniment¹⁴⁶.

Le Premier ministre vit conséquemment sous un régime de double responsabilité : il est à la fois responsable devant la Couronne et devant le Parlement.

L'enchaînement logique apparaît sens dessus dessous si on le compare à la situation actuelle ; un politicien du XXI^e siècle gagne ses élections avant d'exercer le pouvoir, alors que celui du XVIII^e siècle accède au pouvoir avant de gagner ses élections.

D'autres dates retiennent l'attention. Aucun roi ni reine, depuis 1702, ne maintient en poste un ministre après qu'il eut été l'objet d'attaques répétées et soutenues des communes. Un ministre, voire le Premier ministre, demeure donc responsable de ses actes devant les élus. Il ne peut se défendre en plaidant qu'il agissait sur l'ordre du monarque car, contrairement au ministre, le roi ou la reine, selon l'adage connu et accepté, *ne peut mal faire (the king or queen can do no wrong)*¹⁴⁷.

La totalité du Cabinet tombe une première fois suite à un vote de censure des communes en 1782. Toutefois, la responsabilité collective de tout le Cabinet n'est établie pour de bon que dix ans plus tard, donc après 1792, lorsque la formation d'un gouvernement appartenant à un seul parti devient la règle¹⁴⁸.

Le *principe du gouvernement responsable* forme ce que l'on appelle aujourd'hui une *convention de la Constitution*, ou encore une *convention constitutionnelle*. Une convention de cette sorte, d'après ce qu'en a dit John Stuart Mill en 1861, représente une maxime non

146. Walpole exploite les méthodes décrites dans ce paragraphe dès son premier mandat, si l'on en croit ce qu'a écrit un historien et commentateur contemporain, P Rapin de Thoyras, dans *Dissertation sur les Whigs et les Torys*, rédigé en 1717, mais reproduit par la Librairie de Charles Le Vier, La Haye, 1767 aux pp 156-164.

147. R Clayton, «The Growth of Ministerial Responsibility to Parliament in Later Stuart England», (1956) 28 *Journal of Modern History* 215 aux pp 218-219 et 230 ; V Bogdanor, *The Monarchy and the Constitution*, Oxford, Clarendon Press, 1995 aux pp 14-15.

148. Clayton, *ibid* aux pp 223-224.

écrite de la morale politique positive dont le rôle consiste à régir la manière dont un pouvoir légal doit être exercé par son titulaire, dépendant des circonstances¹⁴⁹. En 1872, Edward Augustus Freeman l'a décrite comme un ensemble de règles servant de guide aux hommes politiques, que l'on ne retrouve nulle part dans les statuts du Parlement ou la *common law*, donc qui ne font pas partie du droit, mais qui ne sont pas moins sacrées que les idéaux enchâssés dans la *Magna Carta* de 1215¹⁵⁰.

b) Crises politiques menant au progrès de la fonction de Premier ministre

Trois grandes crises, survenues au début du XIX^e siècle sous les derniers souverains de la maison de Hanovre, ont contribué à réduire à peu de choses l'autorité réelle exercée par le monarque dans la composition et la gestion de son gouvernement : l'émancipation politique des catholiques irlandais en 1829 ; la réforme électorale de 1832 ; puis le congédiement du Cabinet Melbourne en 1834, suivi de son retour au pouvoir l'année suivante.

- Émancipation politique des catholiques irlandais (1829)

Les idées de la Révolution française trouvent un terreau fertile en Irlande, où elles sont nourries par le ressentiment des Irlandais qui vivent alors sous la domination économique et politique d'une minorité d'Anglo-Saxons protestants. Des troubles éclatent un peu partout sur son sol, puis sont écrasés dans le sang. L'Irlande, quoique sous l'autorité d'un même roi, constitue un royaume distinct de la Grande-Bretagne. Sa situation se compare à celle de l'Écosse avant son rattachement avec l'Angleterre en 1707. Comme solution au problème, on choisit donc le même remède, soit de fusionner l'Irlande avec la Grande-Bretagne¹⁵¹. Le Parlement le met en œuvre en adoptant la *Loi sur l'union avec l'Irlande*¹⁵². Cette législation prescrit qu'un nouveau royaume est établi pour toujours à partir du 1^{er} janvier 1801, qu'il a pour nom le Royaume-Uni de Grande-Bretagne et d'Irlande,

149. J S Mill, *Considerations on Representative Government*, New York, Harper & Brothers, 1862, ch V.

150. E A Freeman, *The Growth of the English Constitution*, London, MacMillan, 1872 aux pp 109-110.

151. E Dziemboski, *Les Pitt, L'Angleterre face à la France 1708-1806*, Paris, Perrin, 2006 aux pp 456-457 et 462-466.

152. *Loi sur l'union avec l'Irlande (Union with Ireland Act)*, 39 & 40 Geo 3, c 67 (1800).

et qu'il demeure soumis à l'autorité d'un seul Parlement, celui du Palais de Westminster.

La fusion des deux royaumes ne représente qu'un pas pour calmer les Irlandais. William Pitt le Jeune, un tory, Premier ministre depuis décembre 1783, tente également de les émanciper de manière à ce qu'ils puissent jouir des mêmes droits politiques que les Anglais, dont ceux de travailler à l'emploi du gouvernement et de siéger au Parlement. Il doit pour cela abolir les deux *Lois sur la mise à l'épreuve*¹⁵³. George III refuse de l'envisager. Pitt brandit la menace de sa démission, mais rien n'y fait. Pitt n'a pas d'autre choix que de se retirer des affaires¹⁵⁴. Le régime de double responsabilité des ministres envers le roi et la Chambre des communes semble tenir ; il faut conserver la confiance de l'un comme de l'autre. Aucun ne conteste encore cette interprétation de la pratique constitutionnelle.

Le débat sur l'émancipation des catholiques irlandais reprend avec vigueur lors du règne de George IV (1820-1830). Au mois de mars 1829, Arthur Wellesley, mieux connu comme le duc de Wellington et héros de Waterloo, Premier ministre depuis janvier 1828, pose un ultimatum au roi : ou celui-ci accepte de sanctionner le projet de loi controversé, ou son Premier ministre et ses collègues du Cabinet démissionnent en bloc. Cette fois, une telle menace, qui met en évidence le principe de la responsabilité collective du gouvernement, se révèle un moyen de défense efficace contre la prérogative du souverain. Quelques heures de réflexion suffisent à George pour comprendre qu'il lui sera impossible de composer un autre Cabinet ayant la confiance des communes, ce que Wellington savait déjà¹⁵⁵. Le roi se voit donc contraint à capituler devant son Premier ministre, malgré la douleur que cet acte de soumission lui cause¹⁵⁶. Le projet de loi est finalement sanctionné le 13 avril 1829¹⁵⁷.

– Réforme électorale (1832)

Peu après l'épisode irlandais, et l'avènement de Guillaume IV (1830-1837), l'économie se détériore. Des associations sont créées par dizaines qui demandent le suffrage universel des hommes et le

153. *Supra* note 113.

154. Dziemboski, *supra* note 14 aux, pp 470-472.

155. G H L Le May, *The Victorian Constitution*, London, Gerald Duckworth & Co Ltd, 1979 à la p 29.

156. Black, *supra* note 145 à la p 170.

157. *Loi sur l'émancipation des catholiques (Catholic Relief Act)*, 10 Geo 4, c 7 (1829).

vote secret. Plus de 300 pétitions sont déposées au Parlement, certaines signées par plusieurs dizaines de milliers de Britanniques. Des syndicats ouvriers vont jusqu'à menacer les politiciens de violences populaires incontrôlées si rien n'est fait¹⁵⁸. D'aucuns craignent une révolution, à commencer par le chef du Parti whig, Charles Grey, comte du même nom, qui voit l'exemple du roi Charles X renversé par ses sujets français¹⁵⁹. John Russel, un autre *leader* whig, considère par ailleurs que les progrès de la classe moyenne, en richesse, en savoir et en influence, justifient des changements aux règles électorales¹⁶⁰.

Une vague réformiste porte Grey au pouvoir lors des élections de 1830. Après l'échec de son premier projet aux communes, et des élections générales anticipées, le Premier ministre réélu en propose rapidement deux autres de suite, tous fort modestes : un volet élimine les bourgs de poche et les bourgs pourris, puis équilibre la représentation des circonscriptions restantes, de manière à ce que le nombre de députés qu'elles envoient à Westminster reflète un peu plus équitablement leur poids démographique¹⁶¹ ; l'autre volet élargit la base électorale en abaissant le montant de la franchise nécessaire pour voter, ce qui augmente le bassin d'électeurs potentiels de quelques points de pourcentage¹⁶².

Même si les whigs jouissent d'un appui suffisant aux communes, les lords s'objectent. L'ancien Premier ministre et *leader* tory, le duc de Wellington, mène la charge contre le projet de loi. Pour contourner l'opposition, Charles Grey demande au roi Guillaume, le 4 janvier 1832, s'il accepte de nommer des lords à la Chambre haute afin d'assurer le passage de la réforme envisagée. Guillaume accepte, non sans réticence, puis change d'idée le 8 mai quand il se rend compte qu'il faut 50 nouveaux pairs. Prenant acte du refus, Grey et ses collègues du Cabinet démissionnent. La responsabilité collective du gouvernement était devenue la règle.

158. F O'Gorman, *The Long Eighteen Century, British Political & Social History 1688-1832*, London, Arnold Publishing, 1997 aux pp 362-365.

159. Field, *supra* note 21 aux pp 166-170 ; Black, *supra* note 145 à la p 177 ; Le May, *supra* note 155 aux pp 31-32.

160. T W Heyck, *The Peoples of the British Isles; A New History*, 3^e éd, Chicago, Lyceum Books Inc, 2008 à la p 262.

161. Il faudra cependant attendre 1885 pour qu'une loi du Parlement établisse le principe que chaque circonscription doive avoir une population comparable aux autres : *Loi sur la répartition des sièges électoraux (The Redistribution of Seats Act)*, 48 & 49 Vict, c 23 (1885).

162. Pour un compte-rendu détaillé de la réforme de 1832, lire E J Evans, *The Great Reform Act of 1832*, 2^e éd New York, Routledge, 1994 aux pp 57-68.

Le roi tente alors, sans succès, de former un autre Cabinet dirigé par Wellington. Son échec le contraint à se tourner à nouveau vers Charles Grey, le seul parlementaire qui jouit de la confiance des communes. Grey, en position de force, impose ses conditions : aucune modification ne sera apportée au projet de loi sur la réforme électorale, et le roi devra accepter la nomination d'un grand nombre de pairs dans le cas où les lords s'entêtent dans leur opposition. Guillaume, cette fois, cède. Voyant que le roi se range du côté de son Premier ministre, les lords votent enfin le projet de loi contesté¹⁶³. La réforme est finalement adoptée le 7 juin 1832¹⁶⁴.

Ce fait, à lui seul, illustre à quel point l'importance de la Chambre des lords a diminué. Les communes, ainsi que leur *leader*, Premier ministre et chef de la formation ayant la plus forte députation, jouissent maintenant d'un ascendant indéniable.

Évoquant la perte des bourgs de poche et des bourgs pourris, le duc de Wellington remarque : «*The mischief of the reform is that whereas democracy prevailed heretofore only in some places, it now prevails everywhere*¹⁶⁵.»

– *Congédiement du Cabinet Melbourne (1834)*

La dernière grande crise constitutionnelle d'importance survenue au Royaume-Uni, et mettant en cause une prérogative de la Couronne, est le congédiement du Cabinet du chef *whig* William Lamb, lord Melbourne, survenu en novembre 1834.

Melbourne, Premier ministre depuis juillet 1834 en remplacement du comte Grey démissionnaire, souhaite avoir carte blanche pour constituer son Cabinet. Guillaume IV ne veut absolument pas de l'un des ministres pressentis. Il refuse de le nommer et, peu après, profite d'un désaccord au sein du Cabinet pour congédier Melbourne.

Melbourne juge pourtant que sa demande est tout à fait raisonnable. Depuis l'incident de 1820 où le chef *tory* Robert Jenkinson a

163. Black, *supra* note 145 aux pp 177-178.

164. *Loi sur la représentation électorale (Representation of the People Act)*, 2 & 3 Will 4, c 45 (1832).

165. «Lettre de Wellington à John Wilson Croker», 6 mars 1833, dans J W Croker, *The Croker Papers*, vol 2, London, C Scribner's Sons, 1884 aux pp 205-207.

réussi à imposer la nomination d'un ministre, malgré l'opposition du roi George IV, on croit généralement que le souverain ne possède plus la légitimité nécessaire pour imposer ses vues sur la composition du Cabinet. La nouvelle interprétation de la Constitution est d'ailleurs enseignée en 1832 au King's College de Londres¹⁶⁶.

Melbourne revient cependant au pouvoir à l'invitation du roi suite à l'élection de 1835, après que l'électorat eut retourné une majorité *whig* au Parlement¹⁶⁷. En effet, Guillaume IV, qui vient d'être désavoué par le peuple, n'a pas d'autre choix que celui d'offrir à son ancien Premier ministre de former à nouveau le gouvernement avec le Cabinet de son choix¹⁶⁸. Toute autre attitude de la part du roi aurait mis en danger la survie de la monarchie.

La leçon, cette fois, ne sera pas oubliée : aucun autre monarque anglais ne s'opposera à l'entrée au Cabinet d'un candidat proposé par le Premier ministre, ni ne congédiera unilatéralement ses ministres pour les remplacer par d'autres¹⁶⁹.

c) Dernière version des pratiques constitutionnelles

Une autre convention de la Constitution prend forme, celle selon laquelle « le roi ou la reine règne mais ne gouverne pas », car sa part dans la direction du gouvernement a été réduite comme peau de chagrin durant les règnes de George IV et Guillaume IV. En effet, le roi ou la reine n'a plus de prise sur les ministres qui lui permet d'imposer ses choix ; lorsque tous menacent de démissionner si leurs avis sont repoussés, et que ceux-ci commandent une majorité aux communes, le roi ne peut confier l'exercice du pouvoir à d'autres, à moins que des élections ne créent une nouvelle majorité.

Le rôle du monarque, pour l'essentiel, se limite donc désormais à mettre sous une forme légale les décisions prises par ses ministres.

166. J J Park, *The Dogmas of the Constitution: Four Lectures, Being the First, Tenth, Eleventh, & Thirteenth, of a Course on the Theory & Practice of the Constitution*, 1832, réimprimé par Gale Ecco, Making of Modern Law, Farmington Hills, Michigan, 2010 aux pp 38-41. *Contra* : Le May, *supra*, note 155 aux pp 33-34, dont l'opinion date cependant de 1979.

167. Sur 658 députés, 385 sont des whigs, alors que 273 sont des torys : C Rallings et M Thrasher, *British Electoral Facts*, London, Ashgate Publishing Ltd, 2006 à la p 4.

168. Le May, *supra* note 155 à la p 40.

169. Field, *supra* note 21 aux pp 197-198 ; Black, *supra* note 145 à la p 180.

Malgré ce qu'ont pu en penser George IV et Guillaume IV, il n'est plus indispensable de gagner ou de conserver la confiance du souverain pour arriver au pouvoir. Le régime selon lequel un gouvernement vivait sous un régime de double responsabilité, autant à l'égard de la Couronne que devant le Parlement, n'existe plus¹⁷⁰. Les élections générales de 1841 vont le démontrer.

Alors qu'ils étaient minoritaires avant la dissolution du Parlement, les candidats conservateurs (les anciens torys) remportent une confortable majorité aux élections générales de 1841, déclenchées à la demande du Premier ministre whig Melbourne¹⁷¹. Tous les députés conservateurs, sans exception, s'étaient présentés comme des partisans de leur chef, Robert Peel. Ce dernier, tout naturellement, devient alors Premier ministre. Il s'agit d'une nouveauté ; avant 1841, aucun Premier ministre n'avait perdu des élections générales déclenchées à son initiative ; avant 1841, les résultats électoraux tendaient à confirmer le choix du gouvernement de lancer un appel aux urnes, plutôt que l'inverse, comme ce venait d'être le cas. Les récentes élections sont saluées dans les journaux comme un triomphe de la démocratie sur l'influence de la Cour¹⁷².

Victoria (1837-1901) vient d'avoir 18 ans lorsqu'elle succède à son oncle défunt Guillaume IV. Melbourne occupe toujours le poste de Premier ministre. Celui-ci enseigne sa lecture de la Constitution anglaise, la version *whig*, que la jeune reine, sous le charme de son premier Premier ministre, se montre toute disposée à accepter, malgré de rares errements de sa part en cours de règne¹⁷³. Selon la version *whig* de la Constitution, qui se résume en quelques règles simples, la reine choisit son Premier ministre parmi les *leaders* de la majorité aux communes ; celui-ci soumet une liste de candidats pour occuper les postes au sein du Cabinet, que la reine doit nommer, bon gré, mal gré ; le nouveau Cabinet peut ensuite gouverner comme il l'entend, tant qu'il conserve la confiance des élus du Parlement.

Victoria ne peut se mêler de politique comme ses oncles George IV et Guillaume IV l'ont fait avant elle, surtout avec des Premiers ministres de la trempe des Palmerston (mandats : 1855-1858

170. Le May, *supra* note 155 aux pp 42-43.

171. Rallings et Thrasher, *supra* note 166 à la p 5.

172. Bogdanor, *supra* note 147 à la p 21-22.

173. *Ibid* à la p 41. Lire aussi Le May, *supra* note 155 aux pp 46-47, ainsi que P Alexandre et B De L'aulnoit, *La dernière reine ; Victoria 1819-1901*, Paris, Robert Laffont, 2000 aux pp 212-213.

et 1859-1865), John Russel (mandats : 1846-1852 et 1865-1866) ou William Gladstone (mandats : 1868-1874, 1880-1885 et 1892-1894)¹⁷⁴. Ces derniers exercent les pleins pouvoirs exécutifs. Ils président également les séances du Cabinet, sans la présence de Victoria¹⁷⁵.

L'évolution de la fonction de premier ministre apparait ainsi à peu après achevée.

d) Démocratisation des institutions

Au cours du XVIII^e siècle, et jusqu'au milieu du XIX^e, les députés des communes se considèrent comme des acteurs autonomes, plutôt que comme les rouages d'une organisation à la direction unifiée. Certes, whigs et torys se reconnaissent entre eux et agissent normalement de concert avec leurs amis politiques, mais plus pour des raisons d'intérêts communs, de dépendance économique ou de liens familiaux, que pour de nobles principes¹⁷⁶.

Avant la réforme électorale de 1832¹⁷⁷, l'élite du pays ne croit même pas à la démocratie, au sens d'un droit de vote étendu à l'ensemble de la population. L'opinion publique ne compte pas vraiment, pas plus qu'il n'existe de vaste électorat à courtiser. Les partis whig et tory rassemblent de grands hommes auxquels les membres des classes dirigeantes s'associent. Chaque candidat cultive ses relations avec les nobles, les écuyers et les gentilshommes qui, à leur tour, amènent leurs serviteurs, leurs tenanciers et leurs dépendants, dans la mesure où ils gagnent suffisamment pour pouvoir voter. Comme elles sont inutiles, les partis ne possèdent pas de véritable organisation. Conséquemment, il n'existe pas encore de réelle discipline de parti¹⁷⁸.

L'élargissement du droit de vote, entrepris en 1832¹⁷⁹, a pour effet de relâcher le monopole de l'aristocratie sur le pouvoir. Mais le règne

174. Field, *supra* note 21 aux pp 197-198.

175. D'ailleurs, aucun autre monarque ne s'y invitera plus jamais : Bogdanor, *supra* note 147 à la p 14.

176. L Namier, *The Structure of Politics at the Accession of George III*, London, Macmillan, 1973 aux pp X, XI et 16 ; D Baranger, *Parlementarisme des origines*, Paris, Presses Universitaires de France, 1999 aux pp 224-225.

177. *Loi sur la représentation électorale (Representation of the People Act)*, 2 & 3 Will 4, c 45 (1832).

178. I Jennings, « Cabinet Government at the Accession of Queen Victoria », (1931) 34 *Economica* 404 à la p 408.

179. *Loi sur la représentation électorale (Representation of the People Act)*, *supra* note 161.

des partis n'est pas encore assuré pour autant. Certes, les meetings politiques deviennent plus fréquents. Les principaux dirigeants élaborent des plates-formes électorales, à commencer par le chef conservateur Robert Peel qui, en 1835, publie le *Manifeste Tamworth*¹⁸⁰. Des associations nationales sont même créées afin d'encourager les sympathisants à s'enregistrer comme électeurs, en 1841 pour le Parti conservateur, en 1861 pour le Parti whig-libéral¹⁸¹.

Les lignes de parti demeurent néanmoins imprécises. Les allégeances des députés le sont également, avec pour résultat que les gouvernements et leur Premier ministre ne peuvent se reposer sur une majorité ferme aux communes. Melbourne écrit à ce sujet, en 1841 : «*No one knows beforehand what parliament or members of parliament will do or know how they will vote*¹⁸².» Les Cabinets se trouvent dès lors en situation précaire¹⁸³. Entre 1841 et 1865, chaque nouveau parlement provoque la chute d'au moins un gouvernement par suite d'un vote de censure¹⁸⁴. Les communes font et défont les Cabinets, commente un juriste de l'époque¹⁸⁵.

Le ciment partisan, qui devient de plus en plus idéologique au cours du XIX^e siècle¹⁸⁶, finit par dominer les formations politiques. Les réformes électorales de 1867¹⁸⁷ et de 1884¹⁸⁸ le solidifient pour de bon¹⁸⁹.

On sent déjà les effets d'une plus grande solidarité à l'intérieur de chaque formation à l'occasion des élections générales de 1868. Alors qu'auparavant un Premier ministre défait se présentait au Parlement,

180. I Bulmer-Thomas, *The Party System in Great Britain*, London, Phoenix House Ltd, 1953 aux pp 15-17.

181. *Ibid* aux pp 14 et 17-18.

182. «Lettre de Melbourne à Russel», août 1841, Château de Windsor, Archives royales, Melbourne Papers, 15/48, reproduit dans I Newbould, «Whiggery and the Growth of Party 1830-1841; The Challenge of Reform», (2008) 4 *Parliamentary History* 137 à la, p 139.

183. Baranger, *supra* note 176 à la p 226.

184. Field, *supra* note 21 à la p 198.

185. W Bagehot, *The English Constitution*, London, Chapman and Hall, 1867 aux pp 163-166.

186. Newbould, *supra* note 182 à la p 138.

187. *Loi sur la représentation électorale (Representation of the People Act)*, 30 & 31 Vict, c 102 (1867).

188. *Loi sur la représentation électorale (Representation of the People Act)*, 48 & 49 Vict, c 3 (1884).

189. H Berrington, «Partisanship and Dissidence in the Nineteenth-Century House of Commons», (1967-1968) 21 *Parliamentary Affairs* 338 à la p 349; M Rush, *The Role of the Member of Parliament since 1868*, Oxford, University Press, 2001 aux pp 3-4.

avec l'espoir de réunir une coalition assez large pour soutenir son gouvernement, il n'est plus réaliste d'envisager cette possibilité. On comprend alors pourquoi le Premier ministre conservateur Benjamin Disraëli remet immédiatement sa démission et celle de ses collègues du Cabinet après le vote de 1868, aussitôt qu'il est clair que le Parti libéral de William Gladstone a remporté une majorité de sièges aux communes, établissant ainsi un précédent que suivront presque tous ses successeurs¹⁹⁰.

Ces réformes successives encouragent en outre les grandes formations politiques à mettre en place de nouvelles structures régionales et nationales, gages de futurs succès. Le Parti conservateur crée en 1867 l'Union nationale des associations conservatrices et constitutionnelles (*National Union of Conservative and Constitutional Associations*). L'organisation, dit son président Cecil Raikes, sera vouée à servir comme appui logistique lors des élections et non à se substituer au *leadership* du Parti¹⁹¹. La Fédération libérale nationale (*National Liberal Federation*), quant elle, est mise sur pied dix ans plus tard, en 1877. Son inspirateur, Joseph Chamberlain, se montre plus ambitieux; il veut que l'organisation libérale serve de lieu de débats aux membres du parti afin que ce dernier reflète l'opinion des électeurs¹⁹².

Plusieurs députés des communes croient désormais être obligés d'appuyer leur formation politique, car les partis exercent un contrôle à peu près absolu sur les travaux de l'assemblée, et donc sur le rôle joué par chaque membre au cours d'une session du Parlement. Reginald Plagrove, greffier adjoint de la Chambre des communes de 1870 à 1886, constate: «*It is the discipline enforced by party warfare which enables the Commons to act, not merely efficiently, but at all*»¹⁹³.

Chaque association doit contribuer à l'élection des candidats ou à la réélection des députés. Évidemment, quand les chances des aspirants dépendent de l'aide reçue, ceux-ci doivent compter sur les instances du Parti pour assurer leur avenir politique, ce qui encourage leur fidélité; des députés sont effectivement contraints à la soumission¹⁹⁴, sinon à renoncer à leur siège au Parlement en cas d'insubordination¹⁹⁵.

190. Le May, *supra* note 155 p aux pp 57-58.

191. *Ibid* à la p 175.

192. Le May, *supra* note 155 aux pp 175-177.

193. R Plagrove, *The House of Commons; Illustration of its History and Practices*, London, MacMillan, 1878 à la p 33.

194. M Ostrogorski, *Democracy and the Organisation of Political Parties*, vol 1, London, MacMillan and Co, 1902 aux pp 136, 209-210, 215-216.

195. *Ibid* aux pp 238-240.

Plusieurs membres du Parlement se plaignent de l'omnipotence des partis, surtout au sein des associations libérales appelées familièrement des *caucus*. Un député de ce parti, Joseph Cowen, déclare en 1886: «*I am willing to do my duty in any sphere, however high or however humble, to which my fellow-citizens call me; but I am under no obligation to become a party slave, or subject myself to spiteful persecution for no useful purpose. What the caucus (l'association libérale) wants is a political machine. I am a man, not a machine...*»¹⁹⁶ Cowen se retire de la vie politique. L'association libérale a gagné.

En raison de son succès apparent, il suffira de peu de temps pour que les associations politiques conservatrices suivent le modèle proposé par leurs opposants libéraux, même si elles s'en défendent auprès de l'électorat¹⁹⁷.

Chaque homme vote encore publiquement, aux yeux de tous. On considérait autrefois qu'un vote à visage découvert se justifiait, car tout électeur devait être en mesure de défendre le choix de son ou de ses candidats au poste de député. Il faut toutefois rappeler que le corps électoral, avant la réforme électorale de 1867, était constitué pour l'essentiel d'hommes jouissant d'un bon revenu, capables de résister à l'intimidation et d'exercer un jugement indépendant. L'élargissement du droit de vote aux ouvriers des villes et aux paysans des campagnes modifie la donne. En effet, ceux-ci doivent travailler dur, jour après jour, seulement pour survivre, alors qu'ils dépendent d'autres hommes pour assurer leur emploi et parfois leur logement. D'autres ouvriers et paysans pourraient par ailleurs intimider leurs compagnons en les menaçant de violence. Ouvriers et paysans ne sauraient donc voter librement, sans subir l'influence de tiers, qu'en restant discrets sur leurs opinions politiques. Ralph Bernal Osborne, membre de la Chambre des communes, dit à leur propos: «*They may have logical minds, but they have breakable heads*»¹⁹⁸. Le secret du vote représente leur seule protection, conclut Osborne.

Comme beaucoup d'autres politiciens de son temps, le Premier ministre libéral William Gladstone se laisse convaincre¹⁹⁹. Il présente et fait adopter par le Parlement la *Loi sur le bulletin de vote* de 1872²⁰⁰

196. Cité dans Ostrogorski, *ibid* aux pp 239-240.

197. *Ibid* à la p 268.

198. R-U, HC, *Hansard's Parliamentary Debates*, 34 Vict (16 mars 1870).

199. Le May, *supra* note 155, à la p 187, évoque l'opinion du Premier ministre Gladstone.

200. *Loi sur le bulletin de vote (Ballot Act)*, 35 & 36 Vict, c 33 (1872).

afin d'établir un vote par bulletin secret pour décider des élections à la Chambre des communes.

Tant le Parti libéral que le Parti conservateur sont devenus des institutions autonomes gouvernées par des bureaucraties centralisées. On ne se fait pratiquement plus élire député, à moins de jouir du soutien d'un parti politique, comme de son chef, qui tous deux demandent en retour fidélité et obéissance. La nouvelle solidarité entre les députés d'un parti et sa direction confère de ce fait une plus grande stabilité aux gouvernements qui se succèdent, car un Premier ministre peut désormais compter sur l'appui des députés de sa formation afin de maintenir son gouvernement au pouvoir. Or, plus la discipline de parti se raffermi, et que la position du Premier ministre s'en trouve conséquemment assurée, moins il y a de place pour le souverain dans le gouvernement du royaume. C'est le dernier élément qui manquait pour transformer la monarchie anglaise en une monarchie constitutionnelle moderne²⁰¹.

La convention de la Constitution selon laquelle la reine ou le roi règne, mais ne gouverne pas, ainsi que le principe du gouvernement responsable, associée à la nouvelle discipline de parti, permettent enfin d'assurer la stabilité des gouvernements de Cabinet dans le respect de la démocratie.

Certes, la démocratie anglaise reste bien imparfaite à la fin du règne de Victoria, en 1901. Mais d'autres réformes viendront l'achever. Toutefois, les règles qui gouvernent les relations entre la Couronne et son Parlement sont déjà assez bien circonscrites pour comprendre le fonctionnement de la Constitution anglaise, comme de celle des autres pays qui en suivent le modèle.

VII. CONCLUSION

Il est certainement plus facile d'expliquer le passé que de prédire l'avenir. On pourrait néanmoins prétendre, non sans raison, que le déclin de la royauté était inscrit dans les gènes des institutions anglaises, dès le moment où le souverain a reconnu qu'il devait obtenir l'accord du Parlement s'il voulait accroître le fardeau fiscal de ses sujets.

201. Bogdanor, *supra* note 147 à la p 13.

Le roi ou la reine du Moyen Âge, qui vivait à même ses revenus autonomes, peinait déjà à financer son gouvernement dès que des circonstances inhabituelles ou inédites survenaient. Cette pénible situation est devenue chronique quand la taille de l'administration publique a augmenté dans les mêmes proportions que celle du pays et de son économie. Ce n'était qu'une question de temps. Tôt ou tard, inévitablement, il aurait fallu moderniser le gouvernement du royaume pour satisfaire les nouveaux besoins de la population. Aucun roi, aucune reine, fut-il immensément riche, ne pouvait dès lors payer toutes les factures. Il se trouvait piégé, contraint à gouverner avec l'aide de son Parlement, ne serait-ce que pour lui demander les sommes nécessaires au financement des opérations de son administration.

Assurément, le roi ou la reine possédait, et possède encore, le droit légal de choisir ses ministres, ceux auxquels il confiait les rênes de son administration. Mais il ne pouvait les remettre à n'importe qui. En effet, le premier devoir d'un Cabinet, et de son Premier ministre, était de proposer et faire adopter un budget par le Parlement pour satisfaire les besoins du gouvernement. Si le Premier ministre et ses collègues du Cabinet s'en montraient incapables, ils devaient laisser leur place à d'autres. Le choix du souverain se trouvait donc limité à un certain nombre de personnes susceptibles de rallier une majorité au Parlement. Seules les communes importaient vraiment, car le roi ou la reine pouvait toujours nommer à la Chambre haute autant de lords que nécessaire afin de modifier le résultat d'un vote.

Les derniers rois de la maison de Hanovre, pendant un temps, ont pu nourrir les divisions en jouant sur les ambitions des uns et des autres, puis ont formé des coalitions uniquement redevables envers leur prince. Cela était possible tant que les formations politiques sont demeurées idéologiquement confuses et que les liens de solidarité unissant leurs membres sont restés fragiles. Toutefois, quand l'élargissement progressif du droit de vote a rendu nécessaire l'élaboration de plates-formes électorales, puis la mise sur pied d'organisations partisans afin de rejoindre les nouveaux électeurs, le lieu réel du pouvoir s'est déplacé de la Couronne vers cette masse grouillante et leurs représentants, les députés des communes. Et comme ces derniers ne pouvaient plus se faire élire sans l'aide de leur parti et de son organisation, le chef du parti acquérait une autorité indéniable sur les députés de sa formation. En effet, le chef de parti, une fois qu'il avait derrière lui une majorité de députés prêts à le suivre, pouvait désormais imposer ses conditions au roi plutôt que lui qu'é-

mander ses faveurs. La position de Premier ministre lui était alors automatiquement offerte.

Certes, la reine Élisabeth II (1952-auj.) règne toujours sur le Royaume-Uni. Elle possède les pouvoirs légaux qui font d'elle le chef de l'État. Le gouvernement du pays lui a cependant échappé pour de bon. Seule une crise politique justifierait qu'elle exerce à nouveau ses pouvoirs de sa propre autorité, sans l'aval des élus du Parlement.

CHAPTER 2
PARLIAMENT AND THE CROWN:
A CANADIAN PERSPECTIVE

David E. Smith*

In my living room I have a picture by Canadian artist Charles Pachter—he of the Queen-confronting-a-moose fame. This particular picture is in two parts: on the viewer’s right is a photograph of William Lyon Mackenzie King, garbed in a Ruritanian-like uniform, standing next to the present Queen’s mother, when she and George VI visited Canada in 1939. Framed by the arch of the Peace Tower, the PM and HM are gazing to their right. The object of their attention, at the top left side of the Pachter picture, is a colour photograph of Benjamin West’s painting of ‘The Death of General Wolfe.’ Below that iconic depiction of Canada’s passage from French to British regimes on the Plains of Abraham three solitary words visually vibrate: ‘Kill,’ ‘Conquer,’ ‘Rule’. It is an affecting picture on several levels of understanding, in this instance not least that it hangs in a home in Niagara-on-the-Lake, a community that makes a living out of promoting its loyalty to the British cause.

From the moment I saw this piece of art with its striking amalgam of historical record, political message, and graphic propaganda, I wanted to own it. In analyzing my response to the work, I have concluded that it duplicates the sense of the Crown that I held when I set out in 1992 to write *The Invisible Crown: The First Principle of Canadian Government*. Despite the jewels and braid associated with monarchy, there is more to the institution than meets the eye. Pachter visually (and I would say, uniquely) conveys the truth at the core of constitutional monarchy—its duality. Note, for instance, that in this depiction the King’s consort and his Canadian prime minister stand side-by-side (John Buchan, Lord Tweedsmuir, is nowhere to be seen,

* Distinguished Visiting Professor, Department of Politics and Public Administration, Ryerson University.

as governors general typically remain invisible when the Sovereign is close at hand. Otherwise, the artist would have to create a triptych, and that really would make a puzzle of what already is an enigma). It is this fact – that constitutional monarchy has both an obverse and reverse side (and here I am speaking of more than coins) – that complicates its meaning for a large portion of its subjects. Lack of understanding of the Crown in Canada is undoubtedly its persistent and unalterable feature. Why this should be so is a serious matter for study, because surprising as it may be for many Canadians, the Crown is the centrepiece of the working constitution.

Wherein the surprise? On this side of the Atlantic, the Crown is equated with monarchy—a pastiche of celebrities and ceremony. Monarchy is what happens on the other side of the ocean, and is treated as of little practical importance to Canada. Every visit of a member of the royal family is preceded by a poll asking Canadian subjects what they think of the institution. The equation of royal personages and monarchy is the assumption implicit in the query. No one asks this question on other occasions, although constitutional monarchy, in the persons of the governor general and lieutenant governors, chugs along in Ottawa and ten provincial capitals every hour of every day of every year.

How can this be? Simply stated, Canadians do not think of themselves as subjects. The constitutional narrative that received bi-partisan support from a majority of prime ministers after 1867 focused on Canada's emergence as an autonomous sovereign entity in no way subordinate to the United Kingdom. The signal event of our political history – once but no longer a core subject of the high school history curriculum – was the struggle for and achievement of responsible government. Canada began as a colony but in modest, self-referential fashion sought and gained autonomy – not independence – from the mother country. As a result, by the mid-nineteenth century appointed governors from Great Britain were made subject to the advice of elected legislators in British North America. That evolution culminated in the *Statute of Westminster* (1931), which made Canada and the other Dominions constitutional equals of the United Kingdom, although the “reluctant” dominion of Newfoundland asked to be relieved from the Statute's provisions for sovereign jurisdiction in the absence of its own “specific request”.¹

1. (UK), 22 & 23 Geo V, c 4, s 2; Sean Cadigan, *Death on Two Fronts: National Tragedies and the Fate of Democracy in Newfoundland I* (Toronto: Allen Lane, 2013) at 295.

After 1931, common allegiance to the Crown and not statutory pre-eminence of the imperial Parliament served as the bond of the new British Commonwealth of Nations. At the same time, however, the Crown underwent division, with the effect that the Sovereign who resided at Buckingham Palace became the Sovereign of other realms: Canada, Australia, and New Zealand, for example. In a book with the sub-title *Model Governor General*, John Buchan's most recent biographer, J. William Galbraith, has written that the royal tour of 1939 (and, by inference, subsequent tours) "breathed life into the Statute of Westminster".² Turning that observation around, it might then be said that absent the royal presence the constitutional position of the Crown in the Sovereign's realms other than the United Kingdom is evanescent. This does not mean that the Sovereign's representative is invariably lifeless but that the vigour of the position depends on the individual holder's own actions more than it does on regal association. In Canada, that reputation has been founded on an amalgam of charitable work, geographic exploration (the North, especially), association with Quebec (residence at the Citadel, most notably) and "repository of responsibility toward aboriginal peoples", as well as the establishment and conferral of honours.³ All of these activities are important yet, significantly, none may be said to touch upon the topic of this session: the relationship of the Crown and Parliament.

The analysis that follows will look at this relationship using the traditional 'tripartite' lens, which in Canadian terms means from the perspective of the Crown, Senate, and Commons.

CROWN

There was something of a constitutional finesse in the *Statute of Westminster's* reconciliation of dominion and Commonwealth ambitions, one whose success depended upon its not being submitted to close scrutiny. The Sovereign lives, and has always lived, in what was once the imperial centre. That makes all the difference when it comes to interpreting the meaning of the Crown, for the British situation – established church, landed aristocracy, a hereditary (until recently) upper chamber of Parliament, and a line of succession (until even more recently) based on primogeniture – is foreign, in fact and understanding, to the Canadian context.

2. J. William Galbraith, *John Buchan: Model Governor General* (Toronto: Dundurn Press, 2013) at 161.

3. *Guerin v The Queen*, [1984] 2 SCR 335 at 376, 1984 CanLII 25 (SCC) [Guerin].

It is necessary to be clear about what is meant by the adjective 'foreign'. In the United Kingdom, Parliament's three parts (King, Lords, and Commons) have been viewed since medieval times (until a century ago) as embodying estates or social orders. The effect was to see the power of the state (kingdom) divided, and thus protected from usurpation by a single body.⁴ A neglected aspect in commentary on the 1910 constitutional crisis – when the Asquith government sought to pack the Lords by creating new peers in order to secure passage of financial bills with heavy social consequences – was the reason George V objected to the scheme: the Lords, he believed, was being “destroyed” and he “manipulated”, in a procedure that accorded him “neither the confidence nor consideration to which he was entitled”.⁵ There is more to the contrast between the United Kingdom and Canada than this, although it would require a second paper to elaborate the details. Still, if forced and while acknowledging the following comment to be a generalization, one might say that politics in the first country has been aristocratic, personal, and oral in conduct (consider the importance of conventions and understandings), while in the second, it has been overwhelmingly middle class (with a predominance of lawyers), impersonal (as befitting a frontier, democratic society with a permeable class structure), and disposed to written rather than face-to-face communication, a feature that dualism in language and law, as well as the complexities of federalism have encouraged.

One question the hypothetical second paper might ask is to what extent the contrasting oral and print traditions affect the relationship of the respective Crowns and Parliaments. Consider, for instance, the contrasting tenor of political debate in the two countries: metaphorical, witty, and rapid in the one, didactic, laboured, and slow in the other. Or examine the qualitatively different character of the intercourse between Sovereign and adviser, on the one hand, and Sovereign's representative and adviser, on the other hand. This contrast in what might be called the social provenance of politics in the two countries was demonstrated, from the Canadian position, by the appointment until 1952 of British nobles and aristocrats as governors general. A crucial aspect of the King-Byng affair in 1926—which saw the governor general, Viscount Byng, exercise the Crown's

4. Mark Sproule-Jones, “The Enduring Colony?: Political Institutions and Political Science in Canada” (1984) 14 *Publius: The Journal of Federalism* 93 at 93-108.

5. Harold Nicolson, *King George V* (London: Constable, 1953) at 138, cited in Roy Jenkins, *Mr. Balfour's Poodle: An Account of the Struggle between the House of Lords and the Government of Mr. Asquith* (London: William Heinemann, 1954) at 124.

prerogative right to refuse advice from the Prime Minister of the day, William Lyon Mackenzie King, to dissolve Parliament only to accept the same advice days later from Arthur Meighen, who had formed a government following Mackenzie King's resignation—was the defeat it represented for the practice of Great Britain's appointing Canadian governors general. Mackenzie King's barb—that royalty and peers could avoid political controversy if “they kept out of politics”, that is, were not appointed as governors general—possessed an element of self-serving logic.⁶ It is no exaggeration to compare the events of 1926 in Canada to those of 1909-10 in the United Kingdom in the sense that each marked for its respective country a permanent change in its constitutional equilibrium.

So many other factors account for the difference in the relationship between the Crown and first ministers in London and Ottawa that it is surprising more has not been written on the subject. For a Canadian viewer the National Theatre production, *The Audience*, in which the Queen (played by Helen Mirren) receives eight of the twelve prime ministers who have served her since 1952, makes an important if unacknowledged point. While the Sovereign had twelve prime ministers in London, in Ottawa over the same period there were eleven governors general and eleven prime ministers. The dramatic tension in the two-character play lies in the continuity of one protagonist but serial change of the other. *The Audience* could not have been written about the occupant of Rideau Hall, for the continuity it portrays does not exist on the part of the Sovereign's representative. If continuity exists in the Canadian system at all, it lies with long-lived politicians.

There are other dimensions to the feature of continuity that deserve mention: the Queen has reigned for over sixty years, but she had another sixteen years preparation as heiress presumptive; more than that she was, in Ben Pimlot's words, “her father's daughter” and “he remained her model.”⁷ The familial tie is pervasive and of long-standing: when in 1910 George V was resisting Asquith's request to appoint additional peers to the Lords, he asked one of his personal advisers (Lord Knollys), who sided with Asquith and who himself had been an adviser to Edward VII, when the parliamentary crisis first began: “Is this the advice you would have given my father?” Knollys

6. Galbraith, *supra* note 2 at 52.

7. Ben Pimlot, *The Queen: Elizabeth II and the Monarchy* (London: HarperCollins, 2002) at 240.

replied: “Yes, and he would have taken it”.⁸ In the United Kingdom, the Crown is its own referent.

Memory lies almost as heavy on the wearer of the crown as the crown itself. Indeed, Pimlot argues that the abdication of Edward VIII in 1936 was probably the most determinative event of the Queen’s reign, if only for what it meant to her father: “Under George VI, royal interventions, even minor ones, diminished. The acceptance of a cypher-monarchy, almost devoid of political independence, began in 1936”.⁹ He concludes: “The most striking personal feature of the succession (in 1952) was the sense of continuity from one reign to the next.”¹⁰ In these comments the contrasts with Canada (or Australia or New Zealand) are so stark as to defy comparison. Memory is a paramount feature of accounts of monarchy in the United Kingdom; but in Canada, whose memory would that be—not familial, not that of advisers? (On the subject of advisers, an autobiography that should be required reading for those interested in the subject of the modern Crown is *King’s Counsellor*, by Sir Alan Lascelles, assistant private secretary to four monarchs.)¹¹ Of course, Canadians, like everyone else, are possessed of memory; but in the matter of the Crown and its relationship to Parliament, how to access this memory? The Sovereign’s representative in Canada is an individual, with a term of appointment, which by any standard is short. What associations, if any, are there among former governors general, and even if there are, of what significance is it to the conduct of constitutional monarchy in Canada? Adrienne Clarkson stands alone in writing a memoir that includes a discussion of her period as governor general.¹² Is there need for her gubernatorial counterparts to do the same? Is there a need for their combined experience to be made available to the public?

SENATE

‘Parliament,’ as used in the topic for this book, that is, as distinct from the Crown, refers to the two legislative chambers: Senate and House of Commons. That meaning seems straight-forward enough, although it is anything but simple. There are several reasons for

8. Jenkins, *supra* note 5 at 180

9. Pimlot, *supra* note 7 at 39.

10. *Ibid* at 240.

11. Duff Hart-Davis, *King’s Counsellor: Abdication and War: The Diaries of Sir Alan Lascelles* (London: Weidenfeld and Nicholson, 2006).

12. Adrienne Clarkson, *Heart Matters* (Toronto: Viking Canada, 2006) at 183-211.

complexity, the most important of which is the recourse – and the disposition always – to seek parallels between Canada’s Crown and Parliament and their British namesakes. They seem so similar, and the opening words of the preamble to the *Constitution Act, 1867* appear to confirm that response. Canada, they say, should have “a Constitution similar in Principle to that of the United Kingdom”.¹³ None the less the constitutions are different and in ways that affect the relationship of Crown and Parliament. To begin with, Canada’s Parliament is bicameral because the United Kingdom *was* bicameral in 1867. There was no alternative. Confederation marked the progress to nationhood and no nation of any worth in the eyes of the Fathers of Confederation possessed a legislature that was unicameral. The unicameral legislatures of the day were to be found in the Central American and Balkan states. Nor among bicameral legislatures were there any upper chambers that were not appointed or hereditary. The United States introduced popular election for the US Senate only in 1913. Suggestions that the new upper chamber be elected did not find favour in light of the experience of United Canada. More than that, an appointed upper chamber seemed logical because the Senate would not be a representative body in the sense the Commons was a representative body. On the contrary, the Senate’s role was to compensate those areas of the new federation (Quebec and the Maritime provinces) whose voice would be lessened in a chamber based on rep-by-pop. The foregoing is ancient history, but it bears repeating when any contrast between Senate and Lords is made.

The Senate was not a representative body for the reason that its members were appointed from senatorial divisions of equal size. Even more important, the numbers of senators per division was fixed. There could never be a swamping or packing of the upper chamber, as was threatened later in the United Kingdom in 1910 (or as had occurred earlier in the Legislative Council of United Canada at the time of the Rebellion Losses Bill)—a few extra senators under strict provisions, yes; swamping, never. From the perspective of the present discussion, the consequence of moment therefore was that the Crown had almost no role to play in respect of the upper house: the numerical limit on membership kept the parts of Parliament separate. This separation is an important part of the story (or conundrum) of Senate reform or its absence. No role, and virtually no personal, or social, or religious, or class association, beginning with the fact that the governor then and for another century was British and represented the interests of the

13. (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

British government. None of the Lords' primary features was echoed in the Senate. The alignment of King and Lords in consequence of the dominance of shared Conservative values made George V a reluctant agent of his ministers. A relationship of this nature never arose in Canada because the conditions did not exist to nurture it.

It is possible that Bill C-7, *An Act Respecting the Selection of Senators and Amending the Constitution Act, 1867* in respect of Term Limits, had it been found constitutionally sound might have the unintended consequence of altering the existing relationship.¹⁴ In the matter of proposing a nominee for appointment as a senator, the bill spoke of the prime minister's being "required to consider names from a list of nominees ... determined by an election." The integrity of the office of Governor General would be impugned were the Governor General, who is the protector of Canada's constitutional democracy, advised to appoint an individual other than the winner of a senatorial election held in conformity with the terms set out in Bill C-7. Moreover, there is the matter of gubernatorial consistency. Bill C-7 was not directed to a particular circumstance—that is, to a single senatorial contest—but to contests in multiple provinces and territories for the foreseeable future. In its results if not its declared purpose, Bill C-7 recalls an earlier trespass on Crown prerogative, Manitoba's *Initiative and Referendum Act*, found in 1919 by the Judicial Committee of the Privy Council to be *ultra vires* that province's legislature. Particularly memorable is the following passage from that opinion:

The analogy of the British Constitution is that on which the entire scheme is founded, and that analogy points to the impropriety, in the absence of clear and unmistakable language, of ... permitting [or in the case of Bill C-7, encouraging the perception of] the abrogation of any power which the Crown possesses through a person who directly represents it.¹⁵

The noteworthy feature of the achievement of responsible government in the 1840s lay in its being a triumph for elected assemblies, and not for bicameralism. In the eyes of reformers, upper chambers were on the wrong side of history. The parlous condition of bicameralism in Canada today—no provincial upper chambers and a Senate whose fate appears to be an unending existential quest—has its roots in the unpopular reputations of the original compacts and cliques that

14. Bill C-7, *An Act Respecting the Selection of Senators and Amending the Constitution Act, 1867 in respect of Senate Term Limits*, 1st Sess, 41st Parl, 2011, (first reading 21 June 2011).

15. *Re: Initiative and Referendum Act* [1919] AC 935 at 943.

bound governors and legislative councils. Among federations, Canada is unique in having such anaemic bicameralism. One might go so far as to say that—federalism aside—Canadians are a unicameral people. It is worth noting that there is minimal institutional expression of federalism in the Senate. Normally there are few (none at present) ministers in the upper chamber—and ministers are the conventional expression of federalism at the centre. From the vantage point of many Canadians outside of the Laurentian heartland, Ottawa is less a national capital than it is a meeting place of the federation.

HOUSE OF COMMONS

The relationship between Crown and Commons has always been sharper than between Crown and Senate. Responsible government's achievement was the work of elected assemblies *versus* governors. The success of the struggle lay in the Crown's acceptance that it must in future take direction on domestic (and eventually external) matters from those who controlled the popularly elected assembly. In other words, responsible government was a triumph of government—not of government and opposition. From the time of the Canadian rebellions, the Crown—submissive to government—was the central political reality, one that did not change after Confederation. In Canada, the concern was never about shielding or protecting the Crown but rather about restraining it. This is the legacy of colonialism. Whether it is conflicts, controversies, crises, or a simple difference of opinion between the Crown and its political advisers, the latter invariably prevail; and for reasons in addition to the absence of the Sovereign's personal prestige.

There are multiple reasons for the predominance of the political executive in parliamentary systems, many of which apply with equal force in the United Kingdom as they do in Canada. The size and complexity of government are experienced everywhere; so too are the flattening and decentralizing effects of mass and social media. But there are differences between the two countries that have exerted long-term effects on the relationship of Crown to Commons. One is the practice, now almost a century old, of selecting leaders of political parties by means of delegate conventions. The Liberals introduced this method of selection in 1919, and the Conservatives followed in 1927. It is hardly original to note, because academics and party leaders themselves, beginning with Mackenzie King, have frequently done so, that selection by delegates sets leaders apart from, and above, their parliamentary caucus. In so doing, it contributes to a very

un-Westminster-like perception, which sees the executive and legislature independent of one another, as in a presidential-congressional system, rather than fused, as they are in the British parliamentary system.¹⁶ In 2013-14, Michael Chong's Private Member's bill to limit the power of party leaders in Parliament may be said to stem in part from the consequences of this century-long practice, unique in its longevity among countries possessing parliamentary origins at Westminster. The older alternative to convention was selection by caucus, a procedure that produced leaders already familiar to, and with, the Crown and its representative.¹⁷ Parliamentary experience has almost been a disqualifying factor when party conventions come to choose their leaders. To that extent, it further distances the Crown from the party leaders in the Commons, those persons primarily responsible for seeing that constitutional monarchy runs smoothly.

On the subject of selection methods (and their change), it is worth speculating about but probably too soon to assess what effect the new mechanism to select a governor general, introduced by Prime Minister Stephen Harper prior to the David Johnston's succeeding Michaëlle Jean, will have on relations between the Crown and Parliament. On that occasion, it was reported that potential candidates for consideration would be required to "possess constitutional knowledge and be non-partisan."¹⁸ While many observers would be inclined to say that these characteristics fit the Queen, to what extent – if any – have previous governors general failed to meet these standards?

A second difference in the political histories of Canada and the United Kingdom lies in the matter of extending the franchise. While there were notable exceptions to the following generalization – women and First Nations are two of them – still compared to the United Kingdom, it may be said that the franchise for males was conferred *en masse* in Canada at the outset of Confederation. In the United Kingdom, the male franchise was conferred in stages. In other words, there was a gradual broadening – out of those on whom the vote was conferred. From the position of the Crown and Parliament, the significance of the contrasting process of enfranchisement was

16. David E. Smith, "The Westminster Model in Ottawa: A Study in the Absence of Influence" (2002) 15: 1-2 *British Journal of Canadian Studies* 54 at 54-64.

17. See John C. Courtney, *The Selection of National Party Leaders in Canada* (Toronto: Macmillan of Canada, 1973); Andrew Coyne, "Bill Would Forever Change Parliament", *National Post* (30 November 2013) A5; Doug Saunders, "Party Mustn't Trump Country", *Globe and Mail* (14 December 2012) F2.

18. Bill Curry, "Secret Committee, Seeking Non-Partisans: How Harper Found New G-G", *Globe and Mail* (12 July 2011) 1 and 4.

that in the United Kingdom delay in this regard contributed to delay in recognizing the transformation of the Lords, that is, its political diminishment, which had begun with the *Reform Act* of 1832. Another contrast related to the franchise was that modern disciplined parties based on constituency organization emerged in Canada before they did in the United Kingdom. Ramifications flowing from that development include an early boost to prime ministerial power in Canada, as well as the emergence of a partisan-based public service in the same decades as a non-partisan administration appeared in the United Kingdom.¹⁹ In Canada, there was no delay in acknowledging the fact that the elected Commons, and the Commons alone, was the locus of political power. Never was there, as in the United Kingdom, a sharing of power, or a sense that power should or might be shared with the upper chamber. Certainly, there is no evidence that a Canadian representative of the Sovereign held such an opinion.

CONCLUSION

A few months ago my wife and I were on a visit to India. One day in a bookstore I saw a legal text with the title *The Constitution of India*. In its introduction, the author said the object of his study was ‘to put the constitution in a nutshell.’ If only it were so easy! Still, if such an attempt were made in Canada, the nutshell would necessarily encase, more than anything else, the Crown. It is the Crown that makes whole the actions of government, for it is part of every order-in-council as well as of all – but fewer – statutes. In respect of the former, the Crown is more immediate and central than the Commons or even cabinet. More than history or politics explains this prominence, for neither of these sources of authority account for the Crown’s increasing relevance to the practice of government in Canada. That pre-eminence has another source. In the 2009 *Conacher* case, the Federal Court of Canada stated that “Canada has a system of *constitutional supremacy* that lays out the boundaries of Parliament’s power”.²⁰ In the *Khadr* decision in 2010, the Supreme Court of Canada found that “the courts clearly have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the *Charter*”.²¹

19. David E. Smith, “Patronage in Britain and Canada: An Historical Perspective” (1987) XXII *Journal of Canadian Studies* 34.

20. *Conacher v Canada (Prime Minister)*, 2009 FC 920 at para 53, [2010] 3 FCR 411 [emphasis added].

21. *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 36, [2010] 1 RCS 44.

Today, and unlike the first one hundred and fifteen years of Confederation, Canada has a 'higher law,' which sets out not only rights and freedoms but also a formula for amending the constitution. Again, in *McAteer* (2013), the Superior Court of Justice of Ontario stated that "Her Majesty's role as sovereign has been *reinforced* in section 41(a) of the *Constitution Act, 1982*, which requires unanimity of the federal and all provincial legislatures in order to enact an amendment to the constitutional status of 'the office of the Queen, the Governor General and the Lieutenant Governor of a province'".²²

The point of this brief foray into constitutional law is to underline the importance of the judiciary to the subject at hand. While it has always been the case that Parliament may make law and the Crown's courts adjudicate disputes that invariably arise over statutory interpretation, today the courts do more: they may limit Parliament (and provincial legislatures) (*Conacher*), and they may restrain the political executive (*Khadr*). It is a different constitutional world than Canadians have traditionally known and one that presents a tangible difference from that of the United Kingdom.

Speaking in the early 1960s of the first century of Canada's political development, political scientist Alexander Brady concluded that "amid all the intervening political changes, Canada's adherence to the essential model of Westminster has endured".²³ As evidence for that statement, he cited *inter alia* the legislature, the Crown, the civil service, and the independent judiciary. It would be hard to advance that thesis with confidence now. As in art, in politics the present can never faithfully imitate the past. The same is true of scholarly interpretation—each attempt is of its own time and each betrays the concerns of its era. Where in the 1960s, interpretations of British and Canadian political institutions saw sameness, now they emphasize difference; where half a century ago, there was a United Kingdom 'model,' there is none today.

22. *McAteer v Attorney General of Canada*, 2013 ONSC 5895 at para 17, 117 OR (d) 353 [emphasis added].

23. Alexander Brady, "Canada and the Model of Westminster" in William B. Hamilton, ed, *The Transfer of Institutions* (Durham, N.C.: Duke University Press, 1964), 59 at 80.

CHAPTER 3
**THE LEGISLATIVE PROCESS
AND JUDICIAL REVIEW:
ROYAL FUNCTIONS AND THEIR
JUSTICIABILITY**

John Mark Keyes*

The executive as personified by the Queen has a distinctive role in the enactment of Acts of Parliament. This paper looks at three “royal” functions in this role, largely from the federal perspective in Canada:

- Royal recommendation;
- Royal consent;
- Royal assent.

The object of the paper is to consider how these functions fit with the roles of the other branches of the State in the larger constitutional picture, particularly the role of the courts to review legislative action. This judicial role is sometimes seen to intrude on the world of parliamentary procedure and legislative institutions have generally resisted judicial review of their processes. This is somewhat ironic since the principal function of these institutions is to make law, which is what the courts are mandated to enforce. Why would a law-making institution not welcome the views of a law-enforcing institution?

The short answer is that the law is not the exclusive preserve of either the legislative or the judicial branches, not to mention the executive. And indeed, the courts themselves have come to recognize this through a variety of methods and doctrines about showing deference to the legislative and executive branches when conducting judicial review.

* Adjunct Professor, Faculty of Law (Common Law), University of Ottawa.

This paper begins by describing in general terms the three procedural functions noted above. This description is based on constitutional provisions and accounts of these functions from historical and parliamentary practice perspectives.

The focus then turns to how these functions have been considered by the courts, both in terms of their review of legislative action as well as their application of legislation itself. The paper gives a general account of judicial review and its limits in relation to legislative action, notably the concept of justiciability and the standard of review analysis. It then considers whether the courts have a role to play in reviewing the three functions and argues that they have no role in relation to the royal recommendation and royal consent and have only a very limited role in terms of satisfying themselves that the parliamentary record shows that royal assent has been given.

ROYAL FUNCTIONS IN THE LEGISLATIVE PROCESS

The three royal functions described here are not by any means the only way the executive plays a role in the legislative process. Party politics and constitutional conventions provide a host of levers for its intervention. However, the functions considered here are based on more than political dynamics or convention. They are firmly rooted in the law, and for that reason are arguably capable of attracting the attention of the courts.

Royal Recommendation

In Canada, the royal recommendation is granted by the Governor General on the request of the Government. Historically, it has only been granted for Government bills, but more recently with changes to the Standing Orders,¹ it has also been granted for private members bills that the Government supports.²

1. *House of Commons Procedure and Practice*, 2nd ed. (House of Commons: Ottawa, 2009) at ch 18 (Royal Recommendation).

2. See e.g. Bill C-383, *An Act to amend the International Boundary Waters Treaty Act and the International River Improvements Act*, 1st Sess, 41st Parl, 2013, (first reading 13 December 2011) (which received the royal recommendation before 3rd Reading and was subsequently enacted as SC 2013 c 12).

The requirement originated in British parliamentary practice and recognizes the primary role of the executive branch in the spending of public money. It is the product of historical developments that gradually shifted legislative power, including the power to levy taxation and spend public money, from the Sovereign to democratically-elected legislative assemblies.³ These developments also involved the relationship between upper and lower legislative assemblies and crystalized into two modern procedural requirements: the initiation of financial legislation in a democratically elected chamber and the royal recommendation.

Although much has been written on the development of the origination requirement and the relationship between the Senate and the House of Commons, the development of the royal recommendation and the relationship between the executive and legislative branches is somewhat less well-known. Like the origination requirement, it is derived from ancient constitutional usage, but it was also shaped by the separation of taxation from appropriations at the beginning of the 18th century. An account of its development is provided in the UK House of Commons *Debates* of March 26, 1866 dealing with an amendment to the standing orders.

Speaking first, Ayrton began by acknowledging that “one of the fundamental principles of the Constitution was that the House of Commons should never take the initiative in granting or voting away public money” and that it was “the duty of the House of Commons to sit in judgment upon the measures introduced by the Crown”. He then said:

At the beginning of the last century, however, an entirely new system was introduced, and the Exchequer was constituted to act as a trustee between the Crown on the one hand, and the House of Commons and the people on the other. The consequence of this new arrangement was, that the plan was adopted of separating the levying of taxes from their appropriation by Votes of the House. The result was that there was always a balance of public money lying in the Exchequer, which in the course of time Members began to regard as very much at their own disposal. To prevent the mischief likely to arise from the growing disposition of private Members to establish a claim upon such balances

3. See J.M. Keyes, “When Bills and Amendments Require the Royal Recommendation” (1998) 20 Can. Parl. Rev. at 15; J.E. Magnet and D. Palumbo, “Taxation, Democracy and the Constitution” in J.E. Magnet, ed, *Modern Constitutionalism*, (Lexis-Nexis: 2004) at 247 [Magnet].

remaining in the Exchequer, a Standing Order was made in 1813 [sic] to the effect –

That this House will receive no petition for any sum of money relating to the public service but what is recommended by the Crown.⁴

This standing order was given a broad interpretation and applied not only to petitions, but also to any other steps that would tend to impose a burden on the public purse. In 1852, the standing order was amended to reflect this enlarged application to say

That this House will receive no petition for any sum of money relating to the public services or proceed upon any Motion for granting any money but what is recommended by the Crown.⁵

And, as noted above, the standing order was amended yet again in 1866 to deflect a drafting practice that had developed of including clauses to say that any expenses necessary to implement a bill were to be paid out of money “to be provided by Parliament.” Thus, the standing order came to read:

That this House will receive no petition for any sum of money relating to the public services or proceed upon any Motion for granting any money, whether payable out of the Consolidated Revenue Fund or out of monies to be provided by Parliament, unless recommended by the Crown.⁶

The 1866 debate on this amendment also links its adoption to provisions in colonial legislation dealing with the royal recommendation. The Chancellor of the Exchequer said:

...I believe that in all cases of legislation – certainly in the great cases of legislation we have had in this House in the last thirty years for Colonial Constitutions – we have been most careful to introduce this provision. In Canada, before the present Constitution was established, the proposals by private Members to make grants of public money became so numerous and glaring that a remedy was necessary. The remedy was to introduce this provision. I believe it has been successful, and that the practice is now becoming a recognized principle of the British Government at home and in the colonies.⁷

4. UK, HC, *Commons Debates* (1865-67) at 592 (March 26 1866) (note, the reference to “1813” should be “1713”; see Erskine May, *Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 24th ed, (Lexis Nexis: London, 2011) at 717 [May].

5. *Ibid.* at 592-593.

6. *Ibid.* at 603.

7. *Ibid.* at 598.

Thus, developments in Canada in the first half of the 19th century paralleled those in the British Parliament, spurred on by the concerns of colonial governors to keep a tight control on spending in the face of the emerging democratic assemblies.⁸ This resulted in section 57 of the *Union Act*, 1840⁹, which said:

... It shall not be lawful for the said Legislative Assembly to originate or pass any Vote, Resolution or Bill for the Appropriation of any Part of the Surplus of the said Consolidated Revenue Fund, or of any other Tax or Impost, to any Purpose which shall not have been first recommended by a Message of the Governor to the said Legislative Assembly during the Session in which such Vote, Resolution or Bill shall be passed;

This provision was subsequently incorporated almost verbatim into the *Constitution Act 1867* as section 54 and in *Standing Order 79* of the House of Commons. Section 54 says:

Recommendation of Money Votes

54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

Some commentators have argued that these provisions are narrower in scope than the UK standing orders in that they apply only to bills that expressly appropriate public money, and not to those that would do so indirectly by creating institutions or requirements that entail public expenditures.¹⁰ These arguments are based on the differing historical circumstances in the UK as well as differences in wording. However, it is difficult to see how concerns about the propensity of legislators to spend public money were substantially different in Canada. If anything, the concerns were even greater in Canada¹¹

8. See Keyes, *supra* note 3, at 16, citing JG Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada*, 4th ed (Toronto: Canada Law Book Company, 1916) at 405 and J Small, "Money Bills and the Use of the Royal Recommendation in Canada: Practice versus Principle?" (1995) 27 *Ottawa L Rev* 33 at fn 68 and the accompanying text.

9. (UK), 3 & 4 Vict, c 35, s 57, reprinted RSC 1985, App II, No 5.

10. Magnet, *supra* note 3 at 257ff; Small, *supra*, note 8.

11. Note the following passage from the journals of Lord Sydenham, which Small, *ibid* at fn.69:

You can have no idea of the manner in which a Colonial Parliament transacts its business. I got them into comparative order and decency by having measures

and should have accordingly led to controls that were as strict, if not stricter, than those in the UK. As concerns the differences in wording, it appears that greater detail was introduced into the UK standing orders to counteract specific practices. This detail was evidently not considered necessary to reinforce the application of more generally worded colonial provisions, which the Chancellor of the Exchequer acknowledged as having the same effect as that sought in the 1866 amendment.

Thus, it is hardly surprising that in Canada the requirement was applied broadly, as the first edition of Bourinot in 1884 noted:

The constitutional provision which regulates the procedure of the Canadian House of Commons in this respect applies not only to motions directly proposing a grant of public money, but also to those which involve a grant.¹²

The application of the royal recommendation in Canada both to direct and indirect appropriations has continued to the present day, albeit with some adjustments as concerns indirect appropriations.¹³ Many aspects of its application are fairly clear. First of all, it applies only to provisions that entail the spending of money from the Consolidated Revenue Fund.¹⁴ Thus, it does not apply to provisions that would reduce spending; it also does not apply to provisions to reduce or eliminate taxes since these prevent money from coming into the CRF; they do not entail the expenditure of funds that are ever in the CRF.¹⁵

brought forward by the Government, and well and steadily worked through. But when they came to their own affairs, and, above all, to the money matters, there was a scene of confusion and riot of which no one in England can have any idea. Every man proposes a vote for his own job; and bills are introduced without notice, and carried through all their stages in a quarter of an hour! One of the greatest advantages of the Union will be, that it will be possible to introduce a new system of legislating, and, above all, a restriction upon the initiation of money-votes. Without the last I would not give a farthing for my bill: and the change will be decidedly popular; for the members all complain that, under the present system, they cannot refuse to move a job for any constituent who desires it.

12. J G Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada* (Rothman Reprints: South Hackensack, 1971) at 464.
13. For a summary of recent practice, see M Lukyniuk, "Spending Proposals: When is a Royal Recommendation Needed?" (2010) 33-1 Can Parl Rev 29.
14. Senate Speaker's Ruling on Bill S-223 (11 March 2010); HC Speaker's Ruling on Bill C-285, *House of Commons Debates*, 39th Parl, 1st Sess, No 79 (8 November 2006).
15. Senate Speaker's Ruling on Bill S-212 (24 February 2009); HC Speaker's Ruling on Bill C-253, *House of Commons Debates*, 39th Parl, 1st Sess, No 74 (1 November 2006).

The application of the royal recommendation to indirect appropriations is most often framed in terms of whether a provision would extend the “objects, purposes, conditions and qualifications” of an existing appropriation of public revenue. This aspect of the requirement has engendered considerable debate and there are innumerable speaker’s rulings on this issue. However, some aspects of its application in this regard are quite clear. For example, provisions that would extend the coverage or amount of employment insurance benefits have consistently been ruled to require the royal recommendation.¹⁶

Where things become less clear is when provisions would modify the functions of an existing body. The test for applying the royal recommendation is to determine whether the modification would entail a “new and distinct” charge. The many recent rulings on this point are split fairly evenly, despite a suggestion in a ruling from 1998 that no recommendation is needed for these provisions because any increased funds could be sought in an appropriation bill.¹⁷ For example, in 2012 the Speaker of the House of Commons ruled that Bill C-377, which would have instituted new filing requirements for labour organizations, did not require a recommendation:

In carefully reviewing this matter, it seems to the Chair that the provisions of the bill, namely the requirements for the agency to administer new filing requirements for labour organizations and making information available to the public, may result in an increased workload or operating costs but do not require spending for a new function per se. In other words, the agency, as part of its ongoing mandate, already administers filing requirements and makes information available to the public. The requirements contained in Bill C-377 can thus be said to fall within the existing spending authorization of the agency.¹⁸

In contrast, in 2010, the Speaker ruled that Bill C-501, providing for the appointment of adjudicators for claims against corporate directors under the *Canada Business Corporations Act*, required a recommendation since there was no existing legislative authority for the appointment of adjudicators under that Act.¹⁹

16. HC Speaker’s Ruling on Bill C-243, *House of Commons Debates*, 40th Parl, 3rd Sess, No 32 (23 April 2010).

17. HC Speaker’s Ruling on Bill S-3, 36:1 *House of Commons Debates*, 40th Parl, 3rd Sess, No 56 (10 February 1998); (see also J M Keyes, “The Royal Recommendation: An Update” (1999) 22:2 *Can Parl Rev* 19).

18. See e.g. HC Speaker’s Ruling on Bill C-377, *House of Commons Debates*, 41st Parl, 1st Sess, No 193 (6 December 2012).

19. See e.g. HC Speaker’s Ruling on Bill C-501, 40:3 *House of Commons Debates*, 40th Parl, 3rd Sess, No 49 (26 May 2010).

One further area remains somewhat controversial in relation to indirect appropriations. It involves bills that would require the Government to take some action, but leave it considerable discretion to decide what to do. A pair of rulings in 2006 exemplify these sorts of bills: C-292 (*An Act to implement the Kelowna Accord*) and C-288 (*Kyoto Protocol Implementation Act*).

The ruling on Bill C-292 focused on clause 2:

2. The Government of Canada shall immediately take all measures necessary to implement the terms of the accord, known as the “Kelowna Accord”, that was concluded on November 25, 2005 at Kelowna, British Columbia, by the Prime Minister of Canada, the first ministers of each of the provinces and territories of Canada and the leaders of the Assembly of First Nations, the Inuit Tapiriit Kanatami, the Metis National Council, the Native Womens’ Association of Canada and the Congress of Aboriginal Peoples.

The House of Commons Speaker ruled:

Bill C-292 in clause 2 does state that the government shall “take all measures necessary to implement the terms of the accord”, but it does not provide specific details on those measures. The measures simply are not described. In the absence of such a description, it is impossible for the Chair to say that the bill requires a royal recommendation.

...

As I read it, the Kelowna accord tabled in the House sheds light on the plan of action, but it is not clear whether the accord could be implemented through an appropriation act, through amendments to existing acts, or through the establishment of new acts. From my reading, implementation would appear to require various legislative proposals.

In any event though, this is more of a legal question than a procedural one. The government House leader’s legal advisors are best placed to reply to that question. As my predecessors and I have said on many occasions, the Speaker does not rule on matters of law. When, or perhaps if, enabling legislation comes forward, the Chair will, as usual, be vigilant in assessing the need for a royal recommendation.²⁰

Two days later, the Speaker ruled on Bill C-288. After prefacing his remarks with a reference to his ruling on Bill C-292, the Speaker said:

So too in the case before us, the adoption of a bill calling on the government to implement the Kyoto protocol might place an obligation on the

20. HC Speaker’s Ruling on Bill C-292, *House of Commons Debates*, 39th Parl, 1st Sess, No 52 (25 September 2006).

government to take measures necessary to meet the goals set out in the protocol but the Chair cannot speculate on what those measures may be. If spending is required, as the government House leader contends, then a specific request for public monies would need to be brought forward by means of an appropriation bill, as was the case in 2005, or through another legislative initiative containing an authorization for the spending of public money for a specific purpose.

As it stands, Bill C-288 does not contain provisions which specifically authorize any spending for a distinct purpose relating to the Kyoto protocol. Rather, the bill seeks the approval of Parliament for the government to implement the protocol. If such approval is given, then the government would decide on the measures it wished to take. This might involve an appropriation bill or another bill proposing specific spending, either of which would require a royal recommendation.²¹

More recently, this approach has also been taken to the provisions of Bill C-471 for implementing the recommendations of the Pay Equity Task Force.²²

How does one explain these bills given the application of the royal recommendation to indirect appropriations, particularly those characterized by changes to the scope of existing programs that entail public spending? Arguably, the striking feature of these bills is not that they require the Government to take implementing action. Rather, they involve entirely new measures. Bills involving the expansion of existing programs also require Government implementation; the difference is that the existing programs provide enough details of those implementation measures to attract the royal recommendation. This reflects the basis of speaker's rulings on legislative texts. Speakers generally do not speculate on what will be required to accomplish some legislative objective; they look to the provisions of the bill and other related legislation to answer these questions.²³ It is also worth noting that the Speaker's views about the lack of detail in these bills resonates with a court case brought to enforce the *Kyoto Protocol Implementation Act*.²⁴ In *Friends of the Earth v Canada*, federal courts concluded that many of the provisions of the Act were not clear enough to be "justiciable" and susceptible of judicial enforcement.²⁵

21. HC Speaker's Ruling on Bill C-288, *House of Commons Debates*, 39th Parl, 1st Sess, No 54 (27 September 2006).

22. HC Speaker's Ruling on Bill C-471, *House of Commons Debates*, 40th Parl, 3rd Sess, No 39 (2010/05/04).

23. J Keyes & A Mekunel, "Traffic Problems at the Intersection of Parliamentary Procedure and Constitutional Law" (2001) 46 McGill LJ 6 at 28.

24. SC 2007, c 30.

25. 2008 FC 1183, 299 SLR (4th) aff'd 2009 FCA 297, [2009] FCJ No 1307 (QL). See the discussion below of justiciability at p. 12ff.

Royal Consent

The royal consent is one of the more obscure aspects of the legislative process. It is required “when the property rights of the Crown are postponed, compromised or abandoned, or for any waiver of a prerogative of the Crown” and it has been granted for legislation dealing with Crown land or allowing litigation against the executive (*Crown Liability Act*).²⁶ Given that Crown prerogatives have been much diminished over the course of history, it is not surprising that it has been seldom invoked in recent times.²⁷ However, a Senate Speaker’s ruling in 2011 demonstrates that it still has some vitality.²⁸

The requirement is derived from British parliamentary practice and “is among the unwritten rules and customs of the House of Commons of Canada.”²⁹ Unlike the royal recommendation and royal assent, it has not been expressed in legislative form, either in the Constitution or in the Standing Orders.

The purpose of the requirement is to afford the executive protection from legislative encroachments on its prerogatives and property. However, this protection has more recently been cast by the Senate Speaker in terms of providing notice of possible encroachments, as opposed to a veto over them:

However, with the recognition of parliamentary supremacy and the subsequent development of responsible government, the use of Royal Consent became not so much a veto as an acknowledgement that a prerogative power was involved in proposed legislation. While the lack of Royal Consent can ultimately block the passage of a bill, it should not be used to override the right of Parliament to free debate, the absolute right of Parliament to discuss any topic, to exercise its fundamental right to free speech guaranteed in the *Bill of Rights* of 1689.³⁰

26. Audrey O’Brien & Marc Bosc, *House of Commons Procedure and Practice*, 2nd ed. (House of Commons: Ottawa, 2009), at ch 16 [O’Brien & Bosc](Stages of the Legislative Process, 2nd Reading and Reference to a Committee). See also May, *supra* note 4 at 165-167 and 661-664.

27. In 2011, the Speaker of the Senate noted that it had been invoked only about two dozen times since confederation: see *Senate Debates*, 40th Parl, 3rd Sess, No 95 (March 21, 2011) (relating to Bill C-232 (*An Act to Amend the Supreme Court Act (Understanding the Official Languages)*)) [Senate Debates 40th Parl, 3rd Sess No 95].

28. *Ibid.*

29. O’Brien & Bosc, *supra* note 26.

30. *Senate Debates* 40th Parl, 3rd Sess No 95, *supra* note 27.

Royal Assent

Royal assent is perhaps the best known of the three procedural functions considered in this paper. It is the final stage of enactment and is required for every Act of Parliament. Once it has been given, a bill becomes law, even though its dispositive provisions may not yet be in force. This marks a significant juridical point at which an Act enters the legal domain, being both subject to judicial notice and enforceable according to its terms.

Royal assent has historically been given in a ceremony that takes place in the Senate Chamber with members of the House of Commons present as well as the Sovereign, the Governor General or a deputy appointed under section 14 of the *Constitution Act, 1867* (including judges of the Supreme Court of Canada).³¹ However, since 2002, the *Royal Assent Act* has provided an alternative method for signifying assent by a written declaration.³²

While it is clear that decisions about giving the royal recommendation or the royal consent are discretionary, this is questionable with royal assent. On the one hand, section 55 of the *Constitution Act, 1867* by its terms suggests that there is considerable discretion to refuse assent:

Royal Assent to Bills, etc.

55. Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the Queen's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to Her Majesty's Instructions, either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or that he reserves the Bill for the Signification of the Queen's Pleasure.

On the other hand, Hogg says "There is no circumstance that would justify a refusal to assent, or a reservation ...".³³ He bases this assertion on a resolution of the Imperial Conference of 1930 that the powers of reservation and disallowance must never be exercised.³⁴ However, it is difficult to see why a resolution dealing with relations between the United Kingdom and its former possessions should affect

31. O'Brien & Bosc, *supra* note 26 (see Stages of the Legislative Process, Royal Assent).

32. SC 2002, c 15.

33. P W Hogg, *Constitutional Law of Canada* (Carswell: Toronto, 2012) at 9-20.

34. M Ollivier, ed, *The Colonial and Imperial Conferences from 1887 to 1937* (Queen's Printer: Ottawa, 1954).

the operation of legislative functions within those possessions. Constitutional provisions for reservation and disallowance pertain to the role of the British Sovereign, as opposed to the vice-regal representative. Thus, it is not clear why such a resolution should affect the giving of royal assent by the Governor General other than to eliminate any role for the Sovereign in this function. Arguably, the assent function continued to exist as it did in the UK in relation to UK legislation.

The question of discretion to refuse royal assent was briefly considered by the Supreme Court of Canada in *Re Resolution to Amend the Constitution*:

As a matter of law, the Queen, or the Governor General or the Lieutenant Governor could refuse assent to every bill passed by both Houses of Parliament or by a Legislative Assembly as the case may be. But by convention they cannot of their own motion refuse to assent to any such bill on any ground, for instance because they disapprove of the policy of the bill. We have here a conflict between a legal rule which creates a complete discretion and a conventional rule which completely neutralizes it. But conventions, like laws, are sometimes violated. And if this particular convention were violated and assent were improperly withheld, the courts would be bound to enforce the law, not the convention. They would refuse to recognize the validity of a vetoed bill.³⁵

The view that there is discretion to refuse royal assent has currency outside Canada in both the UK and Australia. In the UK, it is a matter of historical record that two of the most prominent constitutional scholars of the day, Sir William Anson and A.V. Dicey, advised King George V that he had discretionary power to refuse assent to the Irish Home Rule Bill in 1912.³⁶

In Australia, Twomey has argued that there are two ways to characterize royal assent in modern times.³⁷ The first focuses on the wording of enactment clauses such as that used in Canada:

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows

The Governor General thus act on the “advice and consent” of the legislative chambers in deciding whether to give royal assent.

35. [1981] 1 SCR 753 at 881, 11 Man R (2d) 1 [*Resolution to Amend the Constitution*].

36. R Blackburn, “The Royal Assent to legislation and a monarch’s fundamental human rights” (2003) Public Law at 205-210.

37. A Twomey, “The Refusal or Deferral of Royal Assent” (2006) Public Law at 580-602.

Once a bill has been passed by both chambers, the Governor General is bound to give the assent. The competing view is that the Governor General makes decisions about royal assent in the same way as on matters other than those of their personal prerogatives: on the advice of the Government. After reviewing the practice in Australia and the UK, Twomey concludes:

There is much to be said for the view that the Queen or her vice-regal representative, when giving Royal Assent to a Bill, acts upon the advice of the House(s) of Parliament. It is a view that is consistent with the definition of Parliament and the enacting words of legislation, as well as with the principles of representative government. It also has the advantage of providing certainty and avoiding all the problems that arise from the existence of discretion.

However, the history of the exercise of the power to grant Royal Assent, both in its colonial context in Australia, and as part of the royal prerogative in the United Kingdom, suggests that an underlying discretion may continue to exist, albeit one that is heavily circumscribed by constitutional convention.³⁸

JUDICIAL REVIEW AND LEGISLATIVE PROCESSES

The starting point for understanding how the courts have limited judicial review is a statement of what it is. In *Dunsmuir v New Brunswick*, the Supreme Court, with Bastarache and Lebel, JJ writing for the majority, characterized judicial review as follows:

By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.³⁹

This passage conveys a great deal about judicial review in relatively few words. First of all, it tells us that judicial review is about ensuring that public power is exercised in accordance with the law. It also acknowledges the variety of sources of law, ranging from statute law through the common and civil law to the Constitution. Thus *law*

38. *Ibid* at 601.

39. 2008 SCC 9 at para 28, 1 SCR 190 [*Dunsmuir*].

provides the basis for judicial review, which is essentially an inquiry into what the law requires and whether the exercise of public power conforms to these requirements.

Although the focus of this passage narrows from “all exercises of public authority” to “the administrative process and its outcomes”, it is clear that prerogative⁴⁰ and legislative powers are also to some extent subject to judicial review, notably to ensure the legality of their exercise. The extent of judicial review is, generally speaking, more limited than it is in relation to other powers. The basis for this rests on notions of a constitutional separation of powers and judicial deference towards the executive and legislative branches.

Separation of Powers

Montesquieu is generally credited with the definitive formulation of the separation of powers as a principle of government. His thinking inspired republican models of government, such as that of the United States. It was also influenced by the English constitutional system, although Montesquieu’s understanding of that system was somewhat faulty.⁴¹ Thus, it is perhaps not surprising that today in Canada the doctrine of the separation of powers is regarded as having some relevance to our system of government, but it does not enjoy the status of an inflexible constitutional principle.

The decision of the Supreme Court of Canada in *Doucet-Boudreau v Nova Scotia* demonstrates how the Canadian courts view the separation of powers:

Fortunately, Canada has had a remarkable history of compliance with court decisions by private parties and by all institutions of government. That history of compliance has become a fundamentally cherished value of our constitutional democracy; we must never take it for granted but always be careful to respect and protect its importance, otherwise the seeds of tyranny can take root.

This tradition of compliance takes on a particular significance in the constitutional law context, where courts must ensure that government behaviour conforms with constitutional norms but in doing so must also

40. See e.g. *Operation Dismantle Inc et al v The Queen et al*, [1985] 1 SCR 441, 1985 CanLII 74 (SCC).

41. Iain Stewart, “Men of Class: Aristotle, Montesquieu and Dicey on ‘Separation of Powers’ and ‘the Rule of Law’” (2004) 4 MacQuarrie LJ at 187-223.

be sensitive to the separation of function among the legislative, judicial and executive branches. While our Constitution does not expressly provide for the separation of powers ..., the functional separation among the executive, legislative and judicial branches of governance has frequently been noted. ... In *New Brunswick Broadcasting Co. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, McLachlin J. (as she then was) stated, at p. 389:

Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.⁴²

As this passage suggests, concerns about the separation of powers arise when one of the three branches of government does something that interferes with what another branch wants to do. The approach of the courts has been to concentrate on what each branch has authority to do and to reconcile this authority when conflict arises.

Article 9 of the *Bill of Rights, 1689* also recognizes that Parliament and the courts are to operate in separate spheres, stating “[t]hat the freedom of speech and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament”.⁴³ The Supreme Court of Canada in the *Reference Re Resolution to Amend the Constitution*⁴⁴ has accepted that this provision is “undoubtedly in force as part of the law of Canada”.⁴⁵ That decision also carved out a large sphere of activity into which the courts should not venture:

How Houses of Parliament proceed, how a provincial legislative assembly proceeds is in either case a matter of self-definition, subject to any overriding constitutional or self-imposed statutory or indoor prescription. It is unnecessary here to embark on any historical review of the “court” aspect of Parliament and the immunity of its procedures from judicial review. Courts come into the picture when legislation is enacted and not before (unless references are made to them for their opinion

42. [1993] 1 SCR319 at paras 32-33, 100 DLR (4th) 212.

43. 1688 (UK), 1 Will and Mar, Sess 2, c 2.

44. [1981] 1 SCR 753, 1981 CanLII 25 (SCC) (*sub nom. Reference Re Amendment of Constitution of Canada*).

45. *Ibid* at 785.

on a bill or a proposed enactment). It would be incompatible with the self-regulating – “inherent” is as apt a word – authority of Houses of Parliament to deny their capacity to pass any kind of resolution.⁴⁶

Views about the appropriate spheres of courts and parliament were greatly influenced by the political events and constitutional changes of the 17th and 18th centuries. The law of Parliament was seen as a separate law, distinct from the common law. For that reason it was the common belief that “judges ought not to give any opinion of a matter of Parliament, because it is not to be decided by the common laws but *secundum legem et consuetudinem parliamenti* [according to the laws and customs of parliament]”.⁴⁷ By the same token, the *sub judice* doctrine prevents parliamentary debate on matters that are before the courts.⁴⁸

The concept of parliamentary privilege also demarcates the courts and Parliament. Through parliamentary privilege, the legislature maintains its formal internal autonomy from external forces such as the public, the executive, and the courts. The privileges of Parliament include those rights necessary for free action within its jurisdiction and the necessary authority to enforce those rights if challenged. Among the most important privileges of the members of a legislature is the enjoyment of freedom of speech in debate. Although originally intended as protection against the power of the Crown, it was later extended to protect members against attack from all sources. This freedom of speech may not be impeached or questioned in the courts, and statements made in parliamentary proceedings cannot be the subject of an action for defamation or contempt.⁴⁹ Members are liable to censure and punishment only by the House itself for a breach of its rules.

The separation of powers has also been recognized as between the executive and legislative branches. However, in *Wells v Newfoundland-*

46. *Ibid.*

47. Sir E Coke, *Fourth Part of the Institutes of the Laws of England* (London: E and R Brooke, Bell-Yard, 1797) at 14; cited in May, *supra* note 4 at 283.

48. See O’Brien & Bosc, *supra* note 26 at ch. 11 (Questions, Oral Questions) (but note the critique of this doctrine in); L Sossin & V Crystal, “A Comment on ‘No Comment’: The Sub Judice Rule and the Accountability of Public Officials in the 21st Century” (2013) 26 Dal LJ 535.

49. See *Roman Corp v Hudson’s Bay Oil and Gas Co*, [1972] 1 OR 444, 23 D.L.R. (3d) 292 (CA), aff’d [1973] SCR 820, 36 DLR (3d) 413; see also O’Brien & Bosc, *supra* note 26 at ch 3, Rights and Immunities of Individual Members, Freedom of Speech.

land, the Supreme Court noted that it is tempered by the realities of party politics:

The government cannot, however, rely on this formal separation to avoid the consequences of its own actions. While the legislature retains the power to expressly terminate a contract without compensation, it is disingenuous for the executive to assert that the legislative enactment of its own agenda constitutes a frustrating act beyond its control. ... On a practical level, it is recognized that the same individuals control both the executive and the legislative branches of government.⁵⁰

Limits on Judicial Review – Judicial Deference and Justiciability

During the past 30 years or so, Canadian courts have wrestled with the scope of judicial review and the potential it holds for interfering with the exercise of power by the bodies and officials under review. The concept of “deference” has come to the fore in a variety of forms to limit judicial review, most notably in the “standard of review analysis” for calibrating the degree of scrutiny courts should bring to bear on the decisions of bodies and officials under review.

In *Dunsmuir v New Brunswick* the Supreme Court articulated two standards for review: correctness and reasonableness.⁵¹ Correctness, as the name implies, requires the decision under review to conform to the reviewing court’s view of what should have been decided (the “correct” decision).⁵² In contrast, reasonableness recognizes that there is a range of differing “reasonable” decisions and that the decision under review need only conform to one of them. The central concern in determining reasonableness is “the existence of justification, transparency and intelligibility within the decision-making process”.⁵³

50. [1999] 3 SCR 199 at 220-221[Wells].

51. *Supra* note 39.

52. *Ibid* at para 50:

When applying the correctness standard, a reviewing court will not show deference to the decision maker’s reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal’s decision was correct.

53. *Ibid* at para 47:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend

The Court in *Dunsmuir* also recognized a series of factors for determining the appropriate standard, saying that it reflects a contextual analysis that is:

... dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.⁵⁴

Although this formulation of the factors refers to “the tribunal”, this reference reflects only the particular tribunal context in the *Dunsmuir* decision since the standard of review analysis has been applied more broadly to prerogative⁵⁵ and delegated legislative powers.⁵⁶ It does not yet appear to have been applied to questions about the enactment process for primary legislation. Instead, the related concept of “justiciability” has been applied to limit judicial review. Sossin describes it as

A set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable.⁵⁷

themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

54. *Ibid* at para 64.

55. For e.g., *Kamel v Canada*, 2008 FC 338 at para 57 ff, 1 FCR 59 (rev'd on other grounds 2009 FCA 21); *Turp v Canada*, 2012 FC 893 at para 15, (available on CanLII).

56. See, for e.g., *Giant Grosmont Petroleum Ltd v Gulf Canada Resources Ltd* [2001] ABCA 174 at para 16, 286 AR 146; *Sunshine Village Corp v Canada (Parks)* 2004 FCA 166 at para 10, [2004] 3 FCR 600 *Canadian Council for Refugees v Canada* 2008 FCA 229 (CanLII) at para 51ff; *Canada v Canadian Wheat Board* 2009 FCA 214 at para 36, [2009] FCJ No 695; *Enbridge Gas Distribution v Ontario (Energy Board)*, 74 OR (3d) 147 at para 23, 2005 CanLII 250 (ON CA).

57. L Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d ed (Thomson Reuters Canada Ltd: Toronto, 2012) at 7 [Sossin]; see also *Kelly v Canada*, 2013 ONSC 1220 at para 148, 226 ACWS (3d) 654.

He goes on to suggest that although the determination of justiciability “cannot be reduced to purely objective assessments” and its content is “open-ended”, it nevertheless depends on context and the suitability of the subject-matter of a dispute to be judicially determined. It also appears that “the criteria used to make this determination relate to three factors: (1) the capacities and legitimacy of the judicial process; (2) the constitutional separation of powers and (3) the nature of the dispute before the court”.⁵⁸ Interestingly, these factors are not altogether different from those that form the basis for the standard of review analysis. This is hardly surprising since that analysis originated about the same time as justiciability was being developed.⁵⁹

One of the foundational Canadian cases on justiciability is *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)* where Dickson, CJC said:

... As I noted in *Operation Dismantle Inc v The Queen*, [1985] 1 S.C.R. 441, at p. 459, justiciability is a “doctrine ... founded upon a concern with the appropriate role of the courts as the forum for the resolution of different types of disputes”, endorsing for the majority the discussion of Wilson J. beginning at p. 460. Wilson J. took the view that an issue is non-justiciable if it involves “moral and political considerations which it is not within the province of the courts to assess” (p. 465). An inquiry into justiciability is, first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue or, instead, deferring to other decision-making institutions of the polity.⁶⁰

The Supreme Court also situated the notion of justiciability within the judicial review of Acts of Parliament and acknowledged how it had been qualified in Canada by the constitutional context:

The most basic notion of justiciability in the Canadian legal process is that referred to in *Pickin*, *supra*, and inherited from the English Westminster and unitary form of government, namely, that it is not the place of the courts to pass judgment on the validity of statutes. Of course, in the Canadian context, the constitutional role of the judiciary with regard to the validity of laws has been much modified by the federal division of powers as well as the entrenchment of substantive protection of certain constitutional values in the various Constitution

58. *Ibid.*

59. Sossin, *ibid* at 252 (also notes the connection between justiciability and the “pragmatic and functional approach” (the precursor to the standard of review analysis).

60. [1989] 2 SCR 49 at para 49, 61 DLR (4th) 604.

Acts, most notably that of 1982. There is an array of issues which calls for the exercise of judicial judgment on whether the questions are properly cognizable by the courts. Ultimately, such judgment depends on the appreciation by the judiciary of its own position in the constitutional scheme.⁶¹

The reference to the *Pickin* case⁶² demonstrates the scope for applying the concept of justiciability to issues of parliamentary process. It involved a challenge to legislation based on parliamentarians being misled or acting for improper motives. The House of Lords dismissed the challenge as non-justiciable on the basis that such challenges would lead the courts into conflict with Parliament.⁶³ Lord Simon said:

It is well known that in the past there have been dangerous strains between the law courts and Parliament-dangerous because each institution has its own particular role to play in our constitution, and because collision between the two institutions is likely to impair their power to vouchsafe those constitutional rights for which citizens depend on them. So for many years Parliament and the courts have each been astute to respect the sphere of action and the privileges of the other-Parliament, for example, by its *sub judice* rule, the courts by taking care to exclude evidence which might amount to infringement of parliamentary privilege (for a recent example, see *Dingle v Associated Newspapers Ltd* [1960] 2 QB 405)... A further practical consideration is that if there is evidence that Parliament may have been misled into an enactment, Parliament might well-indeed, would be likely to-wish to conduct its own enquiry. It would be unthinkable that two enquiries-one parliamentary and the other forensic-should proceed concurrently, conceivably arriving at different conclusions; and a parliamentary examination of parliamentary procedures and of the actions and understandings of officers of Parliament would seem to be clearly more satisfactory than one conducted in a court of law quite apart from considerations of parliamentary privilege.⁶⁴

However, when one turns to the procedural aspects of the enactment of legislation, the application of the justiciability doctrine is not so absolute. On the one hand, the courts have repeatedly held that the common law requirements of natural justice (including fairness and legitimate expectations) do not apply to the process of enacting

61. *Ibid.*, at para 50.

62. *Pickin v British Railways Board*, [1974] UKHL 1, [1974] AC 765, [1974] 1 All ER 609.

63. *Turner v Canada* [1992] 3 FC 458 (CA), (1992) 149 NR 218 (relying on *Pickin*, *ibid.*).

64. *Ibid.*

bills,⁶⁵ (including the role of the executive in this process).⁶⁶ On the other hand, they have been prepared to enforce legislated “manner and form” requirements, giving effect to constitutional requirements for the publication of laws in both official languages⁶⁷ as well as for the amendment of the Constitution.⁶⁸ They have also differentiated the legislative process from “policy development”, holding that the latter does not enjoy the protection from review accorded the former.⁶⁹ And they have found that the origination requirement of section 53 of the *Constitution Act, 1867* expresses the “fundamental principle of no taxation without representation” and applied this principle to the interpretation of enabling legislation.⁷⁰

The courts have also been prepared to enforce requirements enacted by ordinary statute,⁷¹ although because these requirements are not constitutionally entrenched, they are more susceptible to avoidance through amendment.⁷² They are also subject to the interpretive framework of parliamentary intention, as the Supreme Court noted in the *Auditor General* case in deciding not to provide a judicial remedy to enforce statutory requirements on the Government to disclose information to the Auditor General. The touchstone for deciding the justiciability of this question was the parliamentary intention underlying the statutory requirements:

It is the prerogative of a sovereign Parliament to make its intention known as to the role the courts are to play in interpreting, applying and enforcing its statutes. While the courts must determine the meaning of statutory provisions, they do so in the name of seeking out the intention or sovereign will of Parliament, however purposively, contextually or policy-oriented may be the interpretative methods used to attribute such meaning. If, then, the courts interpret a particular provision as

65. See e.g., *Wells*, *supra* note 50 at 222.

66. See *Reference re Canada Assistance Plan* [1991] 2 SCR 525 at 558, 1991 CanLII 74 (SCC), (but note *Wells*, *ibid*, recognizing that the Executive does not enjoy the immunity from its contractual obligations).

67. *Re Manitoba Language Rights* [1985] 1 SCR 721, 1985 CanLII 33 (SCC) [*Manitoba Language Rights*].

68. *Reference re Senate Reform*, [2014] 1 SCR 707, 2014 SCC 32.

69. See *Native Women’s Association of Canada v. Canada*, [1992] 3 FC 192 (CA), [1992] FCJ No 715; *rev’d on other grounds* [1994] 3 SCR 627. See also Sossin, *supra* note 57 at 197ff.

70. *Re Eurig Estate*, [1998] 2 SCR 565 at para 30, 165 DLR (4th) 1; *Ontario English Catholic Teachers’ Association v Ontario*, [2001] 1 SCR 470 at para 71, 196 DLR (4th) 577.

71. *Canada v Friends of the Canadian Wheat Board* 2012 FCA 183, 352 DLR (4th) 163.

72. See e.g. *Canadian Taxpayers Foundation v Ontario*, 73 OR (3d) 621, [2004] OJ No 5239; Hogg, *supra* note 33 at 12-13.

having the effect of ousting judicial remedies for entitlements contained in that statute, they are, in principle, giving effect to Parliament's view of the justiciability of those rights. The rights are non-justiciable not because of the independent evaluation by the court of the appropriateness of its intervention, but because Parliament is taken to have expressed its intention that they be nonjusticiable.⁷³

One significant aspect of parliamentary intention emerges in the notion of mandatory and directory enactments. This notion recognizes that the breach of a statutory requirement relating to the performance of public functions does not always invalidate the performance of that function.⁷⁴ Invalidity will not result from a failure to follow a statutory requirement if it "would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and would not promote the main object of the Legislature..."⁷⁵ However, it should be noted that the Supreme Court of Canada rejected the characterization of constitutional provisions as directory in the *Manitoba Language Rights Reference*.⁷⁶

This interpretive orientation of parliamentary intention has most recently played a role in a case involving statutory requirements on the introduction of legislation. In *Friends of the Canadian Wheat Board*, Mainville, J. said

In my view, the democratic principle favours an interpretation of section 47.1 of the *CWB Act* that preserves to the greatest extent possible the ability of the elected members of the House of Commons, the Minister, to change that legislation as best they see fit. This is, moreover, what subsection 42(1) of the *Interpretation Act*, reproduced above, specifically requires.⁷⁷

This general description of judicial deference and justiciability suggests that the courts are generally receptive to arguments that questions of legislative process are not justiciable. This receptivity is based on their understanding of the distinctive role of legislative bodies and their ability to manage their own affairs. With this background in mind, I now turn to consider how, if at all, the three royal functions in the legislative process may be judicially reviewed.

73. *Ibid.*, at para 51.

74. *Montreal Street Railway v. Normandin* [1917] AC 170 at 174-175, 33 DLR 195 (PC) (this case has been applied repeatedly by the Supreme Court of Canada, most recently in notably in).

75. *Ibid.*

76. *Supra* note 67 at 741.

77. *Supra* note 71 at para 68.

I will also consider Hogg's assertion that "There is of course no doubt as to the binding character of the rules in the Constitution that define the composition of the legislative bodies and the steps required in the legislative process".⁷⁸ If by "binding" he means here that the courts necessarily have a role in reviewing the application of these constitutional rules, I would argue that his assertion is an overstatement. Although the courts clearly will enforce some of these rules, notably those relating to language rights,⁷⁹ there is reason to doubt this in relation to the three royal functions that this paper considers.

Royal Recommendation

The royal recommendation and section 54 of the *Constitution Act, 1867* have been considered in a handful of Canadian decisions, most of which are from the Supreme Court of Canada.

The earliest of these is *Canada v. Belleau* involving a question of liability to repay debentures to secure a loan to fund road construction.⁸⁰ The question turned on the meaning of the legislation authorizing the loan. Taschereau, J noted that the royal recommendation had been granted for the bill authorizing the loan and accordingly held that it was liable to be repaid by the Government.⁸¹ However, this decision was overturned on appeal,⁸² the Judicial Committee of the Privy Council affirming the minority decisions of Ritchie and Gwynne, JJ in the Supreme Court. Their decisions turned exclusively on the text of the authorizing legislation:

It passes my ability to comprehend and appreciate the propositions here put forward ... In other words, to give to the language of the act a meaning the exact opposite of what the language used conveys, and while the legislature says in plain unambiguous language that the loan shall be made on the credit and security of one fund and payable thereout, and that such loan shall not be payable out of or chargeable on another fund, we are asked to say that the legislature intended thereby to say that it was to be chargeable on and payable out of both funds – failing one, then out of the other.⁸³

78. *Supra* note 33 at 12-11.

79. *Manitoba Language Rights*, *supra* note 67.

80. (1881), 7 SCR 53, Carswell Nat 4.

81. *Ibid* at 131

82. (1882), LR 7 App Cases 473.

83. *Supra* note 80 at 104 per Ritchie, J.

And, although they did not address the grant of the royal recommendation for the authorizing legislation, Ritchie, J did note and reject another argument based on the provision requiring it:

From these enactments [requiring the royal recommendation] they claim to fix on the crown a liability to pay these debentures under the 16 Vic., ch 235, and so it has been strongly urged that because the government paid the first loan under the 4 Vic, and the home district bonds, ergo, they became liable to pay this loan under the 16 Vic. This, to my mind, is a pure fallacy. The legislature in its wisdom or its liberality continually grants money in aid of institutions and undertakings, public, local, or individual, but I know of no principle by which a simple grant of money to one object can be construed into a binding contract to pay other monies, because the parties seeking to set up such a contract are in a position similar to that of those who, by the grants made, benefited by the bounty of the legislature.⁸⁴

Thus in *Belleau*, we see the Court taking some notice of the royal recommendation in the context of interpreting legislation, but not giving it much significance.

The next Canadian case is *R v Irwin* where the Exchequer Court dismissed a challenge to the validity of legislation based on section 54.⁸⁵ Although the challenge was misconceived as an attack on a taxation measure rather than an appropriation,⁸⁶ Audet, J nevertheless dealt with section 54 more broadly on a basis akin to justiciability:

6 Now there is not a tittle of evidence showing whether or not such recommendation was made before the passing of the Act. But that is of no importance in disposing of this case, because it is no part of the business of the Court in construing a statute to enquire as to whether the legislature in passing it did or did not proceed according to the *lex parliamenti*.

7 It is a matter of elementary law that when a statute appears on its face to have been duly passed by a competent legislature, the courts must assume that all things have been rightly done in respect of its passage through the legislature, and cannot entertain any argument that there is a defect of parliamentary procedure lying behind the Act as a matter of fact. It is a case where the maxim *Omnia praesumuntur rite esse acta* applies with great force and rigour. It is for Parliament, to decide how they will proceed to legislate and it is only the concrete embodiment of such legislation – the statute itself – that the Court is called upon to construe.

84. *Ibid* at 106.

85. [1926] Ex CR 127 at 129.

86. See W Conklin, “Pickin and Its Applicability to Canada” (1975) 25 UTLJ 193 at 203.

Conklin has argued that this reasoning is inconsistent in so far as it first states that the court had no business examining whether the *lex parliamenti* had been followed, and then invokes an evidentiary rule that depends on a statute that “appears on its face to have been *duly passed*”.⁸⁷ However, a court must have some basis for determining whether a bill has been enacted. Audet, J’s point is simply that a court should be satisfied with a document that attests to its enactment as a statute and go no further in examining the basis for the attestation. This is essentially the enrollment doctrine that, as Katherine Swinton demonstrated some years ago, serves to protect at least some “irregularities in statutes”.⁸⁸

A little more than 50 years later in *Reference re Agricultural Products Marketing* the Supreme Court of Canada considered both sections 53 and 54.⁸⁹ Pigeon, J for the majority dismissed a challenge on the basis that these provisions were not constitutionally entrenched and could be amended “indirectly”:

Furthermore, ss. 53 and 54 are not entrenched provisions of the constitution, they are clearly within those parts which the Parliament of Canada is empowered to amend by s. 91(1). Absent a special requirement such as in s. 2 of the *Canadian Bill of Rights*, nothing prevents Parliament from indirectly amending ss. 53 and 54 by providing for the levy and appropriation of taxes in such manner as it sees fit, by delegation or otherwise.⁹⁰

This notion of indirect amendment of constitutional provisions has since been qualified by the Supreme Court in *R v Mercure* where it rejected the argument that an unentrenched constitutional requirement to enact laws in both English and French could be impliedly repealed.⁹¹ However, the decision was largely rooted in the fundamental language rights at stake in that case and it is arguable whether the same result would hold for all manner and form requirements.

The next Supreme Court case to discuss section 54 was *Reference re Canada Assistance Plan* where Sopinka, J said:

The formulation and introduction of a bill are part of the legislative process with which the courts will not meddle. So too is the purely

87. *Ibid* at 204.

88. K. Swinton, “Challenging the Validity of an Act of Parliament: The Effect of Enrollment and Parliamentary Privilege” (1976), 14 Osgoode HLJ 345 at 404.

89. [1978] 2 SCR 1198, 84 DLR (3d) 257.

90. *Ibid* at 1291.

91. [1988] 1 SCR 234, 48 DLR (4th) 1.

procedural requirement in s. 54 of the *Constitution Act, 1867*. That is not to say that this requirement is unnecessary; it must be complied with to create fiscal legislation. But it is not the place of the courts to interpose further procedural requirements in the legislative process. I leave aside the issue of review under the *Canadian Charter of Rights and Freedoms* where a guaranteed right may be affected.⁹²

This comment was made in the context of the Court's rejection of arguments based on natural justice and legitimate expectations. It firmly shuts the door on these arguments and more broadly affirms the proposition in the *Irwin* case that the courts should not "meddle" with section 54. It leaves open the possibility of review only on the basis of the *Charter*.

The most recent Supreme Court decision to comment on section 54 is *Ontario English Catholic Teachers' Association v. Ontario*.⁹³ Although Iacobucci, J acknowledged that this section was not pertinent to the case, he nevertheless agreed with the Court's earlier decision in the *Agricultural Products Marketing Reference* that it (as well as section 53) was an "unentrenched" provision of the Constitution, capable of being amended by Parliament and each Legislature with respect to its application to them.⁹⁴ With the recent Supreme Court decisions on the application of the constitutional amending formulae in Part V of the *Constitution Act, 1982*, this view warrants re-examination.⁹⁵

Baker has suggested that the unanimity amending formula in section 41 of the *Constitution Act, 1982* would apply to changes to section 54 because they would affect the "office of the Governor General".⁹⁶ However, in the *Reference re Senate Reform*, the Supreme

92. [1991] 2 SCR 525 at 559, 83 DLR (4th) 297.

93. *Supra* note 70.

94. *Ibid* at 518 (he also noted that British Columbia had in fact amended its constitution to remove the origination requirement (s. 53) with the enactment of the *Constitution Act*, R.S.B.C. 1979, c. 62, but he did not comment on the suggestion that section 54 could be indirectly amended); D Baker, "The Real Protection of the People: The Royal Recommendation and Responsible Government" (2010) 4 *Journal of Parliamentary and Political Law* 197 at 211 (argues that Iacobucci, J also disavowed a judicial role in the enforcement of section 54, noting his citation of Joan Small's comment that "Section 54 is directed to the House of Commons alone". However, this comment simply reflects the text of section 54; neither she nor Iacobucci, J argued that it has any relevance to judicial review).

95. *Reference re Supreme Court Act, ss. 5 and 6* 2014 SCC 21 and *Reference re Senate Reform* 2014 SCC 32.

96. Baker, *supra* note 94 at 210.

Court commented as follows on the scope of the unilateral amending formula of section 44:

When discussing the scope of the unilateral federal procedure in the federal government's 1980 proposal for an amending formula, the then-Minister of Justice Jean Chrétien made statements to the effect that it would allow Parliament to make constitutional amendments for the Senate's continued maintenance and proper functioning, such as for example a modification of the Senate's quorum requirement at s. 35 of the *Constitution Act, 1867: Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, No 53 (February 4 1981) at 50. He made clear, however, that significant Senate reform which engages the interests of the provinces could only be achieved with their consent: *ibid*, at 67-68.

In our view, this understanding of the unilateral federal procedure applies to Part V. The Senate is a core component of the Canadian federal structure of government. As such, changes that affect its fundamental nature and role engage the interests of the stakeholders in our constitutional design — i.e. the federal government and the provinces — and cannot be achieved by Parliament acting alone.⁹⁷

Transposing these comments to the royal recommendation, it is difficult to see how even the repeal of section 54 could be said to “affect [the Governor General's] fundamental nature and role and engage the interests of stakeholders in our constitutional design — i.e., the federal government and the provinces”. The royal recommendation involves one aspect of the relationship between the executive and the House of Commons in managing public spending at the federal level alone, having little if anything to do with the provinces.

The case law discussed above suggests that the courts are unlikely to take much notice of the royal recommendation, either as an interpretive matter or as a basis for challenging the validity of legislation. This is a sensible result. The basic question here is whether the House of Commons and the provincial legislative assemblies should have complete control over this matter, as they generally have over their proceedings.

As I have argued before,⁹⁸ section 54 should not be a basis for judicial review. The factors indicating non-justiciability are all here.

97. *Ibid* at paras 76-77.

98. *Supra* note 23 at 31.

The courts have no particular competence to determine what should be considered an appropriation for the purposes of the requirement; this is a matter for determination exclusively by the speaker according to the practices they have themselves developed.

In terms of the separation of powers and the nature of the question, the royal recommendation is directed to the relationship between the House of Commons and the executive; it does not confer rights or benefits on anyone else. Its unentrenched status in the Constitution underscores this. It protects the right of the Crown to initiate spending legislation, and alerts members of Parliament to the spending implications of bills. Although based on fundamental constitutional principles about the role of the Crown, the royal recommendation originated as a standing order of the UK House of Commons and, as such, is a matter of internal House procedure. Its inclusion in Canada's constitution reflects the preoccupations of a colonial period and, like those underlying the provisions for the disallowance and reservation of bills.⁹⁹ These provisions are now generally considered to be defunct with Canada's accession to full nationhood.¹⁰⁰

The executive and the House of Commons are quite capable of sorting out their relationship on spending matters without the intervention of the courts. The continuing speaker's rulings on the royal recommendation through periods of minority government demonstrate that there is little prospect of any weakening of the rights of the Crown in this regard, as Baker has suggested.¹⁰¹ As with the information disclosure requirements in the *Auditor General* case, the courts should leave the application of the royal recommendation to Parliament alone.

There is no need to resort to arguments about indirect amendment to deflect challenges based on section 54. Arguments about royal assent "curing" the absence of a recommendation are equally unnecessary, if not misconceived.¹⁰² The principles of non-justiciability are enough.

And if there is any doubt that the royal recommendation is non-justiciable, consideration should also be given to re-evaluating the wholesale rejection of the mandatory / directory distinction in rela-

99. *Constitution Act, 1867*, ss 56, 57.

100. See Hogg, *supra* note 33 at 3-2.

101. *Supra* note 70 at 211.

102. See Baker, *ibid* at 209.

tion to constitutional provisions. While it is clear that provisions that protect fundamental rights should never be characterized as directory, the argument is much less compelling for matters of internal parliamentary procedure such as the royal recommendation, quorum, voting and the election of a speaker.¹⁰³

Royal Consent

I have found no cases dealing with the royal consent.¹⁰⁴ This is hardly surprising given its obscurity and its absence from the *Constitution Act, 1867*. However, it is also difficult to see how questions about it could be considered justiciable for much the same reasons expressed above about the royal recommendation. If anything, the arguments against justiciability are even more compelling since the royal consent is still a prerogative matter, not overtaken in any way by legislative enactment.¹⁰⁵

Royal Assent

Canadian courts have on at least one occasion considered whether royal assent had been effectively given to a bill. In *Gallant v The King*, a bill of the Prince Edward Island Legislative Assembly was presented to the Lieutenant Governor for assent, which he then withheld.¹⁰⁶ Over six months later, after the Lieutenant Governor had been replaced and the session prorogued, the new Lieutenant Governor purported to assent to the bill. The Supreme Court of Prince Edward Island held that royal assent had not been effectively given to the bill and that, accordingly, it had never become law. The decision first noted that sections 56 and 57 of the *Constitution Act, 1867*, (dealing with royal assent) did not indicate what was to happen when assent was withheld. In the absence of any express direction, the Court reasoned that assent could not be given unless the bill were re-presented to the Lieutenant Governor for assent.¹⁰⁷ The Court did not comment on the fact that prorogation puts an end to all the business of a session and would, accordingly, have constituted an even more convincing reason for the decision.

103. See *Constitution Act, 1867*, ss 35, 36, 44, 45, 48, 49.

104. Searches on CanLii and QuickLaw have yielded none.

105. See Charles Robert's contribution to this volume, p. 95-131.

106. [1948] PEIJ No. 1, [1949] 2 DLR 425 (PEISC).

107. *Ibid*, at para.17.

The *Gallant* case represents a remarkable judicial intervention in the legislative process, suggesting that the courts can scrutinize the validity of a royal assent that has been given. But, while there is no doubt that, as noted above, the courts must have a role in satisfying themselves that this ultimate step in the legislative process has been taken, their role should be limited, as the *Irwin* decision holds¹⁰⁸, to examining the parliamentary record.

Gallant was discussed by the Supreme Court of Canada in relation to constitutional conventions in the *Re Resolution to Amend the Constitution*. After stating that there was legal, but not conventional, discretion to refuse assent, the Court said:

This is what happened in *Gallant v The King*, a case in keeping with the classic case of *Stockdale v. Hansard* where the English Court of Queen's Bench held that only the Queen and both Houses of Parliament could make or unmake laws. The Lieutenant Governor who had withheld assent in *Gallant* apparently did so towards the end of his term of office. Had it been otherwise, it is not inconceivable that his withholding of assent might have produced a political crisis leading to his removal from office which shows that if the remedy for a breach of a convention does not lie with the courts, still the breach is not necessarily without a remedy. The remedy lies with some other institutions of government; furthermore it is not a formal remedy and it may be administered with less certainty or regularity than it would be by a court.¹⁰⁹

Although this passage at first appears to cite *Gallant* with approval, it in fact turns it on its head. Rather than affirming the jurisdiction of courts to inquire into whether royal assent has been validly given, it says that they will not intervene when it is withheld because the remedy lies elsewhere. But if that is true for withholding assent, why is it not equally true for giving assent? Why is it not enough to take an attestation of assent on the parliamentary record at face value and leave it to Parliament to resolve any problems with the way it was given?

One further potential obstacle to judicial review of royal assent, at least in relation to the Federal Parliament, is the role that judges of the Supreme Court of Canada play as delegates of the Governor General. They are regularly called on to give royal assent in the absence of the Governor General. How then could they, or indeed any judge whose decision could be appealed to the Supreme Court, sit in judgment on legality of a royal assent in which they had been involved?

108. *Supra* note 85.

109. *Resolution to Amend the Constitution*, *supra* note 35 at 881-2.

Before leaving royal assent, it may be useful to note the related function of bringing statutes into force. Many statutes are enacted with commencement provisions that say their provisions come into force on a day or days to be fixed by proclamation or order in council.¹¹⁰ Although these days are generally fixed within a year or two of royal assent, there are instances of several years, if not decades, elapsing without a commencement day being set.¹¹¹ As a consequence, legislation such as the *Statutes Repeal Act*¹¹² has now been enacted in several jurisdictions to deal with statutes that have not been brought into force within a certain period of time.¹¹³

The courts have declined to order governments to bring statutes into force. The most notable case in the UK is *R v Secretary of State for the Home Department ex p. Fire Brigades Union* involving criminal injuries compensation legislation that had not been brought into force. Although a majority of the House of Lords concluded the Government had a “clear duty to keep under consideration from time to time the question whether or not to bring the section ...into force”, it declined to make an order requiring the Secretary of State to do so. Lord Browne-Wilkinson said

In my judgment it would be most undesirable that, in such circumstances, the court should intervene in the legislative process by requiring an Act of Parliament to be brought into effect. That would be for the courts to tread dangerously close to the area over which Parliament enjoys exclusive jurisdiction, namely the making of legislation. In the absence of clear statutory words imposing a clear statutory duty, in my judgment the court should hesitate long before holding that such a provision as section 171(1) imposes a legally enforceable statutory duty on the Secretary of State.¹¹⁴

He also went on to decide that, even though the statute was not in force, it nevertheless limited the Government’s prerogative powers relating to the same subject matter.¹¹⁵

110. See, e.g. *Canada Customs and Revenue Agency Act*, SC 1999, c 17, s 188 (this Act or any of its provisions comes into force on a day or days to be fixed by order of the Governor in Council).

111. See A Samuels, “Is it in Force? Must it be Brought into Force?” (1996) 17 Stat L Rev at 62-65.

112. SC 2008, c 20.

113. See also *Legislation Act 2006*, SO 2006, c 21, Sched F, s 10.1; *Interpretation Act*, RSNS 1989, c 235, s 22A (enacted by SNS 2001, c 5, s 5, but not in force).

114. [1995] UKHL 3 at para 22, [1995] 2 AC 513.

115. *Ibid* at paras. 31 and 33.

The same wariness of treading into the legislative process is also evident in Canadian cases where courts have declined to order governments to bring statutes into force on the basis of the *Canadian Charter of Rights and Freedoms*.¹¹⁶ In the most recent of these cases, *Beauchamp v Canada*, Barnes, J dismissed the application on the basis of a failure to exhaust alternative rights of recourse.¹¹⁷ However, the following comments on the justiciability of the claim leave little doubt as to his reluctance to review decisions about when to bring legislation into force:

Once such a delegation of authority has been made by Parliament, the decision to proclaim is dependant upon the pleasure of the GIC unless and until Parliament reclaims to itself that authority. What the Applicants' are therefore seeking from the Court is an order which would defeat the intent of Parliament not advance it. That this would be an inappropriate intrusion into the legislative realm is well reflected in the following passage from the decision of Justice Bora Laskin in *Reference re Criminal Law Amendment Act (Canada)*, 1968-69, [1970] S.C.R. 777, 10 D.L.R. (3d) 699 at para. 82:

82 It is beside the point that the result of the proclamation in this case may not be congenial to this Court. We miss a step in the legislative process if we purport to read the consequences of the proclamation back into the severable power to promulgate the legislation. To look at the proclaimed legislation in the light of a supposed parliamentary intention, gleaned from looking at the legislation as if it had been made effective without the conditional terms of s. 120, is to truncate that section and plunge into an abyss of speculation. Moreover, it is to make an assumption that there was a limited trust reposed by Parliament in the executive, and, further, that it lay with the Courts to enforce that trust. If there has been a failure to live up to Parliament's expectations on the manner in which the proclamation power should be exercised, the remedy does not lie with the judges.¹¹⁸

These arguments are now even stronger with the enactment of legislation like the *Statutes Repeal Act* that demonstrates Parliament's ability to deal itself with legislation that has been enacted but not brought into force.

116. See *R v Cornell* [1988] 1 SCR 461; *R. v Paquette* [1988] 2 WWR 44 (AltaCA); *R v Bussière* [1990] 2 WWR 577 (SaskCA); *R v Van Vliet* (1988), 38 CRR 133 (BCCA); *R v Alton* (1989), 36 OAC 252 (CA); *R v Langille* [1992] NSJ No 500 (CA); *R v Lunn* 1997 PEIJ No 45 (CA) (leave to appeal to SCC dismissed November 7, 1997).

117. [2009] FCJ No 437.

118. *Ibid* at para 18.

CONCLUSION

It is supposedly trite law that courts should review governmental functions to ensure conformity with the law. But if the development of judicial review in the past 30 years has demonstrated anything, it is that the courts do not resolve all questions involving law. The Supreme Court of Canada has devoted considerable energy to providing guidance on when the courts should defer to other government actors. And while it is clear that some aspects of parliamentary procedure merit considerable judicial scrutiny when they engage individual rights, not all of them do. Procedural requirements relating to the internal functioning of parliamentary institutions are quite different from those such as language requirements that are integral to public participation in parliamentary proceedings and the application of legislation. The concept of justiciability, like the related standard of review analysis, responds to these differences and arguably removes from judicial scrutiny questions related to the three “royal” functions considered in this paper. This is not to say that there is no accountability for these functions; rather, the accountability lies with parliamentary institutions rather than the courts.

CHAPTER 4
**THE ROLE OF THE CROWN-IN-PARLIAMENT:
A MATTER OF FORM AND SUBSTANCE**

Charles Robert*

In Canada, the role of the Crown-in-Parliament is a central and obvious feature of our system of government inherited from the United Kingdom. The importance of the Crown, the Kings or reigning Queens and the administration supporting them, was evident from early colonial days and was deliberately and explicitly reinforced through provisions of the *Constitution Act, 1867* (originally the *British North America Act*) adopted by the Imperial Parliament to provide a federated government for Canada. In addition to the preamble statement declaring that the federal union was to be governed by a structure similar in principle to that of the United Kingdom, the preamble also makes it clear that Canada and its provinces were united under “the Crown of the United Kingdom of Great Britain and Ireland”. Various sections of the Constitution underscore this reality. For example, section 9 provides that the Executive Government is declared to continue and be vested in the Queen. Further, section 17 establishes that Parliament consists not only of the Senate and the House of Commons, but also of the Queen. These constitutional provisions are accompanied by a series of conventions that inform and animate the conduct of the Crown-in-Parliament.

The legal status of the Canadian Crown was not altered when the Constitution was patriated from Britain in 1982. Indeed, the position of the Crown as the apex of Canada’s constitutional order was made more secure and virtually permanent through the amending procedures that were part of the patriation package. Section 41(a) of the *Constitution Act, 1982* stipulates that a change “to the office of

* Principal Clerk of Chamber Operation and Procedure, Senate of Canada. All views presented are those of the author who would like to express his gratitude for the assistance of Ian McDonald, Jonathan Shanks, Chris McCreery, Ron Lieberman and Deborah Palumbo.

the Queen, the Governor General and the Lieutenant Governor of a province” can only be authorized by resolutions of the Senate and House of Commons and of the legislative assemblies of each of the provinces. As a consequence, there is little prospect that the Crown itself will disappear any time soon. More problematic, perhaps, is the role of the Crown-in-Parliament and whether it falls under the amending procedure of section 41 or of section 44. Section 44 provides that “Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and the House of Commons”. The recent Supreme Court decision on the Senate reference suggests a limited scope for section 44.¹ The current court challenge in Quebec on the *Succession to the Throne Act, 2013* may also deal with the scope of Parliament’s legislative authority under section 44.² Whatever the outcome, it remains the case that the role of the Crown-in-Parliament as originally established by the *Constitution Act, 1867* was not altered through patriation and any substantive change is not currently being contemplated.

The role of the Crown-in-Parliament encompasses three determinative acts that are part of Parliament’s core functions as a legislative body: royal recommendation, royal consent and royal assent. The first, royal recommendation, relates to the financial procedures of the House of Commons and stems from the requirement that, to be lawful, any vote, resolution, address or bill authorizing the expenditure of public monies for a specified purpose must be based on a message from the Governor General. This obligation is an explicit part of the *Constitution Act, 1867* as stated in section 54.³ Royal consent, on the other hand, is a practice based on a convention that limits the right of the Houses of Parliament to debate and adopt without the consent of the Crown any legislative measure which might infringe its prerogative or constitutional powers or, with respect to the Queen in the United Kingdom, which might affect her hereditary revenues or personal property. Finally, royal assent is the necessary and indis-

1. *Reference re Senate Reform*, 2014 SCC 32.

2. Two professors from Laval University have brought an action for declaratory judgment in Quebec Superior Court challenging the constitutional validity of the *Succession to the Throne Act, 2013*. Geneviève Motard and Patrick Tailon, “Motion to institute proceedings for declaratory judgment” (6 June 2013) SCQ # 200-17-018455-139.

3. Section 54 provides that: “It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.”

pensable approval by the Crown of any bill adopted by the Senate and the House of Commons in order for it to become an Act of Parliament, actual statute law.

While Canada inherited these practices involving the Crown-in-Parliament from Westminster, the terminology identifying them is not completely identical. Both use the term royal assent, but the other two actions are usually designated differently. In Canada, the terms royal recommendation and royal consent are invariably used rather than the Queen's recommendation or the Queen's consent as is often the case at Westminster. The difference is indicative of a basic reality. The Queen herself as the Sovereign of the United Kingdom, descended from a long line of Kings and Queens, is seen personally as an actual player, a real presence in the parliamentary processes of Westminster. This is not so much the case here in Canada where the Queen's constitutional role, including interactions with Parliament, is usually undertaken by her surrogate, the Governor General, an appointee whose tenure has traditionally lasted between four and six years. The Canadian terminology using the word "royal" is a deliberate reminder of the source of the authority that is being exercised through the Governor General.⁴ This underscores a significant element of the nature and role of the Canadian Crown-in-Parliament. In Canada, there is a greater distance from the institution of the Crown, including its parliamentary aspects than there is in Britain. In Canada, the Governor General represents the Sovereign, while in the United Kingdom, the Queen is the Sovereign. This distinction is relevant to the development, appreciation and use of royal recommendation, royal consent and royal assent. Just as the public profile of the Governor General cannot match that of the Queen, so too, in parallel, the original and historic purpose of the functions of the Crown-in-Parliament is shifting in Canada, in a way distinct from the British model. While both Parliaments continue to evolve, the profile of the Crown in Canada is at greater risk as procedures are modernized in ways that tend to minimize its role and significance.

The nineteenth century Whig historian, Thomas Babington Macaulay, once observed that in Britain's constitutional monarchy, the Sovereign reigns, but does not rule.⁵ At the time, he would certainly have had in mind Queen Victoria. Though Macaulay's observation

4. The Letters Patent of 1947 authorize the Governor General "to exercise all powers and authorities lawfully belonging" to the Queen in relation to Canada. The same terminology is used in provincial legislatures.

5. Thomas Babington Macaulay, *The History of England from the Accession of James II*, vol IV (London: The Folio Society, 2009) at 7.

was undoubtedly true as a constitutional principle, it must be admitted that Queen Victoria tended to reign a lot. She was very much an engaged Sovereign. Throughout her long years as Queen, Victoria immersed herself in the affairs of “Her” government and exercised to the full the duties attributed to the Crown by another 19th century constitutional commentator, Walter Bagehot. Far from public view through her many years as a widow, Victoria remained insistent on her prerogative rights to be consulted, to encourage and to warn.⁶

Without a doubt, the present Queen exercises these same functions but with greater discretion. The difference speaks to the ongoing evolution of the role of the Crown in the public affairs of the United Kingdom. Ever since the Glorious Revolution of 1688, the participation of the Sovereign in government, at that time substantial indeed, has declined gradually, if sometimes unevenly, as the role of ministers grew and the development of responsible government took hold. The pace of this transformation accelerated with the growth of the electoral franchise from the mid-nineteenth century which further enhanced the prominence of the House of Commons and strengthened the accountability relationship of ministerial government to it. Today, the long and successful reign of the current Queen has ensured the Crown’s prestige and its endurance in the constitutional structure of British government, including the role of the Crown-in-Parliament.⁷

But what of the Governor General in Canada who can be said neither to rule nor to reign? The answer is not a simple one. As with the British Crown, there has certainly been an evolution in the office. The early Governors General actually played a dual role as representatives of the Sovereign: they maintained the interests of the British government through their direct relationship with the Colonial Office in addition to providing traditional vice-regal support to their Canadian ministers. The importance of the position was acknowledged by the fact that its early occupants included capable or notable peers, politicians and colonial administrators. Among these was the son-in-law of Queen Victoria, the Marquis of Lorne, husband of Princess Louise, and, in the years leading up to the Great War, the Queen’s third son, Prince Arthur, Duke of Connaught.⁸

6. Walter Bagehot, *The English Constitution* (London: Chapman and Hall, 1867) at 103.

7. Robert Blackburn, “Queen Elizabeth II and the Evolution of the Monarchy” in Matt Qvortrup, ed, *The British Constitution: Continuity and Change* (Oxford: Hart Publishing, 2013).

8. Carolyn Harris, “Royalty at Rideau Hall: Lord Lorne, Princess Louise, and the Emergence of the Canadian Crown” in D Michael Jackson and Philippe Lagassé,

By the early twentieth century, the prospect of change in the role of the Governor General began to emerge as Canada started to shed its colonial status and assert its own interests in international trade and then foreign affairs. It became virtually inevitable through Canada's participation in the 1914-1918 war.⁹ The follow-up from the Great War led directly to the London Conference of 1926 and the *Statute of Westminster* in 1931 which acknowledged the full sovereignty of Canada and the other senior Dominions. From here onward, the British aspect of the Governor General's functions ceased to be as important in comparison to his Canadian constitutional duties as the Sovereign's representative.

The process of fully Canadianizing the office of Governor General reached an important milestone with the appointment of Vincent Massey in 1952, the year of the Queen's accession, and it has continued over the years.¹⁰ While the office of the Governor General has become more distinctly Canadian, this has also exposed some weaknesses in trying to fulfill the role of the Crown. Much of this has to do with the fact that the office of Governor General is temporary; it is held by someone, however accomplished, for just a few years before it is occupied by someone else. The contrast with the current Queen could not be greater. Elizabeth II has been Queen for more than 63 years and she will remain the Queen as long as she lives or until she abdicates. During her reign, the Queen has been served by thirteen Governors General. Equally to the point, the Queen retains significant prerogatives and is routinely consulted as of right by her British Prime Minister. Nothing like this happens in Canada. While the Governor General does possess substantive prerogative rights, there is no equivalent entitlement to be consulted. There is no consistent history of a close relationship with the Prime Minister, especially following a change in government. The nature of the relations with the modern Governor General is determined largely

eds, *Canada and the Crown* (Montreal & Kingston, McGill-Queen's University Press, 2013).

9. Resolution IX of the Imperial War Conference of 1917 declared: "The Imperial War Conference are of the opinion that the readjustment of the constitutional relations of the component parts of the Empire is too important and intricate a subject to be dealt with during the War ... They deem it their duty, however, to place on record their view that any such readjustment ... should be based upon full recognition of the Dominions as autonomous nations of an Imperial Commonwealth..." A Berriedale Keith, *Speeches and Documents on Indian Policy, 1750-1921*, Vol II, ed (London: Oxford University Press, 1922) at 132-3.
10. The appointment of Vincent Massey coincided closely with the accession of Queen Elizabeth II who was the first to carry the explicit title of Queen of Canada as provided for under the *Royal Style and Titles Act*, adopted in February 1953.

at the discretion of the Prime Minister. There is no binding obligation to keep the Sovereign's representative, the Crown's surrogate, fully informed of affairs of state and government through regular meetings or briefings. This difference, this distinction in the status of the Crown in the two countries, has a parallel in the Crown's role and involvement in Parliament.

In Britain, the historic roots that led to the institution of Parliament from the original *curia regis* and the struggle, centuries later, that eventually subordinated Crown to Parliament, once it had successfully asserted its supremacy, created a constitutional monarchy that remains widely respected and even venerated to this day. The role of the Crown-in-Parliament at Westminster is very much part of this ongoing history. The Queen through her Cabinet Ministers has a relationship with Parliament that is mutually reinforcing. The development, from the early eighteenth century, of ministerial government accountable to Parliament generally, and responsible to the House of Commons specifically, has fully integrated the Crown in the exercise of Parliament's powers. The Queen's constitutional identity, neutral and impartial, is folded into the fundamental duties of Government acting through Parliament to secure the peace and ensure the people's welfare. The phrase the Queen-in-Parliament is an expression of this central constitutional relationship.

In Canada, the public significance and profile of the Crown in so far as it is identified with the Governor General has diminished over time even as it remains constitutionally important. As the Queen's representative, the Governor General cannot equal the permanence and experience possessed by the Queen. Certainly, the vice regal office cannot match the Sovereign's majesty and mystique. Instead, the Governor General is duty bound to acknowledge his surrogate status when acting in the Queen's name. Despite the success and merits of this Canadianization, the current result has created a hybrid role for the Governor General who performs a range of responsibilities similar to a Head of State while remaining a surrogate. This has made the admission of subordinate status challenging for some of the recent occupants of the office. At its core, this would appear to be a matter of confusion about form and substance. The balance of the status and role of the Governor General will continue to be a challenge as the office assumes an ever greater Canadian profile at the risk of diminishing that of the Crown.

A similar situation mixing form and substance seems to be occurring in practices relating to the Crown-in-Parliament in Canada.

In this case, the challenge about the involvement of the Crown-in-Parliament arises from its degree of detachment or limited engagement. This has led to the development of modern parliamentary practices associated with the Crown that are not understood, appreciated, or applied in the same way as at Westminster. Aside from this element of detachment, other factors have also contributed to weaken, diminish, and even distort somewhat the parliamentary significance of the Crown. More importantly, some of these practices have affected parliamentarians themselves and their capacity to act as legislators. None of this is really obvious or even deliberate. Nonetheless, that this is happening is evident when these Canadian practices involving the Crown-in-Parliament are compared to the original British model. This applies in different ways to each of the three practices that invoke the Crown: royal recommendation, royal consent and royal assent. An examination of these parliamentary practices reveals how this alternative alignment has developed between form and substance relating to the role of the Crown-in-Parliament.

ROYAL RECOMMENDATION

United Kingdom

Without doubt, the most public parliamentary event traditionally performed by the Crown is the Speech from the Throne. The text of the speech setting out the government's legislative agenda is read by the Queen to open a new Parliament or a new session. This speech always contains a passage addressed specifically to Members of the House of Commons. At Westminster, the statement informs the Members that "Estimates for the public services will be laid before you". In Canada, a similar sentence tells Members that they "will be asked to appropriate funds required to carry out the services and expenditures authorized by Parliament". Both of these declarations constitute a generic royal recommendation and each reflects the established practice that estimates or appropriations can only be requested by the Crown through a Minister and can only be used for government purposes.¹¹ At the same time, the Commons have the initiative and control in these financial procedures of aids and supplies requested by the Crown.

11. Sir Malcolm Jack, ed., *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 24th ed, (London, LexisNexis, 2011) at 717[Erskine May's], 854; G F M Campion, *An Introduction to the Procedure of the House of Commons* (London: Philip Allan & Co, 1929) at 232.

The use of the King or Queen's recommendation requesting specific sums by a Minister as a matter of practice in the House of Commons was first integrated into British parliamentary proceedings early in the 18th century. Previously, the Crown was often able to rely on non-parliamentary revenues to cover most of its expenditures. However, as the financial requirements of the Crown grew, the Commons profited by using the situation to increase its role in providing funds and imposing taxes and in denying any right to the Crown to raise taxes on its own authority. This was decisively accomplished with the settlement of 1688. Efforts had already been successfully made by the Commons to exclude the House of Lords from any primary role in the process. Resolutions adopted by the Commons in 1671 and 1678 had the effect of denying the right of the Lords to alter aids and supplies and to claim that Bills based on them ought to be introduced in the Commons.¹²

The gradual introduction of Cabinet government within the parliamentary environment led to a change in the approach of the Commons with respect to consideration of finances. Rather than taking on the obligation of ensuring the appropriation of grants for specific purposes, the Commons decided to hold Ministers accountable for this role. The House of Commons restricted its functions to review and criticism of the expenditure proposals that could only be initiated for and by the Crown and through its Ministers. This accountability framework established the means by which the Commons could involve itself in the entire apparatus of public administration. The procedure reserving to the Government the right to request expenditure was first acknowledged by the House in the form of a resolution in 1706, which was made a permanent standing order in 1713: "The consent of the sovereign thereafter had to be signified to the House by a minister before consideration of any application for money ..."¹³

The practices of financial procedure for appropriations and taxes evolved significantly over time. Before the mid-nineteenth century, this evolution was often uneven and sometimes haphazard. Two major factors affected its pace and direction during the eighteenth century

12. House of Commons Liaison Committee, Second Report of Session 2007-08, "Parliamentary and Government Finance: Recreating Financial Scrutiny" at 9; Audrey O'Brien and Marc Bosc, *House of Commons Procedure and Practice*, 2d ed, eds (Ottawa, Editions Yvon Blais, 2009) at 824.

13. P D G Thomas, *The House of Commons in the Eighteenth Century* (Oxford: Clarendon Press, 1971) at 72; see also Campion, *supra* note 11 at 28; Office of Parliamentary Counsel, "Financial Resolutions," online: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/342530/Financial_Resolutions.pdf.

and up to the Reform Act of 1832. One was the absence of adequate and prompt accounts, which did not really begin to improve until the establishment of the Consolidated Fund in 1787. The other was the scale of corruption, largely through royal and aristocratic patronage, which determined much of the composition and partisan behaviour of the House of Commons and rendered proper scrutiny of the government's finances difficult.¹⁴

At the beginning, the means available to track government finances were primitive and incomplete. Various accounts were set up to identify monies to be allocated for different services, such as the Civil List and the Aggregate Fund as well as the Sinking Fund, before the Consolidated Fund was established. To oversee and assess the Government's financial initiatives, the Commons originally created the Committees of the Whole; one for Supply, addressing expenditures revealed through annual Estimates, and one for Ways and Means, detailing proposals for raising revenues to fund expenditures.¹⁵ However, the potential effectiveness of this review mechanism was not realized until the House of Commons itself benefited from a shift in the balance of power that made the Prime Minister more dependent on it than on the King. This shift was well underway in the era of William Pitt and it "continued under his successors, and gained considerably in strength after the Reform Act of 1832. By the middle of the nineteenth century Parliament was politically in a position to exercise the powers of financial control that it gained through the Revolution of 1688".¹⁶

During this same time, the government's powers of financial control exercised through the requirement for the Queen's recommendation, signified by a Minister, were extended to cover more than the business of Supply and Ways and Means. They were also applied to the appropriation of unspent surplus funds within the Treasury that had first appeared regularly from the early eighteenth century. The process of expanding the requirement for the Queen's recommendation began with petitions of individuals seeking pecuniary relief and was extended "to motions and particularly to motions emanating from Ministers and concerned with matters for which the Crown was responsible."¹⁷ As this practice developed, the use of the recommenda-

14. Paul Einzig, *The Control of the Purse* (London: Secker & Warburg, 1959) at ch15.

15. *Ibid.*

16. *Ibid* at 130.

17. Sir Charles Gordon, ed, *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 20th ed (London, Butterworths, 1983) at 762.

tion came to imply the broader concept of the royal initiative, and it was soon applied by the government to control legislative measures relating to novel expenditures not included in the ordinary annual expenditure voted on estimates. This control over novel expenditure proposals was secured through additional changes to the Standing Orders of the House of Commons made in 1852 and 1866. In 1852, it was first applied to include motions “for a grant or charge upon the public revenue”, and in 1866 it was further expanded to include bills calling for a grant or charge to be paid “out of money to be provided by Parliament”. These changes were significant. The original purpose of the recommendation had been limited “to proposals which directly and effectively authorized expenditure by ordering payments to be made out of the Consolidated Fund; it was now “extended to proposals which were not in themselves effective, and did no more than direct that payment should be made ...”¹⁸

This expanded use of the recommendation to include bills of novel expenditure compounded the frustration arising from debate at the resolution stage because the restrictions applied to the consideration of Supply bills were now also being imposed on a broader range of legislative measures. This had the effect of depriving the House of Commons of all power of constructive amendment.¹⁹ By the late nineteenth century MPs began to complain that the resolutions drafted by the Government based on the authorization provided by the recommendation were too detailed and that this unduly constrained their ability to propose amendments. It was noted in the 1937 *Report from the Select Committee on Procedure Relating to Money Resolution* that “the greatly increased output of social legislation in recent years” had prompted the Government to present its “proposals with such minute detail regarding the purposes of expenditure that the House has been debarred not only from increasing the charge, but from varying those proposals.”²⁰ Whatever the reasons, this was seen as an unacceptable obstacle to the legitimate work of parliamentary scrutiny of the government’s spending initiatives. As the report explained “the House should not be prevented, by the manner in which the resolution is drawn, from varying the purposes of expenditure within the framework of the Crown’s pro-

18. *Ibid* at 763.

19. Sir Barnett Cocks, ed, *Erskine May’s Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 17th ed, (London, Butterworth & Co, 1964) at 732.

20. Report from the Select Committee on Procedure Relating to Money Resolutions (London: Her Majesty’s Stationery Office, 1937) at ix.

posals, and thus making its criticism constructive”.²¹ For its part, the Government recognized the problem and committed to allowing greater scope for amendments. This was done by deliberately drafting resolutions when possible in a way that was neither too narrow nor overly restrictive. A commitment to maintain this flexible approach was reiterated in 1957.²²

In modern practice, the Queen’s recommendation remains procedurally significant, but the resolutions based on it are no longer the object of contentious debate. As of 1966, Committees of the Whole ceased to consider resolutions needed in relation to supply, ways and means or novel expenditure bills. The substantive work of Estimates review and the assessment of money resolutions are now performed by a range of select committees, each of which focus on a specific department of Government.²³ There is also a simplified process for debating the Estimates and voting Appropriation Acts. This exercise, in turn, is informed by additional documentation which outlines the Government’s long-term expenditure plans through the multiple-year Spending Review that includes data for Total Managed Expenditure and other financial forecasts for each department.²⁴ As well, a change was recently made to allow consideration of a money resolution for novel expenditure bills after second reading. Under current Standing Orders, the resolution is passed forthwith, without debate. Previously, the money resolution had always to be adopted before the introduction of the bill.

Canada

In Canada, the early history of the royal recommendation is somewhat spotty and inconsistent. The British resolution of 1706 and standing order of 1713 assigning control of requests for spending to the Crown was matched in Canada for a time by an equivalent rule of the House of Assembly of Lower Canada adopted in 1793, shortly after that Assembly was instituted in 1791. This rule stated that the Assembly “will receive no petition for any sum of money relating to the public service but what is recommended by His Majesty’s Governor, the Lieutenant Governor or person administering the Govern-

21. *Ibid* at viii.

22. Office of Parliamentary Counsel, “Financial Resolutions”, *supra* note 13.

23. House of Commons Information Office, “Financial Procedure”, online: <http://www.parliament.uk/documents/commons-information-office/p06.pdf>.

24. Erskine May, *supra* note 11 at 721-22.

ment at the time”.²⁵ However, this rule was rescinded in 1834 when the Assembly adopted the Ninety-two Resolutions drafted by Louis-Joseph Papineau to protest the broad authority of the colonial Governor and to demand the implementation of responsible government. The rescission of the 1793 rule had the effect of bringing the practices of the Lower Canada Assembly into line with those of the Upper Canada’s, which had never had a rule to limit appropriations to those recommended by the Crown. As a consequence, it became possible in both legislatures for private members to bring in bills that required the use of public money for various schemes and projects without any royal recommendation.

This lack of control over expenditures scandalized Lord Durham who had been sent to Canada from Britain as Governor General to investigate the causes of the 1837 rebellions in Upper and Lower Canada. In his report to London, he strongly urged that the prerogative of the Crown to control spending through the royal recommendation be instituted as part of the Act of Union joining together Upper and Lower Canada.²⁶ London agreed and section 57 of the Act of Union clearly provided “... that it shall not be lawful for the ... Legislative Assembly to originate or pass any vote, resolution, or bill for the appropriation of any part of the surplus of the ... Consolidated Revenue Fund, or any other Tax or Impost, to any purpose which shall not have been first recommended by message of the Governor to the ... Legislative Assembly during the session in which such vote, resolution or bill shall be passed”.²⁷

With Confederation, the new federal Parliament continued to use financial procedures similar to those which had been put in place following Lord Durham’s report. Section 54 of the *Constitution Act, 1867* maintained the obligation to secure the royal recommendation from the Governor General, an obligation which was also made part of the Standing Orders of the House of Commons. In other words, the financial procedures generally conformed to the practices then followed at Westminster. Resolutions accompanied by a royal recommendation and moved by a Minister of the Crown had to be introduced and adopted before considering any bill that sought to spend moneys out of the Consolidated Revenue Fund. This resolution defined precisely the amount and purpose of the proposed

25. Gary O’Brien, “Requirements of the Royal Recommendation” (1993) 16 *Canadian Parliamentary Review* 1.

26. *Ibid.*

27. *The Union Act, 1840* (UK), 3 & 4 Vict, c 35, s 57.

appropriation. “Every appropriating clause of the subsequent bill had to conform to the provisions outlined in the resolution, and no Member could move amendments to the legislation that would have the effect of increasing the amount or altering the purposes which the resolution had authorized”.²⁸

This system remained in place largely unchanged for one hundred years. Pressure to modify established practice finally came about as a result of two factors: the resolution stage was too often used by the opposition to delay and obstruct the government and the debate on the resolutions often duplicated the second reading debate on the subsequent bill.²⁹ As to the resolutions themselves, there is little evidence, contrary to the situation at Westminster, that the Members ever complained seriously that the resolutions were too restrictive or that they limited their right to move amendments to any appropriation legislation or money bills.

Significant reforms to the financial procedures came in 1968. These changes affected not just the business of Supply, but all bills authorizing expenditures out of the Consolidated Revenue Fund. The resolution stage was dropped completely. The royal recommendation was now introduced as a notice at the same time as the bill to which it applied meaning all Supply Bills and any bill appropriating public money. As the new Standing Order explained: “The message and recommendation of the Governor General in relation to any bill for the appropriation of any part of the public revenue or of any tax or impost shall be printed on the *Notice Paper*, printed or annexed to the bill and recorded in the *Journals*”.³⁰ At first, these recommendations were quite detailed, not unlike the resolutions they replaced. From the Fall of 1976, however, the recommendation was stated in a revised standard form that gave little information identifying the amount and scope of the appropriation being requested through the related bill. The invariable form of the royal recommendation simply stated that “His/Her Excellency the Governor General recommends to the House of Commons the appropriation of public revenue under the circumstances, in the manner and for the purposes set out in the message entitled “(long title of the Bill)”.³¹

28. *House of Commons Procedure and Practice*, *supra* note 12 at 831.

29. *Ibid* at 843.

30. John Mark Keyes, “When bills and amendments require a royal recommendation: a discussion paper and guidelines” (1997-98) 20 Canadian Parliamentary Review at 16.

31. *House of Commons Procedure and Practice* *supra* note 12 at 831.

The language used in the standard message of royal recommendation resembles that found in Erskine May describing the restrictions imposed on potential amendments: "An amendment infringes the financial initiative of the Crown not only if it increases the amount, but also if it extends the objects or purposes, or relaxes the conditions and qualifications expressed in the communication by which the Crown has recommended a charge".³² The generality or vagueness of this wording has made it difficult to determine what amendments might or might not be in order, a difficulty which is compounded by a perception that the royal recommendation is sometimes used when there is no evidence of any appropriating clauses in the bill.³³ Despite this confusion, or maybe because of it, rulings by Commons Speakers, relying too much on British practice, generally tend to protect the financial initiative of the Crown at the expense of Members' rights.³⁴

Questions about the new version of the royal recommendation attracted the attention of the Senate National Finance Committee which produced a report addressing it in 1990.³⁵ Having questioned a former Law Clerk and Parliamentary Counsel of the House of Commons and also the Chief Legislative Counsel of the Department of Justice, the committee was left dissatisfied by the new form of the royal recommendation. Testimony suggested that officials responsible for considering whether the royal recommendation was needed applied a broader standard than what is strictly necessary. Justice officials explained that they were inclined to add a royal recommendation to bills that seemed to entail the expenditure of money even if it was not actually authorized. In effect, this approach indirectly bound Canadian financial procedure to the stringent limitations of the British Standing Orders of 1852 and 1866.³⁶

Curiously, the situation raised by the National Finance Committee is the opposite of the complaint examined by the 1937 UK

32. Erskine May, *supra* note 11 at 857.

33. Joan Small, "Money Bills and the Use of the Royal Recommendation in Canada: Practice versus Principle?" (1995-96) 27 *Ottawa L Rev* 33 at 56.

34. *Ibid.*

35. Ninth Report of the Standing Senate Committee on National Finance (13 February 1990) 130 *Journals of the Senate of Canada*, Part 1 at 568-579.

36. *Ibid* p 574-575; for a discussion on this point see: Rob Walsh, "Some thoughts on Section 54 and the Financial Initiative of the Crown" (1994) 17 *Canadian Parliamentary Review* 2. John Mark Keyes, "When Bills and Amendments Require the Royal Recommendation: A Discussion Paper and Guidelines" *supra* note 30; John Mark Keyes, "The Royal Recommendation: An Update" (1999) 22 *Canadian Parliamentary Review* 19.

committee and yet, in some ways, it has had a comparable impact. In the UK, the elaborate details of the royal recommendation provoked a complaint because Members believed their review of financial legislation was being hampered since they were being prevented from proposing amendments. The constitutional right to assess and criticize the Government's spending plans was being thwarted. This, in turn, undermined the core accountability relationship between the Government and the House of Commons. In Canada, however, the generality of the royal recommendation now in use has also limited opportunities to examine financial legislation effectively. Amendments can be ruled out of order for infringing the financial prerogative of the Crown even when it is difficult to be certain that the bill actually authorizes a new appropriation. The unquestioned default position seems to be that if the bill has a royal recommendation, it must need it. Any bill or amendment is therefore ripe for a challenge based on an infringement of the royal recommendation. There is an abundance of rulings by the Speakers and committee chairs that rely on a broad application of the requirement of a royal recommendation to rule bills or amendments out of order.

The situation first identified by the Senate National Finance Committee almost twenty-five years ago still persists. It remains a real challenge sometimes to identify a specific expenditure being authorized by a legislative proposal. Despite this, there is scant evidence that the use made of the royal recommendation seriously troubles many parliamentarians. Certainly there is little to suggest that Members want to push back and question whether the royal recommendation is unreasonably preventing them from proposing amendments that might otherwise be permissible. This apparent indifference may be a consequence of the strict timetable that was put in place with the reforms of 1968 dealing with financial procedures. Under the Standing Orders adopted at that time, the Government is assured that the House of Commons will deal with votes on the various bills of Supply at fixed times of the year. While some obstruction is still possible, delay is no longer a serious or meaningful threat. As to other bills authorizing an expenditure, their passage can be accelerated through the use of time allocation.

The "power of the Purse" that historically was the foundation of the accountability relationship between the House of Commons and the Government of the day no longer retains the same political appeal it once had in Canada. Fallout from this development seems to have also influenced how any so-called money bill is assessed. Members do not question whether a royal recommendation is actually needed

when it is attached to a Government bill purporting to spend money from the Consolidated Revenue Fund.

ROYAL CONSENT

United Kingdom

The traditional prerogative rights and powers of the Crown enjoy protected status. They cannot be altered by statute unless the Queen agrees by royal consent to allow the Houses of Parliament to debate and adopt a bill affecting these prerogatives. These rights and powers were originally exercised directly by the Sovereign and remain with the Crown. Now, however, most of these prerogatives are used only on ministerial advice and are associated with the responsibilities of modern government. Important prerogative powers include the authority to declare war and peace, to make treaties with foreign governments, to issue passports and, with respect to Parliament itself, to issue summons, prorogations and dissolutions. Royal consent is also needed in instances with respect to legislation that would engage the Queen's hereditary revenues or properties or that would involve her role as the Supreme Governor of the Church of England.³⁷

Royal consent dates back to at least 1728, the first known instance of its use, though there is some suggestion that it could go back as far as the reign of Elizabeth I.³⁸ It is a parliamentary practice that is based neither on statutory requirement nor any explicit rule or order of either the House of Lords or the House of Commons. It may have developed from the King's emerging status as a constitutional monarch. Vested with authority that was no longer accepted as belonging to the Sovereign exclusively and that was increasingly constrained by conventions that came with parliamentary supremacy and responsible government, the practice of royal consent nonetheless acknowledges the continuing importance of the role of the Sovereign.

From an historical perspective, there was another authority that once belonged to the Sovereign, now long since abandoned, that had a parallel kinship to the tradition of royal consent. It was based on the close relationship of the King with his Cabinet Ministers in their

37. House of Commons Political and Constitutional Reform Committee, "The impact of Queen's and Prince's Consent on the legislative process" (Eleventh Report of Session 2013-14).

38. *Ibid* at 9.

role as his principal advisors. It was also wrapped up in the immense amount of patronage that was actually controlled by the King through the reign of George III. In order to bring government legislation into Parliament, it seems that Ministers sought and needed the approval of the King. Because this approval could be withheld, it amounted to a preemptive royal veto. Some examples that support the existence of this practice are reasonably well known. Catholic emancipation, for one, was delayed by George III who opposed granting civil liberties to Catholics, considering the measure a violation of his coronation oath despite the clear preferences of several of his Ministers.³⁹ The measure was finally enacted by Parliament in 1828 during the reign of George IV at the initiative of a Tory Prime Minister, the Duke of Wellington. In another example, Prime Minister Grey, in pushing a measure to modernize the electoral system, the Reform Act, felt the need to secure the approval of William IV before it was introduced in Parliament as a government proposal.⁴⁰ The exercise of this royal veto was undermined by the eventual success of the Reform Act and the substantive growth of the franchise by mid-century which gave greater legitimacy and power to the House of Commons and strengthened its role with respect to responsible government. This loss of the royal veto was also accompanied by a gradual reduction of royal patronage. Royal consent is a vestigial remnant of the once larger role played by the Crown when its authority was still more substantive and real, when the Sovereign actually played a prominent efficient role as well as today's more evident dignified role, according to Walter Bagehot.

The use of the royal consent today arises mainly, though not exclusively, in connection with proposed laws affecting the Crown estates, the Duchy of Lancaster and the Duchy of Cornwall. With respect to the latter, consent must be obtained from the Prince of Wales, if he is of age, since these hereditary lands traditionally furnish his revenues. This expansion of the royal consent to include the heir to the throne was put in place by Prince Albert, the Prince Consort, by 1848.⁴¹ This simple innovation reflects in its own way how the Crown, because of its long history and enormous prestige, could still exert an influence on parliamentary practices to reflect its importance

39. See William Hague, *William Pitt the Younger* (New York: Alfred A Knopf, 2004) at 390-92 and Richard W Davis, *A Political History of the House of Lords, 1811-1846* (Stanford: Stanford University press, 2008) at 6-7.

40. Antonia Fraser, *Perilous Question* (New York: Public Affairs, 2013) at 71.

41. "The impact of Queen's and Prince's Consent on the legislative process", *supra* note 37.

and to preserve its interests. A hundred and seventy years later, that influence still survives.

A British parliamentary committee recently looked into the practice of royal consent to determine whether it should be kept, changed, or abolished. In the end, the committee opted to recommend that royal consent continue to be a part of the legislative process. In pursuing its review, the Commons Political and Constitutional Reform Committee clarified several constitutional and procedural aspects of royal consent. Because it is a matter of convention, the committee recognized that royal consent could be abolished at any time through an address to the Crown followed by the adoption of an appropriate resolution by both Houses. And while there may be no compelling constitutional justification for royal consent, its retention underscores the important comity that exists between Parliament and the Crown. Though it can be seen as a formality, failure to provide royal consent on bills needing it can have consequences. If royal consent has not been signified when the bill reaches third reading in each house, the Speakers will not put the question. However, if a bill should be enacted without royal consent due to an oversight of whatever kind, its status as an Act of Parliament is not in doubt. In such a case, the royal consent is deemed to have been granted by virtue of the approval it received through royal assent.⁴²

In addition, the committee explored other aspects associated with royal consent. It noted that as the Queen and Prince of Wales are bound by ministerial advice in the exercise of royal consent, there was no reason to believe that either has ever acted inappropriately to influence the legislative process. This is because, in practice, when the government believes that royal consent should not be granted, the Ministers will not bother to advise the Queen or the Prince of Wales to withhold it. In other words, Ministers would simply not seek consent in the first place. Nonetheless, the committee acknowledged that the confidentiality of communications, albeit mostly routine, between government departments with the Queen's solicitors when royal consent is being considered can fuel speculation of royal influence or interference and this applies especially with respect to Private Members' bills. In addition, the committee acknowledged that royal consent could be used by the government itself to block progress on such bills and this could potentially override the wishes of Parliament. To avoid either problem, the committee recommended that the

42. *Ibid* at 9-10, 17.

correspondence between the Government and the Royal Household be provided to the Private Member sponsoring any relevant bill and that the Government ensure that royal consent for Private Members' bills be granted as a matter of course. Finally, to standardize when royal consent is applied in the legislative process, the committee proposed that it always be signified at the third reading when the bill has reached that stage in either House and this should be indicated on the Order Paper rather than through an oral statement made by a Privy Counsellor.⁴³

The UK committee report offers substantial evidence that the application of royal consent in the legislative process at Westminster is taken seriously and the question of its ongoing use warranted a proper evaluation. There are two reasons to explain why this might be so: its relatively frequent occurrence during a session because of bills touching the personal properties and hereditary revenues of the Queen and because it is a step in the very serious business of altering a prerogative power. Though this second reason does not arise too often, two recent instances demonstrate how it is still important. As quoted in the report: "In 1999, the Deputy Speaker refused to put the question at second reading of the Military Action Against Iraq (Parliamentary Approval) Bill. The Bill's sponsor, Tam Dalyell, has said that the Government has advised that royal consent be refused."⁴⁴ More recently, in 2011, royal consent was signified at second reading to the Fixed-term Parliaments Act which effectively abolished the prerogative power to dissolve Parliament.⁴⁵

Canada

The Canadian procedural authorities from Todd,⁴⁶ Bourinot,⁴⁷ Beauchesne⁴⁸ and the more recently published manual *House of Commons Procedure and Practice* all reference royal consent and describe how and why, in varying levels of detail, it is applied in Canada. *House of Commons Procedure and Practice* explains how

43. *Ibid* at 14, 20.

44. *Ibid* at 12.

45. *Ibid* at 7.

46. Alpheus Todd, *The Practices and Privileges of the Two Houses of Parliament* (Toronto: Rogers and Thompson, 1840) at 166, 228.

47. Sir John George Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada*, 4th ed (Toronto: Canada Law Book Company, 1916) at 413.

48. Alistair Fraser et al, eds, *Beauchesne's Rules & Forms of the House of Commons of Canada*, 6th ed (Toronto: Carswell, 1989) at 213.

royal consent is derived from British practice and how its practice is among the unwritten rules and customs of the House of Commons. However, the history of the use of royal consent in Canada suggests that in some significant respects it is not well understood nor is it used in the same way as at Westminster. As the *House of Commons Procedure and Practice* states: "Consent is necessary when property rights of the Crown are postponed, compromised or abandoned, or for the waiver of a prerogative of the Crown. It was, for example, required for bills in connection with railroads on which the Crown had a lien, with property rights of the Crown (in national parks and Indian reserves), with the garnishment, attachment and diversion of pensions and with amendments to the *Financial Administration Act*".⁴⁹

Aside from matters dealing with the prerogative rights of the Crown, these examples do not seem to fit the criteria applied in British practice and it is difficult to see an obvious need for royal consent in matters relating to liens and garnishments. It could be argued that there is no real harm in granting royal consent when it is superfluous, but it would be another matter if a claim were made incorrectly that royal consent were needed and it was refused. Given the history of questionable examples, combined with the near-binding nature of precedent in House of Commons procedure, the Canadian practice of royal consent constitutes a potential risk to the rights of parliamentarians and their ability to propose and adopt bills if they were not allowed to proceed because royal consent was refused when it was not actually required. In a House that is often driven by partisan interests, it is not unthinkable that debate could be thwarted on otherwise procedurally acceptable bills by invoking royal consent and refusing to grant it. Though less often used than royal recommendation to frustrate the legislative process, the confusion surrounding the use of royal consent makes its incorrect use a distinct possibility.

In other respects too, it seems that royal consent is not followed in ways that resemble the British model despite its derivative nature. In Britain, royal consent must be signified at the appropriate stage of a bill's consideration in both the House of Lords and the House of Commons. In Canada, royal consent usually occurs at second reading, but it can occur at any stage during a bill's consideration. This aspect of practice is not substantially different. What is different is that royal consent is usually signified in only one of the two Houses, and, more

49. *House of Commons Procedure and Practice*, *supra* note 12 at 755-56.

often than not, it is the House of Commons.⁵⁰ The most recent example of royal consent was provided in 2013 in the case of Bill C-53, *An Act to assent to alterations in the law touching the Succession to the Throne* which was signified by a statement made by the Minister of Justice as the bill quickly proceeded through all stages. On February 4, by a motion made by unanimous consent, the bill was deemed read a second time, deemed referred to the Committee of the Whole, deemed reported back without amendment, deemed read a third time and passed without any debate at all. When debate on second reading began in the Senate, the Leader of the Government informed the House that the Minister of Justice had signified royal consent in the Commons and, in keeping with established practice, this was thought sufficient. However, in the case of Bill S-34, *An Act respecting Royal Assent to Bills passed by the Houses of Parliament*, adopted in 2001, the reverse happened. As the bill had been initiated in the Senate, royal consent was announced in the Senate and not the House of Commons. The only other example found of royal consent being given in the Senate, rather than the House of Commons occurred in 2000. This was with respect to a bill that had actually originated in the House of Commons, Bill C-20, known as the *Clarity Act*, dealing with the Supreme Court opinion in the *Quebec Secession Reference*. The decision to seek royal consent was in response to a point of order that had been raised June 20, 2000.⁵¹ It was signified by the Leader of the Government, the Hon. Bernard Boudreau several days later, on June 29, 2000.⁵²

As a derivative practice, as an unwritten custom, not unlike the situation at Westminster, there is no real impediment to abolishing the requirement for royal consent. Few of the provincial legislative assemblies seem to have ever used it.⁵³ So far as can be determined, abolition has never been raised and it does not seem likely to be considered any time soon. Whether or not royal consent is abolished, the consideration of any bill proposing to alter a prerogative power may now be subject to a constitutional process that is far more rigorous and substantial. As part of the constitutional amending formulas put

50. See "Royal Consent Given to Bills", online: <<http://www.parl.gc.ca/Parlinfo/Compilations/HouseOfCommons/Legislation/CrownConsent.aspx>>

51. Debates of the Senate, 36th Parl, 2nd Sess, No 138, Issue 69 (June 20, 2000) (the point of order was raised by Senator Joyal and discussed by several senators before the Speaker reserved his decision).

52. *Journals of the Senate*, 36th Parl, 2nd Sess, No 135, Part II (June 29, 2000) at 819.

53. One instance of its use in Quebec demonstrates how royal consent was not well understood. The case involved the extension of the boundaries of a village. Quebec, Legislative Assembly, *Journals of the Legislative Assembly of the Province of Quebec*, (June 11, 1886) at p 309.

in place by the *Constitution Act, 1982*, section 41(a) stipulates that changes affecting “the office of the Queen, [and] Governor General” can only be made through resolutions authorized by the Senate and the House of Commons and by the legislative assemblies of all the provinces. The threshold required now for passage of a bill affecting a prerogative power may be significantly higher than royal consent. If the bill can be said to substantially affect the office of the Queen or the Governor General, a constitutional amendment might be needed.⁵⁴ This requirement has no parallel in the United Kingdom.

ROYAL ASSENT

United Kingdom

Of the three activities that engage the Crown-in-Parliament, the most important is royal assent. Without royal assent, no bill adopted by the two Houses of Parliament can become a statute, an Act of Parliament. It demonstrates, among other things, the fact that the Crown remains an integral, constituent part of Parliament and that it is the Queen-in-Parliament that makes the law of the land. The opening words of every bill enacted by Parliament at Westminster make the role of the Crown very clear:

Be it enacted by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

In Canada, the words are basically the same in recognizing that the making of statute law is by authority of the Crown:

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

54. Compare, for example, the subject of fixed date elections. In the United Kingdom, the prerogative of dissolution was abolished; but, in Canada, it was preserved on the theory that an alteration to such an important power might only be accomplished by constitutional amendment. Indeed, in *Conacher v Canada (Prime Minister)* (2010) 320 DLR (4th) 530 (FCA), the Federal Court of Appeal touched on this question when it stated that any restrictions to the Governor General’s power to dissolve Parliament would have to be explicit with specific wording to that effect. This was not the case in section 56.1 of the *Canada Elections Act*, the legislation concerning fixed elections that was at issue in that case. But then the Court went on, *in obiter*, to raise the question as to whether such a restriction would be constitutional, even with explicit and specific wording restricting the Governor General’s power in the *Canada Elections Act*. In other words, any restriction to the Governor General’s power to dissolve Parliament may require a constitutional amendment.

Royal assent as a feature of the English Parliament dates back to the era when it was developing the practices of a legislative body in the 14th century. During this period of English history, the King actively ruled and the decision to assent or not to legislation adopted by Parliament was made by him as the Sovereign. Evidence about this ceremony before the reign of Henry VIII is limited, but the history during his reign from 1509 to 1547 suggests that its pattern was already well established. One distinct feature of the royal assent ceremony still followed today was the use of Norman French to signify whether assent to a bill was granted or withheld. In addition, royal assent took place just once at the close of each session prior to the prorogation. "The reason for this was that it was held that the giving of assent had in itself the effect of terminating the session. However, this doctrine caused obvious inconvenience when statutory authority was required for some urgent action".⁵⁵ The practice of having royal assent at the end of the session was finally abandoned during the early years of the Long Parliament when tensions between Parliament and the King ran increasingly high. In the short period from November 1640 to June 1642, for example, when relations between Parliament and Charles I finally collapsed, royal assent was given twenty-four times.⁵⁶

Prior to 1541 and the passing of the *Royal Assent by Commission Act*, the ceremony of assent was always communicated to Parliament by the King in person. Royal assent by commission was instituted as an option in 1541 to deal with the Bill for the attainder of Katherine Howard and her accomplices. Henry VIII did not want to be seen personally giving assent to the execution of his wife. The Royal Assent by Commission Act 1541 was replaced by the Royal Assent Act 1967. The use of commissions did not outnumber attendances by the Sovereign until the reign of George III. From the late eighteenth century, royal assent by the Sovereign became increasingly infrequent and in the case of George IV and William III, each did it once at the beginning of their reigns to assent to a bill enacting the Civil List, in the case of the former, and the Queens's Annuity Bill, in the case of the latter.⁵⁷ The last Sovereign to participate personally in a royal assent was Queen Victoria in 1854.⁵⁸

55. Stanford Lehmborg, *The Later Parliaments of Henry VIII: 1536-1547* (Cambridge, Cambridge University Press, 1977) at 264-5.

56. House of Lords, *Parliamentary Functions of the Sovereign*, Memorandum No 64 (London, House of Lords Record Office, 1980) at 3.

57. *Ibid* at 6.

58. *Ibid*.

Since 1967, Parliament's involvement in royal assent is limited to an announcement made by the Speaker of the House of Commons and the Lord Speaker of the Lords during the sitting. It is no longer necessary to have Members of the Commons assemble at the bar of the House of Lords to witness the declaration in the House of Lords by the Commissioners. This change was prompted by growing opposition through the early 1960s to the inconvenience of Commons' business being interrupted by a summons to attend royal assent in the Lords. Under the terms of the current Royal Assent Act, the commission is still available and will likely occur at the time of prorogation. These practices have helped to update royal assent without sacrificing the obligation to involve the Queen.⁵⁹

The right of the Sovereign to refuse assent was undoubted through the 17th century. Indeed, it was not unusual for the King to exercise this power to withhold approval to bills adopted by the Houses of Parliament. However, following the settlement based on the Declaration of Rights and the subsequent accession of William and Mary in 1688, the expectation grew that the King should not contest the judgment of Parliament with respect to legislation. The last instance of a royal veto occurred in 1707 during the reign of Queen Anne.

Though now generally accepted as being highly improbable, the issue of the royal veto still comes up. It was apparently raised in connection with the Government of Ireland Bill in 1914. Fears about the prospect of a civil war in Ireland led some advisors close to King George V to urge him to consider refusing royal assent.⁶⁰ More recently, some academics have raised the prospect of a sovereign declining to give assent on the basis of moral right, although the prospect of this happening is remote.⁶¹ The convention of compliance and neutrality on the part of the Sovereign is so much a part of the accepted approach that it has become difficult to imagine that royal assent could ever be withheld. If a veto survives at all, it is as a reserve power that might be used in only the most unusual circumstances.⁶²

59. P D G Hayter, "Royal Assent: A New Form" (1967) 36 *The Table* at 53.

60. Harold Nicolson, *King George the Fifth: His Life and Reign* (London: Constable & Col, 1952) at 199; Kenneth Rose, *King George V* (New York: Knopf, 1984) at 148-49.

61. Robert Blackburn, "The Royal Assent to legislation and a monarch's fundamental human rights" (2003) *PL* at 205.

62. Yann Allard-Tremblay, "Proceduralism, Judicial Review and the Refusal of Royal Assent" (2013) 33 *Oxford J Legal Stud* 2 at 379-400.

Canada

In keeping with their British heritage, colonial legislatures had a royal assent process. It existed in all of the American pre-Revolutionary assemblies⁶³ and its history in Canada dates to the first General Assembly of Nova Scotia in 1758 and to establishment in Canada of the Constitutional régime of 1791.⁶⁴ The act of royal assent underscored the vice regal role and the extent of its authority. Throughout this period, the governor, as an agent of imperial interests, had the authority to withhold assent to bills or to reserve them for the signification of the royal pleasure.⁶⁵ Even after Confederation, these powers of the Governor General, enumerated in the instructions received at the time of appointment and also authorized under the *Constitution Act, 1867*, continued.⁶⁶ In fact, the Governor General of the new Dominion did not ever actually withhold assent, but up to 1878, twenty-one bills were reserved and one bill was disallowed.⁶⁷ After that date, the practice of reservation by the agency of the vice-regal representative was discontinued. Instead, in cases “where the jurisdiction of Parliament was doubtful, a clause was inserted in the bill to the effect that the Act would come into effect only on Proclamation of the Governor General. This suspending clause allowed negotiations with the Imperial government and if necessary – as in the case of the Copyright Act of 1889, the proclamation was not issued”.⁶⁸ The

63. Leonard W Labarbee, *Royal Government in America: A Study of the British Colonial System before 1783*, (New York: Frederick Ungar Publishing, 1958) at 226, 228.

64. Maurice Ollivier, *British North America Acts and Selected Statutes 1867-1962* (Ottawa, Queen's Printer, 1962) at 623.

65. Great Britain. Parliament. House of Lords. Return to an address dated 28th February 1893 for return of the names of Bills passed by both Houses of the Legislature, in colonies possessing responsible government, to which Her Majesty has not given Her assent, showing, in each case, whether the principle contained in such measure is or is not at the present date law in the colony: (The Earl of Onslow): ordered to be printed 2nd August 1894 (London, Her Majesty's Stationery Office, 1894) at 3-8.

66. Section 55 of the *Constitution Act, 1867* states: Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the Queen's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to Her Majesty's Instructions, either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or that he reserves the Bill for the signification of the Queen's Pleasure.

67. The assent to bills or their reservation and disallowance are sanctioned by section 55, 56 and 57 of the *Constitution Act, 1867*. Though never repealed, these provisions, aside from providing for assent, are taken to be generally obsolete. They reflect a relationship between Canada and Britain when Canada did not possess full sovereignty even though it was self-governing.

68. *Supra* note 59.

practice of reservation and disallowance was also sanctioned through the *Colonial Laws Validity Act* that was only repealed in 1931 by the *Statute of Westminster*.⁶⁹

During these first Parliaments, royal assent occurred once at the end of the session. The sessions themselves were usually short, lasting a few months and so there was little risk or harm in delaying royal assent to the end. The Governor General himself participated in this ceremony in the Senate Chamber. Normally there were a fair number of bills, both public and private. Among them, there was always the all-important supply bill, bound in green ribbon. It was presented for assent by the Speaker of the House of Commons in keeping with the British constitutional principle that the Commons have the exclusive right to grant monies to support the operations of government. Unlike the British practice, however, supply bills are always presented after any other bills receive assent. After a Clerk reads the titles of the non-supply bills, which are bound in red ribbon, the royal assent is signified by a simple nod of the head by the Governor General as the Clerk of the Senate states that “In Her Majesty’s name, His Excellency the Governor General doth assent to these bills”. After the Speaker of the House of Commons has presented the supply bill, the Clerk reads the declaration of royal assent saying “In Her Majesty’s name, His Excellency the Governor General thanks Her Loyal Subjects, accepts their benevolence, and assents to this Bill.” This ceremony is always conducted in French and English rather than the old Norman French used at Westminster. This practice respects the bilingual character of the Canadian Parliament reinforced by section 133 of the *Constitution Act, 1867*. Up to 1983, when there was a royal assent at the end of the session, the Governor General or a Deputy would then proceed to deliver a prorogation speech expressing gratitude for the legislation passed during the session that was now ended.

The traditional ceremony of royal assent performed by the Governor General preserves the constitutional principle of the Crown-in-Parliament. It is a public event performed in the presence of the Senators in their Chamber together with the membership of the House of Commons who are summoned to the bar of the Senate by the Black Rod. The ceremony is enhanced by having a Minister, sometimes the Prime Minister or, more usually, the Government House Leader, as well as the Leader of the Government in the Senate proceeding with the Governor General and his Aide-de-Camp into the Senate

69. *Statute of Westminster, 1931 (UK)*, 22 & 23 Geo V, c 4 s. 2.

Chamber and sitting near the Governor General who occupies either the throne or the Speaker's Chair.⁷⁰ When the Governor General was not available, royal assent was given by a Deputy of the Governor General, one of the Justices of the Supreme Court commissioned to act on the Governor General's behalf.

The use of a Deputy to perform royal assent is authorized through section 14 of the *Constitution Act, 1867* and is further confirmed through the Letters Patent that instruct the Governor in the performance of his duties⁷¹. Section 7 of the most recent Letters Patent, issued by the King in 1947 and signed by the Canadian Prime Minister, W.L. Mackenzie King, empowers the Governor General to appoint Deputies who can perform the duties of his office including royal assent.⁷² In some ways, this may seem similar to the use of the Lords Commissioners at Westminster, but there is a substantial difference. In Britain, no one but the Queen, except during a regency, can give royal assent. The Lords Commissioners only announce the assent, they do not grant it. Here, the Governor General, the vice regal surrogate, acts in the Queen's name in assenting to bills, making them law. The power of the Governor General to delegate his functions to a Deputy has no parallel in Britain.

Providing an alternative to the traditional ceremony is one of several major changes that have been made to royal assent practice in recent years. After several failed attempts dating back to 1983, Parliament adopted the *Royal Assent Act* in 2002 which allowed for assent to be granted by written declaration.⁷³ The Act still preserves the traditional ceremony which must be used at least twice each calendar year as well as for the first supply bill of each session of Par-

70. More recently, when the Prime Minister is present, the Governor General will sometimes sign an attestation confirming that he granted royal assent in addition to giving the nod of the head.

71. Section 14 provides that "It shall be lawful for the Queen, if Her Majesty thinks fit, to authorize the Governor General from Time to Time to appoint any Person or Persons jointly or severally to be his Deputy or Deputies ... and in that Capacity to exercise ...such of the Powers, Authorities, and Functions of the Governor General as the Governor General deems it necessary or expedient to assign to him or them, subject to any Limitations or Directions expressed or given by the Queen ..."

72. Section 7, after repeating the text of section 14 of the *Constitution Act, 1867*, provides that: "Now We do hereby authorize and empower Our Governor General ... to any person or persons, jointly or severally, to be his Deputy or Deputies ..."

73. Jessica Richardson, "Modernization of Royal Assent in Canada" (2004) 27(2) Canadian Parliamentary Review at 32-36. See also *House of Commons Procedure and Practice*, supra note 12 at 801-2.

liament. Under the procedure for written declaration, the bills are presented to the Governor General or a Deputy either at Rideau Hall, the Supreme Court, or at an alternative location as circumstances require. Bills are presented for assent by the Clerk of the Senate who is accompanied by another Senate Clerk in addition to a representative of the Privy Council Office. If a supply bill is among the bills ready for royal assent, the Clerk of the House of Commons will participate in presenting the bill. The Act also allows other witnesses, interested parliamentarians from either the Senate or the House of Commons, to attend. The steps followed in the ceremony by written declaration mimic some of the traditional ceremony with the Clerk of the Senate presenting the bills to the Governor General saying in French and English “May it please Your Excellency: The Senate and the House of Commons have passed the following Bill(s), to which they humbly request Your Excellency’s Assent”. The title of each bill is then read following which the Governor General or the Deputy signs a Declaration of Royal Assent that is witnessed by the Clerk of the Senate who also notes the date and time. Under this procedure, the royal assent is not effective until both Houses are notified through letters to the respective Speakers. In the Senate, the Speaker must actually read the letter in the Chamber while in the House of Commons, if it is adjourned, the Speaker can provide notification through the publication of a special issue of the Journals.⁷⁴

Having royal assent by written declaration has made it easier to ensure the prompt enactment of legislation. It has also increased the use of the Deputies when the Governor General is not available. To minimize the inconvenience to the Justices of the Supreme Court, authorization to act as a Deputy to the Governor General was extended to include the Governor General’s Secretary and also the Deputy Secretary. This was done in 2011.

OPENING AND CLOSING SPEECHES IN PARLIAMENT

United Kingdom

In the language of Walter Bagehot, the three functions relating to the role of the Crown-in-Parliament – royal recommendation, royal consent and royal assent – reflect the efficient dimension of the Crown. They relate to long-established and still evolving procedures

74. Standing Order 28(5).

that are a necessary component of the legislative work of Parliament. The Speech from the Throne, on the other hand, is an obvious manifestation of the dignified role of the Crown. Certainly it is the most public display of the Sovereign's association with Parliament. This ceremony of the state opening, which has been followed in much the same manner for several centuries, provides a splendid reminder of the origins of Parliament as the council of the nation summoned by its crowned head to deliberate on "all weighty and arduous affairs" which may the state and defence of the realm concern.

The central purpose of the ceremony is to read the Speech from the Throne, but it is the pageantry surrounding the speech that attracts much of the public's attention. Riding from Buckingham Palace in a series of state coaches with the imperial state crown escorted by the mounted Household Cavalry to the Palace of Westminster, the Queen, usually accompanied by the Duke of Edinburgh, passes through the Royal Gallery in a grand procession into the Lords Chamber to the throne. It is all part of the rich tradition that embodies the role of the Queen as sovereign. It is a spectacle that has become an indispensable feature of the modern monarchy in the United Kingdom and which adds lustre and dignity to the routine work of Parliament.

The state opening has been performed almost annually in this regal fashion since the time of Edward VII who became King in 1901. It was his decision to revive the grand ceremonial of the State Opening of Parliament.⁷⁵ For years, during the widowed years of Queen Victoria's reign, the state opening lacked any pageantry because the Queen refused to appear in state. The few times she did participate in the opening, she remained silent on the throne while the speech was read out by the Lord Chancellor.⁷⁶ King Edward had the insight to realize that much of the popularity and perceived blessings of the monarchical system depended on the sovereign's engagement with people through these displays of pageantry.⁷⁷ During his reign, he did not miss one opening and his successors have been equally dutiful. Queen Elizabeth II has maintained the tradition, missing only two openings since 1952.

75. John Cannadine, "The Context, Performance and Meaning of Ritual: The British Monarchy and the 'Invention of Tradition', c 1820-1977" in Eric Hobsbawn and Terence Ranger eds, *The Invention of Tradition* (Cambridge, Cambridge University Press, 1983) at 136.

76. Henry S Cobb, "The Staging of Ceremonies of State in the House of Lords" in *The Houses of Parliament: History, Art, Architecture* (London, Merrell, 2000) at 43-44.

77. *Supra* note 67 at 120-1.

The Speech from the Throne itself has always been relatively short with content that is often little more a bland statement on the issues that the Government plans to address during the course of the session. This brevity and neutrality is perfectly suitable to the modern expectation that the sovereign takes no public position of such matters and is bound by the advice of the government which is the actual author of the royal speech. This reality is also in keeping with the status of a King or Queen who reigns rather than rules, but it was not always so. When the balance between reigning and ruling was not as clear as it is today, the King exercised a role in deciding the content of the speech. This was expressed through the process of review of the legislative measures to be introduced in Parliament in the name of his government. Without the King's approval, it was difficult to insist on having these bills included in the speech as part of the government's agenda. This situation seems to have persisted through the reign of George III and, less clearly, into that of his two sons, George IV and William IV.⁷⁸ As already mentioned, the growth of democracy through the expanded franchise, the increasing role of the House of Commons, matched by greater independence of the Ministers in their relations with the King and a concomitant loss of royal patronage, progressively reduced the power and authority of the Sovereign to what it has become today.

A standard element of the Speech from the Throne connects it to a core function of the House of Commons, voting Supply. The statement informing the House and its members that Estimates will be placed before them constitutes a generic royal recommendation. It acknowledges implicitly the primary responsibility of the Commons to control the public purse, a fundamental constitutional principle. In addition, for more than a century, from George III (1760) to Edward VII (1901) the first Throne Speech of a new reign contained a declaration placing all hereditary revenues at the disposal of Parliament in order to enable it to determine the Civil List, the fixed sum provided annually to the Sovereign for the expenses of the Royal Household.⁷⁹ This practice of having the King or Queen give royal consent in person for the Civil List seemed to validate its use with

78. See Richard W Davis, *A Political History of the House of Lords 1811-1846*, *supra* note 39 at 6-9.

79. For example, in the first Speech of William IV given November 2, 1830, the King said: "By the demise of my lamented brother, the late King, the Civil List Revenue has expired. I place without reserve at your disposal my interest in the Hereditary Revenues ... In surrendering to you my interest in revenues which in former settlements of the Civil List [have] been reserved to the Crown, I rejoice in the opportunity of evincing my entire reliance on your dutiful attachment, and my

respect to other legislation that touched either on the prerogative powers or the hereditary revenues of the Crown.

The Speech from the Throne, in setting out the legislative agenda of the Government, allowed it, through the subsequent debate in the Commons, to demonstrate it had the support necessary to pursue these objectives. This debate was the first real test of the confidence of the House in the Government of the day, the basis of the constitutional principle of responsible government. The acceptance of this principle by the King depended on the recognition of the limitations on his rights to rule and the importance of his relationship to Parliament. This recognition became increasingly significant during the course of King George III's reign and even more fully in the first years of the nineteenth century. It was also facilitated by his several prolonged illnesses, especially between 1810 and 1820, and the limited abilities of the Prince of Wales who acted as the Prince Regent before succeeding to the throne as George IV. By the mid-nineteenth century, Macaulay's characterization of the Sovereign's role to reign rather than rule was beyond dispute. From this point on, the Speech from the Throne was solely an instrument of the government's legislative and policy objectives without any determinative role for the Sovereign. All that was left for the King or Queen were some opening statements touching on activities or events involving members of the royal family since the last speech.

The debate in the House of Commons and the House of Lords on the Speech from the Throne, known as the Address-in-Reply, takes several days involving three distinct stages on the resolution expressing thanks for the Queen's gracious speech. The first is for general debate, followed by more specific policy debates, and finally debate on amendments to the resolution. After the Address has been agreed to, it is presented to Her Majesty. This, in turn, leads to a response from the Queen which is usually read in the Lords by the Lord Chamberlain and in the Commons by a member of the royal household appearing at the bar of the House.⁸⁰

The companion event to the Speech from the Throne occurring at the end, rather than the beginning, of the session is the Prorogation Speech.⁸¹ Like the summons that initiates a new Parliament or

confidence that you will cheerfully provide all that may be necessary for the support of ... the honour and dignity of the Crown."

80. Erskine May, *supra* note 11 at 160-162, 170.

81. Prorogation without a Speech is achieved by a simple proclamation.

session, fixing the date for a prorogation is a prerogative power exercised by the Sovereign on the advice of the Government. The prorogation is an announcement of the Queen's command that the session is ended. The last time that the Queen herself prorogued a session of Parliament was in 1854. "The royal functions at prorogation are now exercised by certain Lords acting by virtue of a commission under the Great Seal".⁸² If there is to be royal assent, it is pronounced first before reading the Queen's speech once the commission has been read by the Clerk. The speech itself reviews the legislation and achievements of the Government of the session. At the conclusion, the Lord Chancellor prorogues Parliament to the date set in the commission. If there is to be a dissolution, it is declared by a separate and subsequent proclamation.

Canada

There is perhaps no other parliamentary ceremony than the Speech from the Throne that so closely imitates the British original. This is true both with respect to its parliamentary purpose and its importance as an occasion of state representing basic principles of governance. In the first years of Confederation, the Speech from the Throne was also as much a social event as a parliamentary occasion. With the Governor General as the ranking member of Canadian society, a peer and the personal representative of the Sovereign, the opening of Parliament was the highlight of the social season for Ottawa and the excuse for celebration and as much pageantry as the young country could muster. It continued like this for years and remained very much a local event engaging senior politicians, civil servants, professionals and the partisan elite. Following the end of the Second World War, the social aspect of the opening was further elevated as those participating in the festivities expanded to include diplomatic representatives assigned to Canada from the early decades of the twentieth century.

Still, it must be admitted that, from the beginning, the home-grown pageantry was modest by British standards and it has not changed that much to this day. The procession from Rideau Hall to Parliament Hill along Sussex Drive consists of a single carriage (if one is used at all) with a modest escort. There are gun salutes and troop inspections on Parliament Hill before the Governor General enters

82. Erskine May, *supra* note 11 at 145-146.

Parliament to parade to the Senate Chamber. The parade of officials accompanying the Governor General, aside from the Secretary to the Governor General and the Aide-de-Camp, includes the Prime Minister, the Leader of the Government in the Senate, the Chief of the Defence Staff and the Commissioner of the RCMP. In the Senate Chamber, the Governor General reads the Speech before the assembled Senators, Members of the House of Commons and the Justices of the Supreme Court. The participation or not of the diplomats has led to two distinct levels of opening: one, more modest, limited mostly to the parliamentarians themselves; and one that is larger to include as guests the broader membership of the Privy Council and the diplomatic corps sitting in the Senate Chamber and galleries. The decision of having a “small” or “large” opening is one that is made at the discretion of the Prime Minister.⁸³

The purpose of the Speech from the Throne in Canada is identical to that at Westminster, to present the government’s legislative agenda for the coming session. The presentation of this agenda, however, is quite different. The speech read by the Queen is brief, usually containing a short summary of duties recently performed by the royal family, before listing the legislation to be introduced by the government. It often takes no more than ten minutes. In Canada, the Governor General reads a text that is usually much longer. The latest speech, opening the second session of the 41st Parliament, took an hour to read. The government’s legislative proposals are packaged with extensive explanations that frame their justification. In some respects, the Speech resembles the US President’s annual State of the Union Address before the Congress.⁸⁴ This similarity is becoming more obvious, but it has attracted little commentary. This may not be too surprising when the public’s views are more influenced by American, rather than British, media. Also featured in the Speech is introductory text prepared by the Governor General on certain issues or causes that reflect personal interests that sometimes become identified with the mandate of the particular vice regal representative.

Though it is unclear whether there is a direct connection to the more promotional content of the Speech from the Throne, there has

83. Richard Berthelsen, “The Speech from the Throne and the Dignity of the Crown” in D Michael Jackson and Philippe Lagassé, eds, *Crown and Canada: Essays on Constitutional Monarchy* (Montreal, McGill-Queen’s Press, 2013) at 164 (notes that in 2011 the Prime Minister had members of the Canadian Armed Forces as guests in the Senate chamber).

84. *Ibid* at 163, 165.

been a trend to skip altogether the Address-in-Reply debate in the House of Commons. The last time the Address motion was adopted in the House of Commons was for the first session of the 40th Parliament, November 27, 2008. There has been no debate at all on the Address-in-Reply for either of the two subsequent sessions of the 40th Parliament or for the two sessions of the current 41st Parliament. Some of this might be explained by the government's reluctance to give the opposition additional opportunities for debate. It could also be due to the practice of having budget speeches sometimes follow immediately after the opening of the session with their own set timetable for debate. Whatever the cause, what is particularly noteworthy is the absence of any real objection from the opposition. This may be because there is realization that the outcome of the debate on the Address-in-Reply is a foregone conclusion when the government has a majority. However, this explanation did not apply to the sessions of the 40th Parliament. The same phenomenon has not yet occurred in the Senate, but the length of time taken before a final vote on the Address motion is growing longer. In the present session, it took more than two years before the motion was finally adopted.

The lack of debate in the Commons on the Address-in-Reply motion has had consequences in relation to the traditional ceremony of presenting the engrossed motion thanking the Governor General for his gracious speech. This event has the Speakers of both Houses together with the movers and seconders of the motion in the two Houses, other selected parliamentarians and senior parliamentary officers going to Rideau Hall to deliver the engrossed parchment personally to the Governor General. Until recently, the ceremony has always involved both Houses acting together. However, the pattern of presenting Addresses simultaneously is no longer followed. On May 11, 2009, the first time this happened, the two Houses presented Addresses for different sessions – the Commons for the first session of the 40th Parliament while the Senate presented a parchment relating to the second session of the same Parliament. In June 2010, March 2012, and November 2014, the Senate went alone to Rideau Hall to deliver the engrossed parchment.

These recent adaptations to traditional parliamentary ceremonies are the latest manifestation of our evolving political culture at the federal level. They are the evidence of changes that have always been a feature of the country's evolving parliamentary history. Another significant change that seems to have been little noticed occurred more than thirty years ago. The practice of having a prorogation speech to end the session was abandoned after 1983. Like the Speeches from

the Throne, these too had become longer as they extolled the merits of the government's legislation adopted over the course of the session. Nonetheless, in the end, it is fair to assume that the prorogation speech was seen as an unnecessary bother that produced little benefit to the government. Consequently, there was no need to continue with it. Parliamentary sessions are ended, as they always were, by proclamation, though now unaccompanied by any event that gathers Senators and MPs together in the presence of the Governor General or a Deputy to receive an acknowledgement of their service.

CONCLUDING REFLECTIONS

In reviewing the role of the Crown-in-Parliament, it is clear that Westminster and Ottawa share the same constitutional principles, but the two Parliaments do not really share the same history and this makes a big difference. Westminster provided the model that Ottawa copied. The practices that developed at Westminster involving the Crown were part of Britain's political and constitutional evolution that established the linkages explaining the original purpose behind the royal recommendation, royal consent and royal assent. The royal recommendation limited any requests for appropriations to the Crown. The Commons furnished the revenues required by the King to supplement income derived from royal properties and other traditional means. This exchange was based on the understanding that the Crown would provide government while the House of Commons in funding it would also hold it accountable for the peace and welfare of the realm. Royal consent acknowledged the preeminent rights of the Crown with respect to its residual prerogative powers as well as its subsisting hereditary revenues and property rights. Finally, royal assent was the very manifestation of the Crown-in-Parliament, the King's approbation to the laws adopted by the two Houses of Parliament for the good governance of the kingdom and its people. These three roles of the Crown-in-Parliament became part of the fabric of the British Parliament's procedures that were adapted or modified as needed to suite changes that took place over time as the Sovereign's real powers declined in face of the development of ministerial government, the growth of democracy and the obligations of a modern state.

In Canada, the role of the Crown-in-Parliament was part of the basic governmental structure that came with the adoption and implementation of the *Constitution Act, 1867*. The new country inherited concepts and practices of government and Parliament of mid-nineteenth century Britain. Prior to and immediately after Con-

federation, while Canada grew as an autonomous, self-governing colony, the role of the Crown-in-Parliament, based on the British model, was closely followed but with some deviations. By this time, the Sovereign's constitutional powers were substantially reduced in Britain, but in Canada, the Governor General retained some authority as an agent of Imperial interests that mimicked superficially some aspects of the Sovereign's powers from an earlier era. This was particularly so with respect to royal assent when bills adopted by the Canadian Parliament could be disallowed or reserved. The ceremony itself was also a reminder of an older time since the Governor General or a Deputy always came in person to give assent to the bills. As for royal consent, it was not really a coherent feature of Canada's parliamentary practices. The Sovereign possessed no hereditary land or revenues in Canada and there was little prospect of government surrendering its prerogatives at a time when it needed all its powers to build the country. Nonetheless, it was included as a legitimate aspect of Canadian parliamentary procedure. The practices related to the royal recommendation were perhaps the ones that Canada followed most closely. The government's control over expenditures was even confirmed and protected by section 54 of the *Constitution Act, 1867*. The complex processes involving the Committee of the Whole, Supply, and Ways and Means developed in the British Parliament were assimilated into Canadian parliamentary practices. These processes remained fundamentally unchanged for a hundred years.

The pressures and challenges facing Canada as it grew from coast to coast, undertook important infrastructure initiatives, encouraged immigration and settlement to populate the country, aided in the process of establishing a distinct Canadian identity. At first, the response to these challenges was seen as part of the mosaic of the British Empire, but in the aftermath of the Great War, it was a spur to claim a sovereign, national identity. This process of maturation was an expression of the country's confidence. Within this climate of change, the influence of British parliamentary practices was still evident, but it depended more and more on how well it served to improve the specific parliamentary situation in Canada. The time line of this process is not yet fully exhausted. The most important adaptation involved changes to the supply and appropriation processes in the 1960s. The reforms made at Westminster did influence the innovations put in place by Ottawa in 1968. At the same time, some of the specific changes took on a distinctive Canadian character. The traditional resolution stage was abandoned altogether and the post-1976 form of the royal recommendation has assumed a function that is significantly different than that applied at Westminster. The

Queen's recommendation at Westminster is still part of the resolution stage though the practice is much simplified. In Canada, it is now in the form of a non-specific notice printed with the first reading version of the bill to which it is attached without any certainty that it is actually required.

The role of the Crown-in-Parliament as expressed through current practices is part of an ongoing process of Canadianization and modernization. The first reinforces the second. The pressure to adapt to current conditions, really often to simplify, is stimulated in large measure by the national political environment and its needs. This has led to some differences with Westminster practices which are likely to continue and possibly widen. These changes run parallel to the continuing developments in the role of the Governor General as the surrogate of the Queen. This office too is assuming a character that is increasingly identifiable by the national purpose it serves and not just the Sovereign it represents. Like the vice regal surrogate, the role of the Crown-in-Parliament continues to have constitutional meaning and purpose. It embodies past realities without unduly limiting the possibility of future changes. It will continue to evolve, and, in the end, remains a matter of the relationship form and substance.

CHAPTER 5

THE ROYAL RECOMMENDATION

Rob Walsh*

In a parliamentary system of government based on the British model, as we have it in Canada, the Crown (that is, the Government) has the financial initiative, that is, only the Crown can propose a new tax or a tax increase or propose the spending of public funds. In respect of the latter, the House may not vote on a spending proposal that was not recommended to the House by the Crown. This rule is entrenched in our Constitution by section 54 of the *Constitution Act, 1867*, and is reproduced in subsection 79(1) of the *Standing Orders of the House of Commons*.¹

This constitutional requirement is based on Lord Durham's Report to the British Government in 1838. In his Report, Lord Durham wrote:

I consider good government not to be attainable while the present unrestricted powers of voting public money, and of managing the local expenditure of the community, are lodged in the hands of the Assembly.²

The problem for Lord Durham arose from the availability of surplus public funds:

As long as revenue is raised, which leaves a large surplus after the payment of the necessary expenses of civil Government, and as long as any member of the Assembly may, without restriction, propose a vote of public money, so long will the Assembly retain in its hands the powers which it everywhere abuses, of misapplying that money.³

* Law Clerk and Parliamentary Counsel (1999-2012), House of Commons, Canada.
1. (UK), 30 & 31 Vict, c 3, s 54, reprinted in RSC 1985, App II, No 5, [*Constitution Act*]; *Standing Orders of the House of Commons*, SOR, 2014-79, s 1 [*Standing Orders*].
2. Ontario, House of Assembly, *Appendix to Journal of the House of Assembly of the Upper Canada*, 13th Parl, 4th Sess, Vol 1 (1839) at 92 (Earl Durham).
3. *Ibid.*

The solution to the spending problem in colonial Canada seemed obvious to Lord Durham:

[I]f the rule of the Imperial Parliament, that no money vote should be proposed without the previous consent of the Crown, were introduced into these Colonies, it might be wisely employed in protecting the public interests, now frequently sacrificed in that scramble for local appropriations, which chiefly serves to give an undue influence to particular individuals or parties.⁴

It seems to me not unreasonable to ask whether Lord Durham's problem in 1838 in respect of public spending for self-serving political purposes is not still with us, albeit by the Crown (the Government) and not the legislative assembly as it was in Lord Durham's day. The financial initiative rule enshrined in section 54 may not have resolved Lord Durham's concerns about the management of public funds.

When I first came to the House in the early 1990s, my office was expected to get the Governor General's signature on a "*royal rec*" (as it was commonly called) for a Government bill that was about to be introduced in the House. At that time, the House rules required the recommendation to be appended to or printed upon the bill when it was first introduced in the House. I was responsible for deciding whether the bill required a *royal rec* though this was usually done after consultations with the Department of Justice Legislation Section that had drafted the bill. Government bills, as you know, are typically lengthy and quite complex. It was not an easy task for someone who had not drafted the bill to examine the bill to determine if there were provisions that fell under section 54. Then, for someone from my office to head off across town to Rideau Hall, the Governor General's residence, to get the Governor General's signature on a recommendation was absurd. It was not for a mid-level functionary at the House to make recommendations to the Governor General! This was to be done by officials of the Government, whether the Department of Justice or the Privy Council, acting on behalf of the Government. Why was my office doing this, I asked?

I arranged to meet with officials from the Department of Justice, Department of Finance and the Privy Council Office, and eventually they found a way to take over this function. I was pleased to be rid of it. It was a holdover from former times, up to the late 1940s, when

4. *Ibid.*

the Law Clerk had an oversight function in the preparation of Government bills for introduction in the House.

For a bill to require a *royal rec*, it must be appropriating funds from the Consolidated Revenue Fund (CRF) only. Appropriations of public funds before they form part of the CRF do not come under section 54.⁵

Notwithstanding its entrenchment in the *Constitution Act, 1867*, application of the financial initiative rule is a matter between the Government and the House, that is, were the Government to feel that the House was not fully respecting its financial initiative, it is unlikely that a court would be receptive to an action by the Government to enforce section 54 against the House. The courts have recognized that the House has absolute control of its proceedings. The House decides what is proper procedure for its purposes. This means that section 54 applies to House procedures as the House may determine. I do not think the courts would be comfortable telling the House how its proceedings are to be conducted in view of section 54 (or sections 20, 53 or 55 of the *Constitution Act, 1867*), notwithstanding its constitutional status. In fact, during the minority government years, 2004-2011, the Government on many occasions objected that a bill ought not to receive a vote as it required a *royal rec* and did not have one. Of course, the Government, being in the minority, was concerned that the bill might be passed in the House if the opposition parties voted for the bill. The Speaker would make a ruling, sometimes in support of the Government's view and sometimes not. I doubt that the Government ever thought it could go to court to enforce section 54 against a ruling by the Speaker.

Until 1994, Standing Order 79 required that a royal recommendation must accompany bills on their introduction, which for Private Member's Bills meant that they did not reach the floor of the House if they required a *royal rec*.⁶ In 1994, the Standing Orders were amended to require only that a *royal rec* must be produced before the bill receives a final vote at third reading. This meant that the sponsoring Private Member would at least get a debate even though the bill called for or authorized the spending of public funds.

5. See Bill C-363, *An Act to amend the Canada Mortgage and Housing Corporation Act (profits distributed to provinces)*, 38th Parl, 1st Sess, 2005, (defeated at second reading 5 November 2005); *House of Commons Debates*, 38th Parl, 1st Sess, No 130 (3 October 2005) at 8293-8294.

6. *Supra*, note 1.

It must be remembered that a *royal rec* is only given by the Governor General on the recommendation of the Government, which means that an opposition Member will likely never get a *royal rec* for his or her bill if it needed one. For this reason, before the change to Standing Order 79 in 1994, the *royal rec* issue was important to Private Members as they would not even get a debate in the House if their bills required a *royal rec*. In my time at the House (1991-2012), it happened once that a Private Member obtained a *royal rec* for his bill. The Member was a member of the Government caucus (the bill gave unemployment benefits to persons selected for jury duty).⁷ It seems to me unreasonable to suppose that over my 21 years at the House, no Private Member (with one exception) ever had a good idea for the use of public funds, given the number of Private Member's bills introduced over this period (in the thousands).

Parliamentary procedure in Britain (where the Crown's financial initiative is not entrenched in a written constitution) had for many years applied the financial initiative rule to any proposal that would constitute a "new and distinct charge" upon the public purse, whether or not the language of appropriation is used. This has been the guiding consideration in Canada also though application of this test has not always been easy. This has been expanded through procedural practice to where, according to the House's authoritative text on its practices and procedures, *House of Commons Procedure and Practice*:

[A] bill that...extends [an existing or proposed appropriation's] objects, purposes, conditions and qualifications is inadmissible on the grounds that it infringes on the Crown's financial initiative.⁸

The language of the *royal rec*, introduced in 1976, was much shortened and recommended the bill "under the circumstances, in the manner and for the purposes" set out in the bill. Objects, conditions and qualifications mentioned in *House of Commons Procedure and Practice*, above, are not included and are arguably a further extension of the *royal rec* requirement. This broad language effectively prevents virtually any substantive amendments to Government bills that have a *royal rec* attached. Before 1976, the *royal rec* had detailed language indicating the clauses in the bill that required a *royal rec*, which would have enabled amendments to avoid offending the *royal rec*.

7. Bill C-216, *An Act to amend Unemployment Insurance Act (jury service)*, 1st Sess, 35th Parl, 1994.

8. Audrey O'Brien & Marc Bosc, *House of Commons Procedure and Practice*, 2nd ed (House of Commons: Ottawa, 2009) at 834.

If the financial initiative rule applied only where a bill spoke of appropriating funds, application of the rule would be an easy matter. However, bills often do not use appropriation language; in fact, they often avoid this language by design in the hope that they might avoid attracting the *royal rec* requirement. Thus section 54 is applied where, despite the absence of language indicating an appropriation, it is clear that the objectives of the bill cannot be implemented without a new expenditure of public funds. These bills are treated as the equivalent of express appropriations or authorizations to spend additional public funds. Bills that may cause incidental increases to the operating costs of the Government do not need a *royal rec*; these are covered by existing appropriations, that is, they are not a “new and distinct charge” upon the public purse.

Before I joined the House in 1991, legislative counsels had tried including a “non-appropriation” clause in Private Member’s Bills that might otherwise attract the *royal rec* requirement. This clause said that no monies shall be expended for purposes of this Act until an appropriation is made for such purpose by the House. In 1978, the Deputy Speaker refused to deal with the clause directly and instead characterised it as an unacceptable way to “elude” the *royal rec* requirement. Later, the argument developed that the non-appropriation clause was an attempt to do indirectly what could not be done directly. If a private Member could not, directly, introduce a bill that called for the spending of public funds, the Member could not do this “indirectly” by inserting a “non-appropriation” clause.

In my view, the “non-appropriation” clause was doing *directly* what could be done *directly*, that is, it avoided doing *directly* what could not be done *directly* (offending the financial initiative of the Crown). The notion of a clause in a bill doing something indirectly didn’t make sense to me. One had to completely disregard this clause in the bill as if it were not there which, in my view, is clearly inappropriate: bills for whatever purpose are to be read in their entirety. However, this is a lawyer speaking and the two Speakers were making procedural rulings. One must remember that the House can do whatever it chooses in its application of s. 54 under S.O. 79(1).

I sought a restrained application of the *royal rec* requirement – some might say, unkindly, a narrow application – perhaps reflecting a bias in favour of my client group, Private Members. Others, such as my learned colleague at the Department of Justice, John Mark Keyes,⁹

9. Chief Legislative Counsel at the Department of Justice from 2005 to 2013.

were attracted to a broader application reflecting, in a similar fashion, their bias in favour of their client, the Crown. I say this with the greatest of respect for John Mark and his colleagues at the Department of Justice. We naturally lean toward the interests of our clients and if you work for the same client long enough, the bias becomes ingrained as an unthinking habit of mind sometimes.

The minority government years, 2004 to 2011, brought increased attention in the House to the *royal rec* requirement. Of particular note from these years are three Private Member's bills, one on employment insurance, one on the Kyoto Protocol and another on the Kelowna Accord.

On February 8, 2005, the Acting Speaker ruled on Private Member's Bill C-280, a bill that amended the *Employment Insurance Act* to provide, inter alia, for 13 new commissioners to be added to the Canadian Employment Insurance Commission. The bill was held to require a royal rec as the existing legislation provided for remuneration being paid to commissioners, which meant that the new commissioners created by the bill would also have to be paid. According to the Acting Speaker:

Where it was clear that the legislative objective of a bill cannot be accomplished without the dedication of public funds to that objective, the bill must be seen as the equivalent of a bill effecting an appropriation.¹⁰

On May 17, 2006, former Liberal Prime Minister Paul Martin, sitting in opposition, introduced the *Kelowna Accord Implementation Act*, Bill C-292, seeking implementation of the Kelowna Accord that his Liberal Government had entered into with the provinces, the territories and the leadership of Canada's aboriginal people "to close and ultimately eliminate the gaps between our aboriginal Canadians and non-aboriginal Canadians".¹¹ The Kelowna Accord was negotiated only a few days before the collapse of the Liberal Government on November 28, 2005. The minority Conservative Government said that the bill, if passed into law, would have significant financial implications for the Government and therefore should be accompanied by a royal rec. Speaker Milliken did not agree when he rendered his ruling on the bill on September 25, 2006.

10. *House of Commons Debates*, 38th Parl, 1st, No 52 (8 February 2005) at 3253,

11. *House of Commons Debates*, 39th Parl, 1st Sess, No 52 (35 September 2006) at 3197-3198 (Hon Peter Milliken).

The Bill, said the Speaker, required the Government to “take all measures necessary to implement the terms of the [Kelowna] accord’ but provided no specific details on those measures”. He noted that the measures to be taken by the Government were not described in the Bill. “In the absence of such a description,” said the Speaker, “it is impossible for the [Speaker] to say that the bill requires a royal recommendation”.¹²

The Speaker noted that implementation of the Kelowna Accord would likely require various legislative proposals, possibly including an appropriation of public funds and when such enabling legislation appears, the Speaker will, he said, “be vigilant in assessing the need for a royal recommendation”.¹³ In other words, while public funds may eventually be needed, they were not yet being appropriated by this bill.

On May 17, 2006, a Private Member introduced the *Kyoto Protocol Implementation Act*, Bill C-288, which sought implementation of the multi-national Kyoto Protocol on climate change setting greenhouse gas emission reduction targets for 2012. The Protocol had been negotiated by the Martin Liberal Government but not fully implemented before the Liberal Government fell in late November 2005. The new Conservative Government was opposed to the Kyoto Protocol.

Bill C-288 required the Minister of Environment to establish an annual Climate Change Plan in accordance with the Kyoto Protocol and for the Commissioner of the Environment to report to the Speaker of the House on the Government’s progress in the implementation of the Plan and required the Government to amend its environmental regulations to meet the requirements of the Kyoto Protocol.

The Government said that Bill C-288, if adopted, would commit the Government to implementation of the Kyoto Protocol and this would require significant expenditures and therefore the bill required a royal rec. The Speaker ruled that the Bill did not need a royal rec as it did not impose upon the Government actions that would entail the spending of public funds:

[T]he adoption of a bill calling on the government to implement the Kyoto protocol might place an obligation on the government to take

12. *House of Commons Debates*, 39th Parl, 1st Sess, No 52 (25 September 2006) at 3197-3298 (Hon Peter Milliken).

13. *Ibid.*

measures necessary to meet the goals set out in the protocol but the Chair cannot speculate on what those measures may be. If spending is required, as the government House leader contends, then a specific request for public monies would need to be brought forward by means of an appropriation bill, as was the case in 2005, or through another legislative initiative containing an authorization for the spending of public money for a specific purpose.¹⁴

The Bill did not specifically authorize any spending for a distinct purpose. “Rather,” said the Speaker,

the bill seeks the approval of Parliament for the government to implement the protocol. If such approval is given, then the government would decide on the measures it wished to take. This might involve an appropriation bill or another bill proposing specific spending, either of which would require a royal recommendation.¹⁵

The bill only required the Government to produce a plan on climate change. The Government would have to use its existing staff resources to meet the requirements of the bill but this was not new spending.

The *royal rec* requirement is both a legal and a procedural issue. Under section 54, it was a legal issue and came within my function as a lawyer. As the section was repeated in the procedural rules of the House, it also came within the function of procedural staff. I had to accept, in keeping with the privileges of the House, that ultimately the House could apply section 54 however it saw fit as an internal procedural rule, whether or not, from a legal statutory analysis viewpoint, it was applying the section in accordance with its terms. It was all about reading the actual text of the bill and in some cases very carefully. We eventually developed the approach that where the language of the bill unavoidably constituted an authorization to spend new public funds, a *royal rec* was required; an explicit appropriation or authorization was not necessary though the language of section 54 would suggest this was necessary.

We agreed that a *royal rec* was not required where the bill merely increased the Government’s cost of doing business, as it were, by increasing the responsibilities of a department or agency such as requiring that it submit more reports. In these cases, there is already

14. *House of Commons Debates*, 39th Parl, 1st Sess, No 54 (27 September 2006) at 3314-3315 (Hon Peter Milliken).

15. *Ibid.*

an appropriation in place for the business of these departments or agencies and the bill is not effecting or authorizing a new appropriation or an increase to an existing appropriation.

It was during the minority government period that the House's practices on the *royal rec* were put to the test and, in my view, were much improved as a result. Closer and more thoughtful scrutiny was given to the *royal rec* requirement. Rather than a pre-emptive decision being taken "en arrière du rideau", the practise developed that in clear cases the Speaker would simply announce that certain bills required a *royal rec* and therefore would not be put to a vote at third reading. With the doubtful cases, the Speaker simply advised the House of his concerns regarding application of the *royal rec* and left it to the Government to make its case in the House for requiring a *royal rec*. The sponsor of the bill and other interested Members could respond to the Government's case and the Speaker would then make a ruling. This enabled the issues surrounding the *royal rec* to become better known and generally improved the understanding among Members (and their staff) on when a *royal rec* is required on a bill. From this approach, considerable procedural jurisprudence developed through the Speaker's rulings that will offer guidance for years to come.

Since the return of majority Government in 2011, the *royal rec* issue has not been so prominent. The Government side can simply vote against a Private Member's bill that it felt offended the Crown's financial initiative (though it might raise the issue in the hope that the bill might be disposed of without a vote).

Ultimately, one's approach to the *royal rec* requirement will turn on what one thinks makes for good government. This was Lord Durham's concern. The choice is between the British model, as we have it in Canada, where the financial initiative is with the Crown exclusively and the American model where the financial initiative is exercised by both the executive branch and the legislative branch.

Lord Durham thought the public interest would be best served if public spending were kept in the hands of the Crown. In his day, however, the Crown, in the person of the Governor, was not under the control of the Government of the day. Admittedly, the Governor acted more in the interests of the Colonial Office in London than the larger public interest as we know it today, but at least he could act independently of his ministers. Canada advanced to responsible government in 1848 where this independence was given up, and properly so, but the independence of the Crown, that is, the Governor, from

the politics of the day was fundamental to Lord Durham's thinking. His objective was to remove public spending from self-serving partisan politics. The financial initiative of the Crown as we have it today merely limits the self-serving to the party in power. At best, we have only a partial solution to the concerns of Lord Durham.

What the financial initiative rule does do, however, and this is important, is assign fiscal responsibility and accountability to the Government. With its exclusive control over national finances, the Government will get the blame for deficits or the credit for surpluses – as it should. However, we must remember that there is much political smoke and mirrors in the Crown's exercise of its financial initiative and I think it's fair to say that the House is not very effective in its oversight role on Government spending. I'm not at all sure, 175 years later, what Lord Durham would recommend were he looking at us today.

With regard to those two bills that became the *Kelowna Accord Implementation Act* (S.C. 2008, c. 23) and the *Kyoto Protocol Implementation Act* (S.C. 2007, c. 30), these bills were, in my opinion, legislative nullities *ab initio*.¹⁶ In a perfect parliamentary world, which will never emerge, these bills would have been ruled out of order at first reading. The Kelowna Accord bill did not propose measures implementing the Accord, which it could have done, of course (leaving aside the *royal rec* issue for the moment), but rather legislated for the Government to take legislative action that would implement the Accord. In my view, a bill cannot legislate the legislating of a matter, however worthy the matter might be seen by some. Moreover, a Government cannot by force of law be compelled to legislate on a matter. A bill that legislates legislative action is not doing anything; thus, a legislative nullity.

Similar considerations apply with respect to the Kyoto Protocol bill. It, too, proposed only that the Government legislate (through regulations) implementation of the Kyoto Protocol. The bill did not legislate measures designed to implement the Protocol.

Bills are parliamentary instruments by which legislative assemblies legislate, that is, make laws by which public policy objectives are made into laws that are enforceable in the courts. These two bills legislated only for the making of laws; they did not themselves make

16. SC 2008, c 23; SC 2007, c 30.

laws though they had the look and feel of doing so, that is, they took the form of legislative bills. They were empty legislative vessels, as it were.

As I have said, the legislative lawyers and the legislative clerks at the House had some great debates on Private Member's bills and the *royal rec* especially during the minority government years when this was a contentious issue. I remember desperately saying to those that I thought were too inclined to require a *royal rec* that it was not good enough that you could *smell* money, damn it! You had to see language that indicated that public funds were being appropriated or new spending was being necessarily authorized. In each case, one had to look closely at the language of the bill to determine what the bill was doing.

In other words, it was not good enough to rely on what the language of a bill may – I say “may” – be implying or inferring. It is not good enough, in my view, to adopt the approach of the Government's Chief Legislative Counsel, Peter Johnson, appearing before the Senate National Finance Committee in 1990, that the *royal rec* was required on any bill that involved public spending. What does involve mean? A mere inference of some spending is too vague and saying that public funds are involved in any legislative implementation is too broad, in my view.¹⁷

On the other hand, insisting on legislative language that indicated a clear intention to use public funds, as I had done, was too narrow. It seems to me that the balanced view is to require a royal rec on bills where implementation will unavoidably require a new or an increased expenditure of public funds from the Consolidated Revenue Fund, beyond incidental costs for which funds have already been authorized by an appropriation. Here as elsewhere, however, the Devil is in the details.

17. Senate, Standing Committee on National Finance, *Minutes of Proceedings* (October 1989) at 17A-1.

CHAPTER 6

**THE ‘CONVENTION’ TO CONSULT
PARLIAMENT ON DECISIONS TO DEPLOY
THE MILITARY: A POLITICAL MIRAGE?**

Alexander Bolt*

Canada’s military is active. At the time of writing, the Canadian Armed Forces (“CAF”) had more than 1200 personnel deployed abroad on operations, including in Haiti, South Sudan, the Sinai Peninsula, in support of NATO assurance measures in Eastern Europe, and as part of the Middle East Stabilization Force in Iraq.¹ Only a small segment of the Canadian population is aware of some deployments, with fewer still holding a position on whether they are a good or bad thing. Other deployments are more broadly known and discussed and might be the subject of intense opinions. To take two examples of those in the latter class, on 17 May 2006 a contentious vote took place on a government motion framed in terms of House of Commons “support” for the government’s decision authorizing a two-year extension to the mission in Afghanistan,² and the motion narrowly passed with 149 yeas to 145 nays. Nearly eight years later in mid-April of 2014 and in response to Russian actions concerning Ukraine, the government offered a number of assets including six CF-188 Hornets as part of NATO “reassurance measures”. There

* Lieutenant Colonel and legal officer in the Office of the Judge Advocate General, Canadian Armed Forces. The views expressed in this chapter are the author’s alone. They do not necessarily reflect, nor should they be taken to reflect, the views of the Government of Canada, the Department of National Defence, the Canadian Forces, or the Office of the Judge Advocate General.

1. Government of Canada, “Operation IMPACT” online: Government of Canada <<http://www.forces.gc.ca/en/operations-abroad-current/index.page>> (This figure is the lowest it has been for more than a decade, following Canada’s engagement in the armed conflict in Afghanistan).
2. The government moved that “the House support the government’s two year extension of Canada’s deployment of diplomatic, development, civilian police and military personnel in Afghanistan and the provision of funding and equipment for this extension.”

was some discussion in the press about whether this was the right thing to do, but the House of Commons did not pay much attention to the matter, and there was no debate, and no vote.³ Most recently, the CAF deployed six CF-188 Hornet fighter aircraft, along with a Polaris aerial refueller and two CP-140 Aurora surveillance aircraft, to Iraq. Before the deployment, and as the House of Commons discussed the situation in Iraq, the media generated analyses of the pros and cons on Canadian engagement there, with the *Globe and Mail* inviting the government and opposition to make their cases and asking the public to comment, and vote.⁴ In the event, the government put forward a motion in the House supporting its decision to deploy which passed 157-134 on 7 October 2014.⁵

In Canada's system of government, it is the executive – the cabinet, the Prime Minister, and on occasion individual ministers – that is empowered to authorize the deployment of the CAF on international operations.⁶ The relevant legal authority flows from the Crown prerogative, in Peter Hogg's definition "the powers and privileges accorded by the common law to the Crown".⁷ This legal authority is separate and distinct from authority granted the Crown in statute, but it is no less legitimate or important. Parliament plays no legal role in the exercise of the Crown prerogative to deploy the CAF.

The fact that the executive possesses powers and privileges independent of those sourced in parliamentary grants – and the power to deploy the CAF is only one of many – is a cause of concern to some. The Crown prerogative is archaic, they might argue, or an ill fit with Canada's 21st Century parliamentary democracy; relevant powers should belong to the House of Commons. For Rosara Joseph, writing about the situation in the United Kingdom, "the decision to deploy the armed forces is too important and solemn a decision to leave to the Prime Minister and an inner cabal of government ministers"; she

-
3. Philippe Lagassé, "Parliament Neglects its Duty to Debate Military Deployments", *Ottawa Citizen* (5 May 2014).
 4. "Your turn to vote: Should Canada enter Combat in Iraq?", *Globe and Mail* (3 October 2014).
 5. *House of Commons Debates*, 41st Parl, 2nd Sess, no 124 (7 October 2014) at 2045.
 6. For general discussion on the Crown prerogative authority to deploy the CAF, including decision making mechanisms, see A Bolt, "The Crown Prerogative in Canada and its Use in the Context of International Military Deployments", Office of the JAG Strategic Legal Paper Series Issue 2, 2008 [Bolt].
 7. P W Hogg, *Constitutional Law of Canada*, 5th ed loose-leaf (Toronto: Thomson Reuters, 2007) at 1.9. [Hogg] (this definition of the Crown prerogative was accepted by the Supreme Court of Canada in *Ross River Dena Council Band v Canada*, 2002 SCC 54 at 217, 2 SCR 816).

continues “in a constitution such as ours, which enshrines democratic values, we must revise our constitutional arrangements”.⁸ Others, including this author, hold contrary opinions: considered, as it must be, in the context of Canada’s system of responsible government, the Crown prerogative is a legitimate and often necessary source of authority.⁹

Connected to this debate in an interesting way are statements about the existence of a “convention” to consult Parliament before deployment decisions are made. Some in Canada appear to hold the position that such a convention exists.¹⁰ Others suggest there should be a convention along these lines, and that one may form at some point in the future,¹¹ while still others argue that this may not be the best way forward.¹² But perhaps a convention to consult Parliament before deployment decisions is a political mirage. It is not clear

-
8. R Joseph, *The War Prerogative: History, Reform, and Constitutional Design* (Oxford: University Press, 2013) at 219 [Joseph].
 9. See e.g. A Bolt, “Crown Prerogative Decisions to Deploy the Canadian Forces Internationally, a Fitting Mechanism for a Liberal Democracy” in D Michael Jackson and Philippe Lagassé, eds, *Canada and the Crown: Essays on Constitutional Monarchy* (Kingston: McGill-Queen’s University Press, 2014) [Bolt, *Crown Prerogative Decisions*].
 10. See e.g. J Ibbitson, “Commons unanimously backs Canada’s deployment to Libya”, *Globe and Mail* (21 March 2011): (“While constitutionally, the federal government can commit forces without consulting Parliament, Mr. Harper has adopted the convention of seeking parliamentary approval for deployments that involve military force”); (Interestingly, Lagassé – who elsewhere counsels caution in the formation of a convention – suggests that consultation is now an “expectation” which might be described as a “custom” (P Lagassé, “How Should Canada’s Parliament Decide Military Deployments? Lessons from the United Kingdom”, Policy Paper for Canadian Defence & Foreign Affairs Institute, Dec 2013 at 3 [Lagassé, “How Should Canada’s Parliament Decide Military”]).
 11. C Forcese, “Parliament, Creeping Constitutionalism, and the Deployment of Canadian Forces?” National Security Law: Canadian Practice in International Perspective, (5 January 11) (Blog) (asking the question “A New Constitutional Convention?”, Forcese concludes “There is no compelling record of which I am aware... suggesting that any (or at least a notable number) of the actors within the executive or Parliament considered that the vote on deployment was required by a mandatory rule. That expectation may develop organically with the passage of time, if deployment votes continue. But we aren’t there yet.”); see also P Lagassé, “Accountability for National Defence: Ministerial Responsibility, Military Command and Parliamentary Oversight” (March 2010) 4 Institute for Research on Public Policy at 14.
 12. See, generally Lagassé, “How Should Canada’s Parliament Decide Military”, *supra* note 10 (examining whether Canada should follow the “British example” and grant “members of Parliament control over the executive’s power to deploy the armed forces by means of a constitutional convention.”). See also P Lagassé, “Parliament shouldn’t decide when we go to war”, *Ottawa Citizen* (9 April 2010) (arguing against “subjecting military action to greater parliamentary control by convention or statute”) [Lagassé, “Parliament shouldn’t decide when we go to war”]; P Lagassé, “How Canada Goes to War”, *Ottawa Citizen* (3 December 2013)

what is meant by the term “convention”, in this context, in the first place. Indeed, it will be argued in this chapter, that either the term “convention” as applied to Commons consultation practices refers to a “constitutional convention”, or it is a concept empty of meaning in Canadian law and parliamentary practice.

If what is being suggested is a “constitutional convention” to consult the House of Commons before a military deployment, such a convention would stand alone among its peers; it would neither look like other constitutional conventions nor serve comparable purposes. And even if a consultation constitutional convention were a theoretical possibility, the test for the establishment of one is extremely hard to meet, and it has not been met.

Those discussing a consultation convention in Canada will often-times refer to the UK experience. This is reasonable; after all Canada’s constitution is “similar in Principle to that of the United Kingdom”.¹³ And has not the UK accepted the fact of a convention to consult their Parliament in advance of a deployment decision, and cannot we reposition the Canadian debate as a matter of when we will adopt the UK approach rather than whether a convention is even possible in the first place? While the broader Crown prerogative debate in the UK is very advanced, and a quick review of the relevant parliamentary and government statements might suggest a recognition by all of a convention to consult Parliament before deployments, this seemingly clear picture blurs on a closer look.

Given all of this, why are we talking about conventions in the military deployment context? It will be argued here that such talk is intimately linked with criticism of the underlying Crown prerogative authority for such deployments; for those who do not like the Crown prerogative’s use in the deployment context, a consultation convention is a desirable thing. Yet the argument – based in criticism – that a consultation convention exists has important implications for other modes of criticism. In the final analysis it is better to disregard the mirage of a convention to consult Parliament and instead focus analytical and critical energy on the first order questions: are we making deployment decisions in the right way, and are we making the right deployment decisions?

(referring to lessons Canadian Parliamentarians might learn from the UK experience, while suggesting existing arrangements might be good enough).

13. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 (preamble) [*Constitution Act*].

“CONVENTIONS”

A central fact of the convention debate is that the word “convention” is not given a single meaning by participants. Part of the problem is that it is a common word with a well-known, if loose, meaning. In regular speech, convention suggests consent to a practice, but this consent might be informal, perhaps implied or even just evidenced by anticipated or accepted behaviour. But even as the word convention can cover a wide range of practices, the term “constitutional convention” has a meaning in law and political theory that is very precise. Given this, those who would speak of conventions in the deployment context must be clear on what is meant. Foremost, it is crucial that those expressing views on consultation conventions not use the vernacular meaning for definitional purposes, and then, having found the existence of a “convention”, fall back on the legal sense of the term to supply the meaning and import of this finding.

Although some use terms such as “parliamentary convention”, “political convention¹⁴” or “binding convention”,¹⁵ or others,¹⁶ the term used most often in the deployment debate context is simply “convention”. On reading this single word, one might assume it is being used as shorthand for “constitutional convention”¹⁷ or that it is not. The key point here is that if “constitutional convention” is not meant, then the word is being used in a way devoid of legal or even practical meaning. In law and formal parliamentary practice, there are no conventions other than the constitutional kind.¹⁸ If a convention other

-
14. C Haddon, “Parliament, the royal Prerogative and decisions to go to war” Institute for Government Blog (6 September 2013) (Blog), uses both terms.
 15. See, e.g. J Hallwood, “The Syria vote was a triumph of parliamentary sovereignty” *New Statesman* (30 Aug 2013): “Votes such as last night’s are no longer mere rubber stamps but a binding convention that can change the foreign policy of a government” [Hallwood].
 16. P Brode, “War Powers and the Royal Prerogative” *Law Times* (1 May 2006) (uses the unlikely term “new prerogative”, described as where “Parliament is not only informed of events but demands a real say over whether or not the country goes to war in the first place.”)
 17. In at least one UK instance, this is implied. House of Lords Constitutional Committee, “Constitutional Arrangements for the Use of Armed Force” (24 July 2013) HL Paper 46 at footnote 42 (states: “The word ‘convention’ is, in constitutional parlance, a term of art. Although there is no universally accepted definition of the term, the feature common to all definitions is that, whilst a convention is not justiciable, it is nevertheless regarded by all relevant parties as binding. Constitutional conventions may therefore be regarded as practices which are politically binding on all involved, but not legally binding”)
 18. Leaving aside “conventions” in completely different contexts. For example, the title “convention” is used for certain types of treaties.

than a constitutional one were violated there would be no formal consequences beyond purely political ones; one side would state that a convention existed and that it was not followed and therefore that a wrong had been committed, and the other side could counter that the convention does not exist or that it exists in a form other than the one suggested. In other words, we can refer to conventions that are not constitutional conventions, but in doing so we commit ourselves to imprecision and indeterminacy. Such an approach is ill-suited to serious criticism, let alone policy-making.

In the UK context, we see an expert witness refer to a “convention with a small ‘c’” as a way of identifying this important difference.¹⁹ In Canada, the tendency has been to use completely different terms to capture the distinction. In the important decision of the Supreme Court of Canada (SCC) in the *Patriation Reference*,²⁰ and in Professor Hogg’s treatise on constitutional law, a convention is contrasted with a “usage”, or “practice”.²¹ It is undeniable that practices have developed respecting how the executive will make deployment decisions and the role the Parliament will have in these decisions (as they have in other areas). In Joseph’s words “governments have normally (consistent with constitutional orthodoxy) asserted their exclusive power over war and denied a role for Parliament in its exercise. But through practice, they have implicitly recognized that they must exercise the power in conjunction with Parliament”.²² But are these practices properly considered “constitutional conventions”? The answer is no.

19. See House of Lords Select Committee on the Constitution, “Waging War: Parliament’s role and responsibility” (27 July 2006) HL Paper 236-I at 88 (referring to witness Dr Howells’ interpretation of Gordon Brown as stating “that the way the House works at the moment (if you like, convention with a small ‘c’) is the way it ought to proceed”).

20. *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 at 883 [*Patriation Reference*] (the majority adopted an earlier definition of a convention which provided in part that “a convention occupies a position somewhere in between a usage or custom on the one hand and a constitutional law on the other,” and “that if one sought to fix that position with greater precision he would place convention nearer to law than to usage or custom”. Going even further, Jennings suggested that “members of the Government do not know and need not bother to know whether a rule is a matter of law or convention,” and “indeed, it is better that the rule should be law and not convention, for a law may be changed by legislation and a convention is rather difficult to change abruptly”: Sir Ivor Jennings, *The Law and the Constitution*, 5th ed (London: University of London Press, 1964) at 132 [Jennings].)

21. Hogg, *supra* note 7 at 1.10(c): “a usage is not a rule, but merely a governmental practice which is ordinarily followed.”

22. Joseph, *supra* note 8 at 96.

CONSTITUTIONAL CONVENTIONS

In contrast to the imprecision and indeterminacy of “conventions”, constitutional conventions have an extremely important place in Canada’s constitutional fabric. The purpose of constitutional conventions and how they interact with the law and what might be called mere practice are discussed by commentators in law and political science. In addition, however, we have an in-depth analysis of constitutional conventions by the SCC in its 1981 decision in the *Patriation Reference* where it held²³ that there was a convention requiring the federal government obtain a “substantial” degree of provincial consent before it requested the UK Parliament to enact an amendment to the Constitution of Canada.²⁴

British constitutional theorist A.W. Dicey probably coined the term, and he described conventions as “the principles and rules of responsible government”.²⁵ Hogg describes “rules of the constitution that are not enforced by the law courts”.²⁶ Two things may be said. First, constitutional conventions are *rules*, rather than practices: the relevant norm is that the concerned players *must* act in a certain way by constitutional rule. Second, far from referring to political practices that have developed simply as rules of procedure, the term “constitutional convention” is reserved for rules foundational to the operation of our parliamentary democracy. “Constitutional conventions are the manifestation of constitutional principles”,²⁷ and as the SCC has said, “constitutional conventions plus constitutional law equal the total constitution of the country”.²⁸ So important are constitutional conventions to the operation of the political system that if they were not followed a change in the law would be required.²⁹ To violate a convention is to act unconstitutionally.³⁰

23. Six of the justices agreed on the “conventional aspect” of the case, with three dissenting.

24. As Hogg argues at 1.10(b), it is not clear that the SCC should have decided the question at all given that the conclusion that a convention exists did not have legal relevance. With the *Patriation Reference* the SCC became the first in the Commonwealth to engage directly with the matter of constitutional conventions: see Hogg, *supra* note 7 at 1.10(c).

25. *Patriation Reference*, *supra* note 20 at 878.

26. Hogg, *supra* note 7 at 1.10(a) (citation omitted); in a similar vein see Jennings at 103.

27. J Bowden & N MacDonald, “Cabinet Manuals and the Crown” in D Michael Jackson and Philippe Lagassé, eds, *Canada and the Crown: Essays on Constitutional Monarchy* (Kingston: McGill-Queen’s University Press, 2014) [Bowden & MacDonald].

28. *Patriation Reference*, *supra* note 20 at 883-84.

29. See e.g. Hogg, *supra* note 7 at 1.10(e): “Since conventions are not legally enforceable, one may well ask: why are they obeyed? The primary reason is that breach of a convention would result in serious political repercussions, and eventually in changes in the law.”

30. *Ibid* at 1.10(a); *Patriation Reference*, *supra* note 20 at 883-84.

The “main purpose of constitutional conventions” as described by the SCC “is to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period”.³¹ For Jennings, “the short explanation of the constitutional conventions is that they provide the flesh which clothes the dry bones of the law; they make the legal constitution work”.³² Several examples of existing Constitutional conventions serve to illustrate their preeminence:

- At law, the Queen could refuse assent to bills passed by the legislature, but convention prohibits this; such an action would be “unconstitutional”.
- Also at law, a government could refuse to resign following a general election won by the opposition; in certain circumstances such an action would be a very serious breach of convention, and would amount to a coup d’état.
- By convention, the person who is appointed Prime Minister must have the support of the House of Commons.
- By convention, Ministers are appointed on the advice of the Prime Minister.³³

A further example of a constitutional convention benefits from closer study. By law, the prerogatives of the Crown are exercised by the titular Crown “on the advice of” the government.³⁴ Without conven-

31. *Patriation Reference*, *supra* note 20 at 880. Quoting this statement, Hogg goes on to say: “they bring outdated legal powers into conformity with current notions of government.” (1.10(e))

32. Jennings, *supra* note 20 at 81-82, (Jennings also states that they are “the motive power of the constitution” (at 83)).

33. This list comes from the *Patriation Reference*, *supra* note 20 at 878-82 (not being necessary for determination of the case, the list is *obiter dicta*. Note there has been a great deal of discussion lately about the first two of these examples, in which simplified versions of the rules have been called into question. For discussion on the first example, see “The Day After an Election,” briefing session, Institute for the Study of the Crown in Canada, Massey College, 9 June 2014. The points being made here do not depend on whether rules applicable in these situations are or are not properly titled “constitutional conventions,” the exact content of the rules, or precisely how they apply practically, but simply that these are *the sorts of situations* that are dealt with by constitutional conventions. In fact if the “rules” for these two situations – central as they are to the proper functioning of responsible government – are not constitutional conventions, or the constitutional conventions are more complex than previously thought, this would strengthen the argument that there are no constitutional conventions surrounding “mere” executive decisions to deploy the military).

34. In fact, the advice is to come from the Privy Council, and the Sovereign or the Governor General can also make decisions alone: see *Constitution Act, 1867*, *supra* note 13 at ss 9-13.

tion to modify the legal rule, it would be the Sovereign making Crown prerogative decisions, possibly through the person of the unelected Governor General.³⁵ By constitutional convention, however, decisions under Crown prerogative power are made by the government: whole of cabinet, the Prime Minister, and in certain circumstances individual ministers. The “advice” called for by the law becomes, by convention, the decision itself.³⁶

THE IDEA OF A CONSULTATION CONVENTION TO CONSULT PARLIAMENT

Given the place of constitutional conventions in the Canada’s constitution, their purpose, and examples of them, what do we make of a practice to consult Parliament before military deployment?

Before getting into this question, we need more clarity on what such a convention would look like, and most importantly what it would say about actual decision-making power. Unfortunately, oftentimes the convention is kept at the level of abstraction – for example a “convention to consult Parliament” or even “Parliament is engaged in deployment decisions as a matter of convention” – rather than given a concrete form. There are three options as to what a “convention to consult Parliament” could actually be:³⁷

1. The convention to “consult” Parliament could mean that the House of Commons is the actual decision-making authority on the deployment, with the executive merely putting an option on the table.³⁸

35. The Governor General was appointed by the Queen (under prerogative authority) by the *Letters Patent Constituting the Office of Governor General of Canada, 1947*, RSC 1985, Appendix II, No 31.

36. For a discussion on this point see Bolt, *supra* note 6 at 9.

37. Given the categorization that follows it is difficult to know what to make of statements such as this one by Hallwood, *supra* note 15: “while the Prime Minister officially retains the Royal Prerogative to declare war, it is clear that this power is now tempered by the convention that Parliament must vote on the matter beforehand.”

38. Several commentators suggested this for the UK following the Syria vote, see e.g. G Phillipson, “Parliament’s Role in the Use of Military Action After the Syria Vote”, videotaped lecture: March 2014, available at <http://vimeo.com/88916249> [Phillipson], who described the Commons as having “a real veto”; “Syria intervention: is there a new constitutional convention,” *The Guardian* (2 September 2013): “the convention also now requires a vote on a substantive motion and that an adverse vote would make military action impossible...”; and C Moore, “The world is not a better place for Britain taking a back seat over Syria”, *Telegraph* (30 August 2013): “Mr Cameron has, in effect, lost what is called the ‘royal prerogative’”.

2. The convention to “consult” might amount to a “two-key” decision-making process, with the agreement of both executive and the Commons required for a particular deployment.³⁹
3. The convention to consult could mean simply that: the executive must put its decisions to the Commons for reaction and debate, but the Commons does not hold any formal authority to veto the decision or substitute another decision for it.⁴⁰

The first possibility must be discarded. As mentioned, there is another convention, itself sourced in the constitutional authority for the Privy Council to “advise” the Sovereign, which requires that the executive make Crown prerogative decisions. Were the consultation convention to be interpreted as granting Parliament sole decision-making authority, this would amount to the abolishing of this underlying convention. The development of such a “consultation” convention would therefore involve two important changes: first, the existing legal and conventional structure giving the executive authority to decide on deployments would need to be destroyed, and second the Parliamentary decision-making power – sourced in constitutional convention – would spring into being. It appears that no one is actually suggesting that the executive has been or should be stripped of its authority to exercise the Crown prerogative. Furthermore, this change would move a decision-making power from the executive branch to the legislature, and perhaps such a fundamental change should not occur via development of constitutional convention. Some would argue that the executive’s control over the military – including deployment authority – exists in the written constitution and could therefore not be changed by ordinary legislation, let alone a constitutional convention.⁴¹

Likewise, the second possibility is not workable. Both this possibility and the previous one stretch the meaning of the word “consult”

39. Perhaps suggested by former UK Parliamentary Under Secretary of State at the Foreign and Commonwealth Office Alistair Burt, “Vote that ties Britain’s hands,” (2014) 70:1 *The World Today* 30 at 32, (where he states that Parliament and government have “worked to a convention that if troops are to be deployed, then the Commons will get a vote”.)

40. This appears to be Joseph’s position. *Supra* note 9 at 109, (she asserts the existence of a constitutional convention to consult, but also states “The executive is the policy and decision-making body. Parliament’s participation is limited to trying to influence those policies and decisions”.)

41. P Lagassé, “The Crown’s Powers of Command-in-Chief: Interpreting Section 15 of the Constitution Act, 1867” (2013) 18:2 *Review of Constitutional Studies* 189 (suggests that such a change would have to come through constitutional amendment).

past its breaking point. Beyond this, a “two-key” decision-making process would be unprecedented not only as a process sourced in convention, but in the wider activity of Canadian government. The system of responsible government works through a mechanism of single, accountable, decision-making authorities. For example, executive decision-making is subject to criticism in the Commons and the Senate, and the government ultimately requires the confidence of the Commons to remain in power. It is Parliament that makes statute law in Canada; the Crown’s role in this law-making process is limited to the almost entirely symbolic providing of assent.⁴² Hogg seems to suggest against the possibility of a convention that would create a two-key system when he states: “some conventions have the effect of transferring effective power from the legal holder to another official or institution. Other conventions limit an apparently broad legal power, or even prescribe that a legal power shall not be exercised at all”.⁴³ At all events combined decision-making must be ill advised. In such a case accountability for the decision is shared and responsibility is hard to apportion. Also, the institutionalized critic function inherent in the Commons would be lost.⁴⁴

The third possibility – that the posited convention requires the executive to consult with the Commons but not to grant the Commons veto authority – is by far the most likely. This type of consultation has precedent in other political processes.⁴⁵ What must immediately be acknowledged, however, is that this is a very limited form of parliamentary power. In addition, however, this conception of the consultation convention raises questions about whether such a “rule” is sufficiently important and central to the workings of responsible government to be termed a constitutional convention.

It might first be said that such a consultation practice does not seem like the sort of matter that is dealt with by constitutional convention. The Crown’s role in the passage of legislation, the resignation of a government defeated in a general election, the appointment

42. For a discussion of assent to Bills, as well as royal recommendation and consent, see chapters 4 and 5.

43. Hogg, *supra* note 7 at 1.10(a).

44. For a discussion of this point in the context of wider criticism of the Crown prerogative, see Lagassé, “Parliament shouldn’t decide when we go to war”, *supra* note 12 at 12-13, 16.

45. See Jennings, *supra* note 20 at 102: “It is now recognised that in framing social legislation the appropriate department must consult the appropriate outside ‘interests.’” (Clearly, Jennings did not mean to imply that such outside interests – including e.g. the trade unions – had actual decision-making power).

of ministers who will have executive authority: related decisions are at the core of functioning responsible government, and the rules governing such decisions are properly accorded constitutional status. Conversely, while critics might object to deployment decisions made under Crown prerogative authority, it must be granted that consultation with Parliament is not *necessary* for our responsible government system, which functions fine without such a practice. In discussing the relationship between conventions and law, Hogg has said: “Each convention takes a legal power that would be intolerable if it were actually exercised as written, and makes it tolerable. If the convention did not exist, the legal power would have to be changed”.

In the *Patriation Reference* the SCC spoke of conventions having a “constitutional value” as a “pivot”.⁴⁶ In that case a convention was found because the “federal principle” could not tolerate federal authority to modify provincial powers unilaterally.⁴⁷ But the SCC also spoke of the “democratic principle” as a convention pivot: “the powers of the state must be exercised in accordance with the wishes of the electorate”.⁴⁸ It is presumably this principle that would be at play with a convention to consult Parliament before deployment decisions. This position, however, would misapprehend the notion of the constitutional pivot and the reason for constitutional conventions.⁴⁹ In the *Patriation Reference*, the SCC described the resulting convention as an “essential requirement” of the “federal principle”,⁵⁰ stating “the purpose of this conventional rule is to protect the federal character of the Canadian Constitution and prevent the anomaly that the House of Commons and Senate could obtain by simple resolutions what they could not validly accomplish by statute”.⁵¹ On the other hand, the democratic principle is already met with existing deployment decision-making mechanisms and is inherent in the system of responsible government. The government is formed by the party

46. *Patriation Reference*, *supra* note 20 at 880.

47. *Ibid* at 905 (it is this framework for the decision-making power at issue that makes it different in kind from the notion of a convention to “consult” Parliament before executive deployment decisions).

48. *Ibid* at 880.

49. Likewise, in an argument that misses the mark in the sense of falling short of the purposes for and requirements of constitutional conventions, Joseph states at *supra* note 8 at 183: “it seems clear that a rule requiring the government to seek parliamentary approval before going to war serves a necessary role in promoting constitutional government.” With respect, a “necessary role in promoting constitutional government” is not enough to ground out a constitutional “rule” requiring parliamentary consultation.

50. *Supra* note 21 at 906.

51. *Ibid* at 908.

that can carry the confidence of the House of Commons, ministers of the Crown are generally selected from among those elected, and the government must at all times hold the confidence of the elected house. While it could be argued that deployment decisions would be *more* democratic were they to be made in consultation with Parliamentarians (again, not a universally held view), the important fact is that decisions without consultation are not *undemocratic*.⁵² Executive decisions to deploy the military made without parliamentary consultation may be criticised by some, but such decisions are not “intolerable”, and they certainly cannot be considered “unconstitutional”.⁵³

A second and related idea is that based on existing conventions, rules on *who* in Canada’s political system should be making decisions are properly the subject of constitutional conventions. Rules about *how* these decisions are made are different in kind. In the first category are rules such as that requiring the legislature (rather than the Sovereign) to be the lawmaker, and the electorate (rather than government) decide who will govern the country. A consultation convention would be different; such a practice would not relate to who made the deployment decision (it would still be made by the executive) but instead would insert an element of procedure. Such a practice is simply a *practice*. It is not a constitutional convention.

A final idea relates to the source of the underlying decision-making authority for military deployments. As earlier discussed, it is the executive that wields this authority and not the person of Sovereign. But, and importantly, this is so because of convention. With this background, it is clear that a convention to consult Parliament in advance of military deployments would amount to a “convention on a convention”. This would be a situation unique in Canada’s constitution,⁵⁴ but also raises questions about the absolute and necessary status constitutional conventions are meant to have. Positing conventions of this secondary class would broaden immeasurably the

52. For an argument against the view that Crown prerogative decisions to deploy violate the democratic principle, see Bolt, *Crown Prerogative Decisions*, 2014.

53. Indeed, Jennings, *supra* note 20 at 133 states that not only is a violation of a convention “unconstitutional”, it will also be “contrary to the traditions of a free people and the principles upon which democratic government must be based.”

54. Note Phillipson seems to accept the notion of a second convention on top of a first: G Phillipson, “‘Historic’ Commons’ Syria vote: the constitutional significance (Part I)” (19 Sep 2013) (Blog), online: UK Constitutional Law Association <<http://ukconstitutionallaw.org/2013/09/19/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-i/>> [Phillipson] (see also Phillipson, 2014 videotaped lecture. In any case this understanding is necessary to his logic).

class of activities that could be considered conventions, but would also do existing conventions a disservice. If a violation of a convention to consult Parliament before a deployment had the same status as a refusal of the government to resign in the face of a contrary general election, something of the import in the latter would be lost.

THE DIFFICULT CONSTITUTIONAL CONVENTION TEST HAS NOT BEEN MET

In the previous section, it was argued that there is something flawed about the very idea of a constitutional convention to consult Parliament before a deployment decision. But even if this hurdle is cleared and we accept that such a convention is a theoretical possibility, the simple fact is that there is no such constitutional convention in Canada. The test for the establishment of a constitutional convention is a very difficult one. For any practice to consult Parliament on military deployments this test has not been passed to date, but beyond this it would be extremely difficult to pass in the future.

In his seminal work on the UK constitution, Sir Ivor Jennings devoted an entire chapter to constitutional conventions, and laid down the test for the existence of one: “We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?”⁵⁵ This was the test applied by the majority in the *Patriation Reference* and it is the law of Canada.⁵⁶ It may be said unequivocally that even if one were possible, there is no constitutional convention to consult Parliament before deploying the military because this test has in no way been met. In fact the application of the test hangs up in its every aspect.

The simple and overriding fact here is that there has been no consistent practice of consulting the Parliament on deployment decisions. Sometimes it is done, sometimes not; when it is done different mechanisms are used. Generally speaking, governments from 1950 to 1992 used the *National Defence Act* mechanism of placing members of the military on “active service”.⁵⁷ This mechanism has a statute-

55. Jennings, *supra* note 20 at 136; Phillipson, *supra* note 54, refers to Jennings’ “classic three fold test for the existence of a Convention”.

56. *Patriation Reference*, *supra* note 20 at 888. For Hogg’s discussion of the test see *supra* note 7 at 1.10(c)

57. RSC 1985, c N-5 s 31(1) (section 31(1) [NDA] reads: “The Governor in Council may place the Canadian Forces or any component, unit or other element thereof

based Commons debate requirement,⁵⁸ and was used from Korea, through a 1964 Order-in-Council on Cyprus, in the early 1990s on Iraq, to the deployment in Somalia. Importantly, and contrary to the views of some,⁵⁹ there is no relevant legal significance to these active service designations;⁶⁰ the governments of the relevant day used them to enable Commons debate only: throughout this period and into the present, all regular force military members were and are on active service “for all purposes”.⁶¹

Since 1992, however, successive governments have moved away from bespoke active service designations towards Commons “take note” debates for some but not all deployments, sometimes followed by a vote on a related motion and sometimes not. This practice was used, for example, for operations in the Former Yugoslavia, for peacekeeping in Ethiopia and Eritrea, the engagement in Afghanistan, and most recently for Canada’s deployment in 2014 to Iraq. Importantly, with those debates that do involve votes the relevant motions have been worded in a way that is highly significant: the House of Commons has voted in each such case to indicate its support for a government deployment decision.⁶² For example, the recent government-introduced motion on Iraq asked in part that the House “support the Government’s decision to contribute Canadian military assets to the fight against ISIL, and terrorists allied with ISIL, includ-

or any officer or non-commissioned member thereof on active service anywhere in or beyond Canada...”)

58. See NDA s 32.

59. See e.g. dissenting opinion of J DeP Wright J in *Aleksic v Canada (Attorney General)* (2002), 215 DLR (4th) 720 at 724, (Ont Div Ct).

60. Being placed on active service simply means that a number of disciplinary and other consequences are brought into existence with respect to the member: see NDA ss 30(1) and 77, 88, 97. A member can be placed on active service without being deployed, and a deployed CAF member need not be placed on active service.

61. The current Order-in-Council is P.C. 1989-583 (6 April 1989), which is merely the last in an unbroken line of designations from P.C. 1950-4365 of 9 Sep 1950 at the time of participation in the Korea action.

62. For a discussion of the practice until May 2006, see M Dewing & C McDonald, “International Deployment of Canadian Forces: Parliament’s Role”, Library of Parliament (18 May 2006) at appendices 1 and 2. On 13 March 2008, the House passed a motion supporting the government’s decision to extend the mission in Afghanistan to July 2011. While this motion states that the “extension of Canada’s military presence in Afghanistan is approved by this House,” this statement is under a heading containing the words “it is the opinion of the House,” and the lengthy motion is full of “should” phrasing. While the motion does not contain the “support” to the government formula, its overall tenor is one of support (see e.g. Allan Woods, “Conservatives, Liberals extend Afghanistan mission”, *Toronto Star* (14 March 2008) which reported that the House “endorsed the will of the Conservative government”).

ing air strike capability for a period of up to six months”.⁶³ This voting mechanism is clearly driven by political considerations, rather than recognition of a consultation rule or principle.

Not only has the practice been inconsistent, it is highly relevant that sometimes the government has failed to consult Parliament at all. For example, there was no consultation in relation to Canada’s contribution in 2014 to NATO Reassurance Measures regarding Ukraine. As the majority stated in the *Patriation Reference*, the precedents put forward for a convention must be considered in both positive and negative terms.⁶⁴ In coming to its conclusion that there was a convention to get the substantial agreement of the provinces, the majority noted that “no amendment changing provincial legislative powers has been made since Confederation when agreement of a province whose legislative powers would have been changed was withheld. There are no exceptions”.⁶⁵ By contrast, history shows a practice of consulting Parliament before deployment decisions that is replete with exceptions.

The requirement for precedents is only the first arm of the test: even if we had the practice – and it is clear that we do not – in Jennings’ words “practice alone is not enough. It must be normative”.⁶⁶ In other words, there is a requirement that actors in the precedents act in that way because they believe there are *obligated* to do so.⁶⁷ In finding that this arm of the test was met in the *Patriation Reference*, the majority pointed to confirmatory language in a White Paper, as well as statements by different government ministers.⁶⁸ In the case of a parliamentary consultation convention, however, we have no similar record of government statements.⁶⁹ In addition, two facts make it clear that governments have *not* thought consultation to be obligatory. The first is the inconsistent practice itself, which suggests that far from governments acting on the basis of a perceived obligation of some sort, they are motivated by political expediency. The second is

63. House of Commons, *Journals*, 41st Parl, 2nd Sess, No 123 (6 October 2014) (Government Business No 13).

64. *Patriation Reference*, *supra* note 20 at 891.

65. *Ibid* at 893.

66. Jennings, *supra* note 20 at 135.

67. There is a parallel here with the formation of customary international law, see *Statute of the International Court of Justice* article 38(1)(b), and the *North Sea Continental Shelf* (1969), ICJ at paras 74 and 77.

68. *Supra* note 21 at 898-902.

69. One place in which such a practice might be “officialised” is in the *Manual of Official Procedure of the Government of Canada*, Henry F Davis & André Millar (Ottawa: Government of Canada, 1968): see Bowden & MacDonald, *supra* note 27.

the simple and overwhelming fact of statements to the contrary. In November of 2010, for example, Prime Minister Harper announced that Parliament need not be consulted on the government's extension of the Afghan mission.⁷⁰

The recent experience in the lead up to the Iraq deployment is also illustrative of both of these points. In the face of opposition calls for a Parliamentary debate and vote, the government first indicated that it had no intention of holding a vote on a possible deployment to Iraq, suggesting strongly it did not believe it was required by law or convention to do so.⁷¹ While the government did, one month later, move that the House support the government's deployment decision, it was guaranteed to win the resulting vote since it held a majority in the House; it is clear the decision to have a vote was driven by political and not legal considerations. But the situation also produced an interesting secondary debate. The Opposition and certain commentators⁷² linked the earlier refusal to hold a vote to the government position that the mission in Iraq would not involve 'combat,' and suggested that this meant votes would, or must, be held when they do involve combat.⁷³ If we accept for the moment that the government was drawing a true distinction, this would provide clear evidence that the government did not believe a convention to consult existed for non-'combat' deployments (however these may be defined). Further, none of this amounts to recognition of a consultation convention for 'combat' missions. A key government quote seized on by the opposition as evidence of an undertaking is the Prime Minister's: "whenever there has been deployment of a combat nature, the government

70. "Afghan training mission doesn't need vote: PM", *CBC News* (12 November 2010).

71. L Berthiaume & D Pugliese, "Opposition calls for vote, debate over Iraq deployment", *Ottawa Citizen* (6 September 2014). See also M Petrou, "Iraq and the proper path to war", *Maclean's* (1 October 2014)[Petrou]; and J Wingrove, "Iraq deployment not up for vote, Harper says", *The Globe and Mail* (15 September 2014) [Wingrove].

72. See e.g. *Ibid*; see also P Lagassé, "When Does Parliament Get to Vote on Military Deployments?" CIPS Blog (8 September 2014) online: CIPS <<http://cips.uottawa.ca/when-does-parliament-get-to-vote-on-military-deployments/>>, and Petrou, *supra* note 71, who seems to go further, suggesting that special treatment for "military missions involving combat", or deployments in an "explicit combat capacity", respectively, have been rules of longer standing.

73. This position amounts to a reframing of the issue considered in this chapter. Instead of a convention to consult Parliament on deployment decisions being at issue, the question would concern a narrower class made up of a certain type of mission (one involving 'combat') only. All of the arguments made here against the existence of a convention would apply with equal force to the narrower convention, acknowledging that those based on past precedent (negative and positive) would contain fewer applicable examples.

has put this to Parliament for a further confidence vote. Mr. Speaker, that is not the case with the present mission to Iraq.”⁷⁴ This phrasing describes past events and suggests a pattern for the future. At all events its use supports recognition of a political undertaking, rather than a legal or conventional obligation.

The third requirement for a constitutional convention is a reason for it, and the application of this arm of the test may be dealt with summarily. As has already been argued, a practice of consulting Parliament before military deployments is not a good fit with existing constitutional conventions because it is unlike the others and has no constitutional value “pivot”. Much less can it be said that such a convention would have the required “reason”.

UK EXPERIENCE

Some have argued that in the UK there is a convention to consult Parliament before deployments, and that therefore the Canadian convention debate can be reduced to the straightforward one of whether Canada has adopted the UK position, or should adopt it in the future.⁷⁵ However the UK position is not so simple.

There is no doubt the wider Crown prerogative analysis is far advanced in the UK. Since 2004 and following on the UK decision to go to war in Iraq, there have been no fewer than 24 official reports or statements dealing with the Crown prerogative in the UK: nine by three different House of Commons committees, three by Lords committees, one by a joint committee, seven by the government, and four by the Commons Library. Thirteen of these reports and statements – of varying lengths – deal specifically with the Crown prerogative authority to deploy the military. On top of this, during this time period the UK has gone through a general election in which the Crown prerogative to deploy was an issue, plus a decision to deploy in Libya and the now-famous August 2013 Commons decision not to further consider a deployment in Syria. This has resulted in a rich dialogue on the Crown prerogative power to deploy the military, and no small number of references to a “convention” to consult Parliament before exercise of this power. Yet in spite of all of this activity, a definitive UK position on the existence or not of a relevant constitutional convention is elusive.

74. Wingrove, *supra* note 71.

75. See e.g. Lagassé, “How Should Canada’s Parliament Decide Military”, *supra* note 10.

Broadly speaking, the UK dialogue on the convention issue can be separated into two: that which took place before the general election of 2010, and that after. Prior to the election, both a Commons committee in 2004⁷⁶ and Lords committee in 2006⁷⁷ referred to the argument that a convention to consult Parliament before a deployment had already formed following the 2003 Iraq deployment decision (in which prior parliamentary approval was obtained). However neither committee accepted this argument, and, importantly, the government expressly denied that the convention existed.⁷⁸ In fact at this time, the *development* of a convention was one of several options on the table for a Parliamentary consultation framework⁷⁹ (one with which the government expressly disapproved).⁸⁰ While there was a slight change in approach when Gordon Brown took over from Tony Blair as prime minister, this change was simply that the government first said it *would* propose that a “parliamentary convention” be developed,⁸¹ and then put forward language for a related parliamentary resolution.⁸² But in the event, before the government could

-
76. UK, The House of Commons Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (16 March 2004) (London: The Stationery Office Limited) HC 422 at 6.
77. House of Lords Select Committee on the Constitution, *Waging War: Parliament's role and responsibility*, 2006 at 86.
78. A February 2005 statement by the Prime Minister to the effect “he did not think the vote set a constitutional precedent,” was acknowledged by the 2006 Lords Committee at 86, and the Lord Chancellor confirmed this position to the committee directly in answer to its question 273, stating: “you could not possibly go to war with Parliament against you because it is the embodiment of the people, but that is not the same as saying, as you are trying to say, that therefore gives rise to a convention that subject to emergencies or secrecy you have got to go to Parliament and have a vote on the substantive motion as to whether or not Parliament supports it.”
79. For the 2006 Lords Committee, the appropriate way forward was the development of a “parliamentary convention” (at 108).
80. See Government Response to the House of Lords Constitution Committee's Report, 15th Report of Session 2005-06, *Waging War: Parliaments Role and Responsibility* (7 November 2006) (London: The Stationery Office Limited) CM 6923 (the government went on to say: “the existing legal and constitutional convention is that it must be the Government which takes the decision in accordance with its own assessment of the position”.)
81. UK, “Governance of Britain”, cm 7170, Green Paper (July 2007) at 29; See also “War powers and Treaties: Limiting Executive powers”, cm 7239, Consultation Paper (25 October 2007) at 22 and its question 11.
82. UK, HC, “Constitutional Renewal”, cm 7342-I, White Paper (25 Mars 2008) at 215 and Annex A “draft detailed war powers resolution”. UK, The Commons Public Administration Select Committee, *Constitutional Renewal: Draft Bill and White Paper* (4 June 2008) (London: The Stationery Office Limited) HC 499 at 79; and the Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill* (31 July 2008) HL 166-I and HC 551-I at 318, 347; both agreed that the resolution capturing the “parliamentary convention” was the best way forward.

submit the draft resolution for formal consultation,⁸³ it was replaced following the May 2010 general election by the Conservative and Liberal Democrat coalition.

The Coalition Government's approach to the convention issue would be markedly different from that of its Labour predecessor. Most importantly, in a number of statements the government purported to acknowledge the existence of a "convention" – at least of some sort – to consult Parliament before deployments. In an oft-quoted example, in the March 2011 run-up to the intervention in Libya, Sir George Young, Leader of the House of Commons, stated: "A convention has developed in the House that before troops are committed, the House should have an opportunity to debate the matter. We propose to observe that convention except when there is an emergency and such action would not be appropriate".⁸⁴ Later that year, following pressure from the Commons Political and Constitutional Reform Committee⁸⁵, the government amended the Cabinet Manual – which was then in draft form – to read: "In 2011, the Government acknowledged that a convention had developed in Parliament that before troops were committed the House of Commons should have an opportunity to debate the matter and said that it proposed to observe that convention except when there was an emergency and such action would not be appropriate".⁸⁶

The coalition approach made great political sense. The two parties that made up the coalition had both campaigned in part on the promise to submit decisions regarding deployments to Parliamentarians. Upon taking the leadership of the Conservative Party in 2005, and in the role as critic of the ruling Labour government, David Cameron established the Democracy Task Force which produced a 2007

83. As it promised to do in Ministry of Justice, *The Governance of Britain*, "Review of the Executive Royal Prerogative Powers: Final Report" (October 2009) at 37.

84. UK, HC, *Parliamentary Debates*, vol 524, No 130, col 1066 (10 March 2011); Joseph, *supra* note 8 at 105 without any analysis on the point, refers to this statement as an acknowledgement of a "constitutional convention". See also *Constitution Act*, *supra* note 13 at 183.

85. UK, Political and Constitutional Reform Committee, *Constitutional Implications of the Cabinet Manual* (29 March 2011) (London: The Stationery Office Limited, 2011) HC 734 at 61; UK, Political and Constitutional Reform Committee, *Parliament's role in conflict decisions* (17 May 2011) (London: The Stationery Office Limited, 2011) HC 923 at 3.

86. "The Cabinet Manual: A guide to laws, conventions and rules on the operation of government," 1st ed (October 2011) at 5.38. (The Manual defines "Conventions" as "Rules of constitutional practice that are regarded as binding in operation but not law".)

report calling for parliamentary approval of military deployments.⁸⁷ More broadly, criticism of the Crown prerogative can be linked with populist strands of political conservatism.

Notwithstanding that the Coalition Government acknowledgement of the convention probably owes more to political and ideological factors than any objective assessment of parliamentary practice, the fact remains that the government did make statements about a convention to consult. However what has the Coalition Government said, exactly? There is no clear answer to this. Very importantly, the use of the terms “convention”⁸⁸ and “parliamentary convention,”⁸⁹ rather than “constitutional convention,” suggest what is referenced is a usage or practice rather than a constitutional obligation.⁹⁰ Also, in support of the existence of the “convention,” the government referred to the decision-making on the 2003 Iraq deployment; precisely the same precedent that was rejected by the Labour government (which was in power at the time) as creating a constitutional convention.⁹¹ We also find ambiguity in the words used to describe the “convention”. It provides an “*opportunity* to debate” a deployment; and situations of emergency where debate “would not be appropriate” are excluded.⁹² In addition, the actual practice of the coalition is not entirely consistent with the view that it was constitutionally bound to consult

87. R Gough, *An End to Sofa Government: Better working of Prime Minister and Cabinet* (London: Conservative Democracy Task Force, March 2007) at 1, 7-8.

88. UK, Political and Constitutional Reform Committee, *Parliament's role in conflict decisions: a way forward* (27 March 2014) (London: The Stationery Office Limited, 2014) HC 892 at 3.

89. See e.g. “The Government’s Response to the Report of the Lords Constitution Committee into Constitutional Arrangements for the Use of Armed Force Published on 24 July,” 25 Oct 2013, in which the government referred to “its commitment to respect the existing Parliamentary convention: that, before UK troops are committed to conflict, the House of Commons should have the opportunity to debate the matter, except where there was an emergency and such action would not be appropriate.”

90. Haddon implies this in discussion on the Syria vote: “a strong political convention has therefore been set...so the question that now remains is whether such a convention should be fixed constitutionally”. See also UK, House of Commons Library, “Parliamentary Approval for Deploying the Armed Forces: An Update”, SN05908 (13 October 2014), which seems to use the terms “constitutional convention” and “convention” to refer to two separate things.

91. In his March 2011 in reply to a question of the Commons Political and Constitutional Reform Committee, Cabinet Secretary Sir Gus O Donnell said: “the Government believes that it is apparent that since the events leading up to the deployment of troops in Iraq, a convention exists that Parliament will be given the opportunity to debate the decision to commit troops to armed conflict...”

92. For Joseph, *supra* note 8 at 185, “the government wanted to protect its extensive discretion and power over the decision to go to war and to restrict Parliament’s involvement to a purely formal approval of the executive’s decisions...”

Parliament. The government announced British participation in the operation to enforce the no-fly zone in Libya under United Nations Security Council Resolution 1973 on 18 March 2011, three days before the Commons would have the opportunity to debate the matter;⁹³ and in 2013, the government declined to engage Parliament at all in its decision to deploy assets in Mali.⁹⁴ Finally, even in the face of seemingly clear government acknowledgment of a convention, some academics have denied one has sprung into being. For example, in evidence to the Commons Political and Constitutional Reform Committee referred to in its 2011 report, Professor Nigel White stated: “I don’t think there is a constitutional convention or unwritten law that Parliament should be consulted about conflict decisions”.⁹⁵

On 29 August 2013, the House of Commons engaged in a debate on the situation in Syria and options for UK engagement there. Following debate, the Commons voted down a motion including wording that “a strong humanitarian response is required from the international community and that this may, if necessary, require military action that is legal, proportionate and focused on saving lives by preventing and deterring further use of Syria’s chemical weapons”.⁹⁶ Immediately following the announcement of the vote results, The Right Honourable Edward Miliband MP, Leader of the Opposition, raised a point of order asking “the Prime Minister [to] confirm to the House that, given the will of the House that has been expressed tonight, he will not use the Royal Prerogative to order the UK to be part of military action before there has been another vote in the House of Commons”.⁹⁷ Prime Minister Cameron answered: “Let me say that the House has not voted for either motion tonight. I strongly believe in the need for a tough response to the use of chemical weapons, but I also believe in respecting the will of this House of Commons. It is very clear tonight that, while the House has not passed

93. The Commons motion, which provided in part that the Commons “supports Her Majesty’s government...in the taking of all necessary measures” was approved 557 to 13.

94. This was acknowledged by the UK, House of Commons Library, “Parliamentary Approval for Deploying the Armed Forces: An Update”, SN05908 (13 October 2014) at 1, 4 [SN05908]: “military forces deployed to Mali in 2013 were neither the subject of a debate or a vote in Parliament”; (the government stated that the deployment was in response to an emergency request, and that British troops would not be placed in a combat role).

95. UK, Political and Constitutional Reform Committee, *Parliament’s role in conflict decisions*, (17 May 2011) (London: The Stationery Office Limited, 2011) HC 923 at 5, (referring to question 4).

96. UK, HC, Parliamentary Debates, vol 566, No 40, col 1425 (29 August 2013).

97. *Ibid* at col 1555.

a motion, the British Parliament, reflecting the views of the British people, does not want to see British military action. I get that, and the Government will act accordingly”.⁹⁸ Many commentators would jump on the Syria vote as evidence of a convention to consult Parliament, and even breathlessly declare that a new convention had been established requiring Parliament vote on all deployments,⁹⁹ or even approve them.¹⁰⁰

Yet even following the Syria experience, the Commons Library would opine that “under the Royal Prerogative, matters pertaining to defence and the Armed Forces are exercised by the Government on behalf of the Crown. In the event of a declaration of war, or the commitment of British forces to military action, however, *constitutional convention requires that authorisation is given by the Prime Minister. In constitutional terms therefore, the Government has liberty of action in this field*”.¹⁰¹ It would go on to state “on the occasion where a vote on the deployment of the Armed Forces has been held, were the Government to be defeated it would have been under *no constitutional obligation* to change its policy. The defeat would indicate the view of Parliament without prejudice to the exercise of the prerogative powers, although there would be great political pressure on the Government to take Parliament’s views into account”.¹⁰²

The government itself referred to the complexity of the issue following the Syria vote. Lord Wallace, Government Whip for the Foreign and Commonwealth Office, said the following in answer to a question of the Commons Political and Constitutional Reform Committee: “The Government has an evolving position... This Government, like its predecessor, has discovered as it goes into it that this is a great deal more complex than one thought. The definition of armed conflict and the deployment of forces has all sorts of ragged edges, questions of urgency and secrecy come in [...]. We are in the process of discover-

98. *Ibid* at col 1555-56.

99. For Phillipson, *supra* note 38 or 55: “It may now be said with some confidence, therefore that, following the Syria episode, a constitutional convention exists to the effect that the government must, before, commencing any military action, permit a debate and vote in the House of Commons and abide by its result, subject to a narrow exception exists where truly urgent action is required.” Hallwood, *supra* note 15 states: “While the Prime Minister officially retains the Royal Prerogative to declare war, it is clear that this power is now tempered by the convention that Parliament must vote on the matter beforehand”.

100. Joshua Rozenberg, “Syria intervention: is there a new constitutional convention”, *The Guardian* (2 Sep 2013).

101. SN05908, *supra* note 94 at 2 [Emphasis added.]

102. *Ibid* at 3 [Emphasis added.]

ing we need a strong convention but how we actually interpret it... is a large question".¹⁰³ Former UK Parliamentary Under Secretary of State at the Foreign and Commonwealth Office Alistair Burt has said that the Syria vote "expands the current convention of foreign policy relationships between the executive and the legislature to an as yet unknown and, crucially, uncertain extent".¹⁰⁴

The debate continues, and in 2014 the Commons Political and Constitutional Reform Committee would propose a parliamentary resolution framework, in part on the basis that it would assist by "embedding the current convention and clarifying some of the ambiguities that exist under current arrangements", and in reference to evidence that it had received arguing that "formalising Parliament's role would end any uncertainty about the existence of a convention, and also serve to clarify its terms".¹⁰⁵ These are hardly words describing a clear-cut constitutional convention. The Commons Defence Committee has since stated that "wherever possible, Parliament should be consulted prior to the commencement of military action, [recognizing] that this will not always be possible such as when urgent action is required",¹⁰⁶ with the lack of the word "convention", and the use of "wherever possible" and "should", suggesting something other than a "constitutional convention". It added words that come very close to the post-Syria vote Commons Library statement: "on the occasion where a vote on the deployment of the Armed Forces has been held, it could be argued, that were the Government to be defeated, it would be under no constitutional obligation to change its policy given its prerogative power in these matters",¹⁰⁷ and would refer to evidence of Steven Haines: "It is an interesting question whether or not the current PM's decision to refer Syria to Parliament has set a precedent that subsequent PMs will find it difficult not to repeat. One suspects this is the case but, as with all such constitutional shifts, we must wait for subsequent experience to either confirm a shift in that direction or mark the Syria decision out as an exceptional departure from a constitutional norm".¹⁰⁸

103. UK, Political and Constitutional Reform Committee, *Parliament's role in conflict decisions: a way forward*, (27 March 2014) (London: The Stationery Office Limited, 2014) HC 892 at 18 (referring to Lord Wallace's answer to Q 23)[HC 892].

104. Alistair Burt, "Vote that ties Britain's hands" (2013) 70:1 *The World Today* 30 at 30 [Burt, "Vote that ties Britain's hands"].

105. HC 892, *supra* note 103 at summary 9, 51.

106. UK, House of Commons Defence Committee, *Intervention: Why, When and How?* (28 April 2014) (London: The Stationery Office Limited, 2014) HC 952 at 11.

107. *Ibid* at 54. The 10 December 2013 version of SN05908 contained the similar statement, which was reproduced in the 13 October 2014 update.

108. *Ibid* at 62.

Thus in 2014, even after the August 2013 vote in the Commons that led the government to reverse its position on military intervention in Syria, the convention question lingers in the UK. While there have been Coalition Government statements and a Cabinet Manual entry suggesting the existence of a convention, all understandably seized upon by parliamentarians and some academics, it is not clear what the “convention” requires exactly, and there is a strong suggestion the word “convention” is being used as a synonym for a practice or usage rather than as shorthand for a “constitutional convention”. In other words, the view that a “constitutional convention” to consult Parliament would not be appropriate in Canada, and in any case that such a convention has not formed, is entirely consistent with the UK experience.

TALK OF CONVENTION AS CRITICISM OF THE CROWN PREROGATIVE

Given this, why are we talking about constitutional conventions at all in the deployment context? The answer is that positing a convention is part of a wide-ranging approach that is, at its heart, critical of the underlying Crown prerogative authority. The why of the criticism is plain enough: as discussed, there are those who believe certain types of executive power – including the power to deploy troops abroad – are an ill-fit with our political system. If the convention exists and Parliament must be consulted, then the underlying Crown prerogative-based deployment authority is weakened to that extent; Parliament has seized some of this suspect power for itself.¹⁰⁹ A parliamentary convention is one of several modes which can help shine the light of democracy on corners left dark by historical accident. Positing a consultation convention, therefore, is a form of second-order Crown prerogative criticism.

Two points follow. First, this critical underpinning for the positing of the convention can inform the analysis and discussion. Since critics are not dispassionately concerned with the list of existing constitutional conventions, arguments against the existence of the consultation convention – no matter how persuasive they may be

109. Again, there are others who would argue against this point of view, including in the particular situation of constitutional conventions: see, e.g. Moore who says in respect of the situation in the UK following the Syria vote: “Parliament cannot work if it tries to run the country as opposed to keeping a check on the people who run it”.

objectively – will never satisfy. This means that in respect of all but the most superficial level of analysis, discussion will be more fruitful when aimed at the broader questions. It does not really matter, ultimately, whether there can be a constitutional convention requiring parliamentary consultation or if there is one in fact. The crux of the matter is the proper role of Parliament in deployment decisions. This, ultimately, is where the hope of agreement lies; the thirsty desert traveller does not really care about whether the water hole does or does not exist, she just wants a drink.

The second point that can be made about the relationship between convention talk and general Crown prerogative criticism concerns what such talk implies about other anti-Crown prerogative arguments. In particular, statements about the existence of the consultation convention are often paired with arguments that the legislature should pass laws seizing the deployment authority from the executive. But the two arguments interact in an important way. If we find that there is a constitutional convention relating to executive decisions on military deployments, we suggest strongly that the underlying executive power is a *constitutional* one.¹¹⁰ Indeed, some, including Lagassé, have reached the position that the authority to deploy the military could be a constitutional one through a different route (analysis of s. 15 of the *Constitution Act, 1867*.)¹¹¹ But what is important in this context is the necessary corollary. If the executive's underlying authority to deploy is a constitutional one, then it cannot be abolished by ordinary statute and instead a constitutional amendment would be required.¹¹² For this reason, asserting the existence of a constitutional convention requiring that the government consult Parliament before deciding on a military deployment could undercut the oft-paired argument that Parliament can and should seize the deployment authority for itself by “occupying the field” through statute law.

110. The implication is also important in reverse: if we say the authority is not a constitutional one, then perhaps we undercut the argument that a practice related to its exercise can be a constitutional convention.

111. See P Lagassé, “The Crown’s Powers of Command-in-Chief: Interpreting Section 15 of the Constitution Act, 1867” (2013) 18:2 *Review of Constitutional Studies* 189.

112. *Ibid*: “In Canada...it is unclear if an act of Parliament could ever fully eclipse the Crown’s military prerogatives, under section 15 of the Constitution Act, 1867”. K Chapman, “The Unjustifiable Aspiration of the Canadian Parliament to Vote on Military Missions” (Jan-Feb 2014) 74:1 *RCMI Sitrep* 3 at 4 seems to go further, suggesting that the constitutional authority to deploy the military cannot be amended through “an emerging ‘convention’”.

CONCLUSION

When it is said that there is a “convention” requiring that Parliament be consulted before the executive decides on a military deployment, what is meant exactly? Perhaps the reference is to a simple practice, an approach that different governments have taken when making political choices on how to engage Parliament. It may be politically expedient to follow such a practice, or failure to follow it may present political difficulties, but that is the whole of it. The trouble is that the word “convention” can be taken to refer to a “constitutional convention”, a binding rule the violation of which amounts to an unconstitutional act. We must know which type of convention is meant each time the word is used. Above all, we cannot accept the establishment of a “convention” on the basis of the loose and common meaning of the term, only to turn around and supply the content and meaning of the established convention through reference to “constitutional” conventions. Perhaps this error is made with a convention to consult Parliament before military deployments, with a loose and ill-defined analysis used to posit the convention, and reference to constitutional obligations used to describe its violation. Alistair Burt, former UK Parliamentary Under Secretary of State at the Foreign and Commonwealth Office, is well aware of this important distinction when he states, in discussing changes to the relevant “convention” following the Syria vote, “I do not pretend to be a constitutional expert, and do not write as such, but as a practical politician with experience of executive Government”.¹¹³

This chapter has argued that there can be no constitutional convention to consult Parliament in advance of a deployment decision for the basic reason that this is not the sort of matter that is dealt with by constitutional conventions. Beyond this, even if such a convention were a possibility, the facts fall far short of satisfying the difficult test for the establishment of one. And while Canada can look to the rich UK experience to help inform its debate, the position that a constitutional convention has been established in that country is too simple.

Conjured from elements of political reality and a belief that Crown prerogative decision-making should not stand unchallenged, a constitutional convention requiring consultation with Parliament before deployment decisions is a political mirage: it does not and cannot exist in fact. Sourced in an underlying idea that the Crown

113. Burt, “Vote that ties Britain’s hands”, *supra* note 104 at 32.

prerogative authority to deploy the military is an ill-fit with Canada's form of liberal democracy, the positing of a consultation convention is a form of second order criticism. And yet it is a critical form that may prejudice others; in particular, if there is a constitutional convention requiring consultation with Parliament before the executive decides on a military deployment, then perhaps the whole deployment decision-making structure is a constitutional one and changes to it could not be made through ordinary legislation.

We could have a discussion about consultation "conventions" broadly-defined while acknowledging that the term is being used in an extra-legal way, or we can apply all of the meaning of the legal and political science term "constitutional convention" to the very narrow class it will cover, a class that will exclude a constitutional convention to consult Parliament on military deployments.¹¹⁴ Perhaps all of those concerned with the authority to deploy the military, and particularly those who would challenge the current executive decision-making power, would be better served focusing on the wider issue: how should Parliamentarians be involved in decisions to deploy the military? Under current decision-making systems, parliamentarians are involved in such decisions: they can ask questions of the executive and act as institutionalized critic, they control Business of Supply without which the military is undeployable, and ultimately the government must retain the confidence of the House of Commons to remain in power. For Joseph, parliamentary engagement in the exercise of what she calls the "war prerogative" fulfils "four functions": "legitimation", "mobilising consent", "scrutinizing", and an "expressive function".¹¹⁵ This involvement is an unqualified good, and there are interesting questions to be asked about whether parliamentarians are doing enough with what they have.¹¹⁶

114. For Joseph, *supra* note 8 at 107, these are two separate discourses: "[This chapter] has demonstrated that the Commons has played a varying, but influential, role in the exercise and scrutiny of the war prerogative. It has also highlighted the disparity between orthodox political and constitutional discourses, which assert the executive's exclusive power over war, and how the war prerogative is exercised in practice."

115. *Ibid* at 107-08

116. P Lagassé (5 May 2014) suggests that perhaps "the legislature is the source of its own marginality" on deployment decisions, *supra*, note 3.

CHAPTER 7

RECOVERING THE ROYAL PREROGATIVE

Paul Benoit*

The Law was the golden met-wand and measure to try the causes of the subjects and which protected his Majesty in safety and peace.

Sir Edward Coke, *Prohibitions del Roy*.¹

Can Canadians, as a country, still recover their Westminster system of governance?

This is a question that may well be asked, as hardly a month goes by that Canadians are not faced with some issue of governance: that is, some issue dealing with the proper functioning of one of our major public institutions or how one of those institutions should be related to another. Among the most prominent of such governance issues, we find the expansion of the Prime Minister's Office, in size and in the control it exercises; the accountability of Senators; the discretionary authority of the Governor General; the way the House of Commons conducts its business; and the proliferation of 'agents' of Parliament. While each of these issues has, as it were, its own etiology, all are symptomatic, in one way or another, of our collective straying from the set of constitutional arrangements that we have inherited and that are known as the Westminster system.

This article will examine two recent Canadian practices, less notorious than those just referred to, but which illustrate the same point. The two practices in question are the appointment of senior officials and the ratification of treaties – two practices grounded in the royal prerogative, but which have recently attracted Parliamentary involvement.

* Former ministerial advisor and Senior Counselor, Hill+Knowlton Strategies.

1. Sir Edward Coke, "Prohibitions del Roy", *Reports*, Vol XII, 65, in Steve Sheppard ed, *The Selected Writings of Sir Edward Coke*, Vol 1 (Indianapolis: Liberty Fund, 2003) 481 [Coke].

In order to put those recent Canadian practices into perspective, we have first to sketch out what we mean by the Westminster system of governance and then to describe the central role of the royal prerogative within that system.

THE WESTMINSTER SYSTEM OF GOVERNANCE

The Westminster system is often reduced to a set of procedures for regulating the behaviour of politicians operating in an environment of a non-elected Head of State, a Parliament usually made up of two Chambers, and a Leader of Government or Prime Minister having a seat in the popularly-elected Chamber. In fact, much more is involved in the Westminster system: before all else, it refers to the Palace at Westminster where the monarch had a residence, where his private Council of advisors met, and out which evolved the four major courts of law: the Court of Chancery (for matters of equity), the Court of Exchequer (for tax matters), the Court of King's Bench (for matters of public law), and the Court of Common Pleas (for property disputes between subjects), all of which heard pleadings in, or adjoining, the great Hall of Westminster. The two Chambers of Parliament were also products of this same process of institutional differentiation: two special kinds of court that evolved to meet the need for representation and consent in the governance of the country. To speak of the Westminster system is to refer, therefore, not to some abstract political model that could be depicted in some organizational chart and applied willy-nilly to different countries, but to a long tradition of jurisprudence and institutional differentiation – the Common Law – that is constantly evolving but that has to be grounded in the culture of society in order for it to adapt and grow.

Partly as a result of the vigour of this legal tradition, the Westminster system can no longer be thought of as exclusively English. It has taken root in other countries. In our case, for over a century and a half, from the *Act of Quebec* in 1774 to the *Statute of Westminster* in 1931, the laws, institutions and jurisprudence of Britain were gradually implanted in Canadian soil.² The latter *Act* recognized that Canada had fully received the Westminster system of law and government as its own and that henceforth its evolution would be independent of that in the UK. The British Crown had propagated or multiplied

2. For an account of how the full range of English institutions and conventions were received and interpreted in the Province of Quebec following Confederation, see Paul Benoit, *The Programme of 1871: A Modern Instance of Natural Right Argumentation* (Ph D thesis, McMaster University, 1978) [unpublished].

into several Dominion Crowns. The *Constitution Act of 1982* marked the culmination of this process of reception or ‘patriation’.³

The golden thread running through this British tradition and its many institutional refinements – and what Canada, as an inheritor of that British tradition, has benefited from – is an ancient understanding of the rule of law.⁴

3. For an account of how we got to the stage that “we’re on our own now”, see John Pepall, “1982: Myths and Realities of ‘Patriation’” (Autumn/Winter 2013) 3:2 *The Dorchester Review* at 20-28.

4. In his *In Praise of the Laws of England* (Cincinnati: Robert Clarke & Co, 1874), Sir John Fortescue, Chancellor to Henry VI, explained what made the rule of law in England so excellent, when compared with the civil law on the continent:

“A King of England can not, at his pleasure, make any alterations in the laws of the land, for the nature of his government is not only regal, but political. Had it been merely regal, he would have a power to make what innovations and alterations he pleased, in the laws of the kingdom, impose tallages and other hardships upon the people whether they would or no, without their consent”. (25-26)

For as long as men could remember, through successive waves of conquest going back to the ancient Romans, England has always preserved its body politic; that is, it has never been ruled exclusively by men, by what Fortescue called regal government, but by law as well, by what held together or constituted the artificial body politic of the realm:

The law under which the people is incorporated, may be compared to the nerves or sinews of the body natural; for, as by these the whole frame is fitly joined together and compacted, so is the law that ligament (to go back to the truest derivation of the word, *lex a ligando*) by which the body politic and all its several members are bound together and united in one entire body.” (37)

The absolute prince is really at a disadvantage when compared to the constitutional prince: “to be able to do mischief, which is the sole prerogative an absolute prince enjoys above the other, is so far from increasing his power, that it rather lessens and exposes it.” (41)

Human laws, Fortescue goes on to explain, are of three kinds:

“Know then, that all human laws are either the law of nature, customs, or statutes, which are also called constitutions; but the two former, when they are reduced into writing, and made public by a sufficient authority of the prince, and commanded to be observed, they then pass into the nature of, and are accepted as constitutions or statutes, and, in virtue of such promulgation and command, oblige the subject to the observance of them under a greater penalty than otherwise they could do.” (44-48)

Although conquerors had the opportunity to impose their own laws, they recognized the goodness of the body politic and were content to leave it essentially intact. Tacit consent was constantly renewed, which made the English rule of law the best of rules:

“During all that time, wherein those several nations and their kings prevailed, England has nevertheless been constantly governed by the same customs, as it is at present: which if they were not above all exception good, no doubt but some or other of those kings, from a principle of justice, in point of reason, or moved by inclination, would have made some alteration or quite abolished them, especially the Romans, who governed all the rest of the world in a manner by their own laws... Nor, in short are the laws of any other kingdom

By ‘rule of law’ is not meant the sum total of statutes and regulations that are on the books, as though we were referring to a set of rules for a board game, a card game or a competitive sporting event. That is only one superficial manifestation of what might be called the rule of law. In the Westminster tradition of jurisprudence, the ‘rule of law’ comprises, even more importantly, a realm of unwritten natural law, customs and conventions.⁵ Informing both kinds of manifestation of law – the written and the unwritten – and making both kinds inwardly compelling, are norms. Norms are what express the rule of law in a given set of circumstances calling for human action. They are what Aristotle referred to as the virtuous mean (*meson*) or right measure.⁶ All human beings, kings included, are subject to this general rule of law and its prescriptive norms. It is this normative element that draws us and binds us to a particular course of action, regardless of any explicit external constraint that may have been enacted. Grounded in this intangible ethical dimension, the rule of law is always, already in force. This tradition of searching for and discovering the law that already exists and then appropriating it, rather than positing or imposing man-made law, is what we mean by the Common Law tradition. It was up to judges, sitting in different courts, to determine whether society’s particular statutes, regulations, or customs were legitimate expressions of this all-encompassing rule of law.⁷

in the world so venerable for their antiquity. So that there is no pretence to say, or insinuate to the contrary, but that the laws and customs of England are not only *good*, but the *very best*.” (52)

5. In his *History of the Common Law of England* (Chicago: University of Chicago Press, 1971), Sir Matthew Hale, Chief Justice of the King’s Bench under Charles II, clarifies what is meant by the unwritten part of the English constitution:

“And when I call those parts of our laws *Leges non Scriptae*, I do not mean as if all those laws were only oral, or communicated from the former ages to the later, merely by word. For all those laws have their several monuments in writing, whereby they are transferred from one age to another, and without which they would soon lose all kind of certainty... those laws of England which are not comprised under the title of Acts of Parliament, are for the most part extant in records of pleas, proceedings and judgments, in books of reports, and judicial decisions, in tractates of learned men’s arguments and opinions, preserved from ancient times, and still extant in writing. But I therefore style those parts of the law, *Leges non Scriptae*, because their authoritative and original institutions are not set down in writing in that manner, or with that authority that Acts of Parliament are, but they are grown into use, and have acquired their binding power and the force of laws by a long and immemorial usage, and by the strength of custom and reception in this kingdom”. (16-17)

6. See Aristotle, *Nicomachean Ethics*, (New York: Random House, 1941) Book II, ch 6 at 1106a-1107a [Aristotle].
7. Sir Edward Coke, arguably the greatest exponent of the Common Law, summarized its working in his Report on the Dr. Bonham’s case (Coke, *supra* note 1 at 118 a (Vol VIII)):

In searching for the norm defining the ‘rule of law’ in a particular set of circumstances, the Westminster system can be seen as a system of five different orders of right or jurisdiction embedded within each other. Beginning with the most all-encompassing or general and ending with the most individual or particular, we find:

- 1) natural law (*ius naturalis*), which is the order of reason that substantially unites all human beings among themselves and with the working of their natural environment; it is the transcendent or *a priori* backdrop against which all human deeds and words can be judged;
- 2) the law of nations (*ius gentium*), which provides a first empirical conditioning of the transcendent law of nature: it is the law of nature as manifest over time and among different peoples. It is the core of law common to the nations of the world, however much some of their accidental customary features may vary;
- 3) the common law, which, analogously with the law of nations, is the core of law found to be common among the different ethnic groupings inhabiting England (and subsequently the rest of the British Isles and territories overseas). From very early on, the common law of England was practically differentiated into three different orders or jurisdictions:⁸
 - I. royal law (*ius regem*), also known as the royal prerogative, the right of superintendancy, which treats of all issues

“And it appeareth in our Books, that in many Cases, the Common Law doth control Acts of Parliament, and sometimes shall adjudge them to be void: for when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will control it, and adjudge such Act to be void;” (*Selected Writings* at 275)

8. Sir Matthew Hale has described how these different orders of the body politic are meant to work together:

Insomuch, that even as in the natural body the due temperament and constitution does by degrees work out those accidental diseases which sometimes happen, and do reduce the body to its just state and constitution; so when at any time through the errors, distempers or iniquities of men or times, the peace of the kingdom, and right order of government, have received interruption, the Common Law has wasted and wrought out those distempers, and reduced the kingdom to its just state and temperament, as our present (and former) times can easily witness.

This Law is that which asserts, maintains, and, with all imaginable care, provides for the safety of the king’s royal person, his Crown and dignity, and all his just rights, revenues, powers, prerogatives and government, as the great foundation (under God) of the peace, happiness, honor and justice, of this kingdom; and this Law is also, that which declares and asserts the rights and liberties, and the properties of the subject; and is the just, known, and common rule of justice and right between man and man, within this kingdom. (*History*, 30-31.)

of state having to do with the realm as a whole and in particular with its preservation and protection against all manner of threat;

- II. public law (*ius publicum*), which deals with governmental issues having an impact on all subjects of a certain territory: it is the jurisdiction that we identify with Parliament, the passage of domestic legislation, the setting of limits to private interests, and the natural law notion of distributive justice; and
- III. private law (*ius privatum*), which covers all issues dealing with disputes between individual subjects, usually over their respective property interests (what is yours and what is mine); it is the order that we associate with the lower courts of justice, specialized tribunals, and the natural law notion of commutative justice.⁹

Of course, there have always been differences of opinion, sometimes leading to historical confrontations, as to where precisely the line should be drawn between one order of jurisdiction and the next.

9. For A V Dicey, the five orders of the English constitution and the concept of the rule of law underlying and uniting them can be reduced to this fifth order, the order of private law and the security given to the rights of individuals. In Chapter IV of his *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1889)[Dicey] he elaborates on the three different aspects of his definition of the rule of law and summarizes as follows:

That 'rule of law' then, which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three different points of view. It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government... It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals... The 'rule of law' lastly may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of the constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts; that, in short, the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land. (189-90)

My article may be read as a first step in trying to reverse the pernicious influence that Dicey's reductionism has had on Canadians' understanding of their constitutional heritage.

We can find down through the centuries learned debates, for example, between the courts of Chancery and the courts of Common Pleas on when a case deserved a *fair and equitable* hearing over and above a simply *just* hearing or between the courts of Admiralty and the courts of King's Bench on matters of extra-territoriality involving the *jus gentium*. Although the nature of the subject matter at issue would normally determine the appropriate jurisdiction, a clever lawyer could present his case in such a way as to elevate the nub of the issue to a higher tribunal if he thought that desirable. In many cases, as we shall see with regard to treaties, the roles of two jurisdictions were complementary.

It is noteworthy that while, physically, each jurisdiction arrived at its judgments in very different venues – from the most private to the most public, from the broadest of consultations to the most discreet of recommendations and advice – official decision-making in the Common Law tradition, at all levels, from a prime minister offering advice to a monarch through to a citizen choosing his representative in Parliament or serving on jury duty, involved the following *five formal elements*:

- 1) A fundamental belief in the *moral agency of individual men and women* and their freedom to will or to opt for one course of action or another, however constrained externally their circumstances may be.
- 2) That it was never a matter of a person's will alone: at whatever level of decision-making, individuals had *a responsibility, before making a decision, to consult* and to become as well-informed as possible in keeping with the nature of the issue to be resolved, whether that meant questioning current opinion, hearing testimony, calling on experts, trying to establish facts, etc.
- 3) That, with as much relevant empirical data as possible before one, a person had then to *exercise their reason*, which did not mean what nowadays we take to be the instrumental or calculating reason of a rational economic actor; nor the demonstrative or logical reason of an objective scientific actor; nor the constructive reason of a subjective psychological actor. No, reason, in the Common Law tradition, refers rather to *the discernment of a moral actor* – a reason capable of seeing through empirical data, of apprehending the order that is right or just in a given set of circumstances,

and of unifying a situation by calling on all the moral actors involved to do their duty and help restore or advance that order.¹⁰

- 4) As a further check on any of the three derivative or rationalizing forms of reason just mentioned¹¹, the decision-maker had also to be informed by *a sense of equity* (what Aristotle referred to as *epieikia*¹²), which required sufficient imagination and sympathy to put oneself in the place of those actually involved and to ensure that the decision one was coming to was not only just or correct in the abstract, but that it was also fair or good in the concrete.
- 5) Once the norm expressing the law in a given situation had been found, how was the decision confirmed as legitimate? Just as the nature of the issue to be resolved determined the appropriate degree of consultation *before* the decision was taken, so did it determine the *appropriate degree of consent* to be obtained *afterwards*. It is this element of consent and the various forms it could take that largely accounts for the physical differences we find in Westminster decision-making: everything from the consent of Privy Councillors (and possible dissent in the form of a resignation from office) to the consent of both Chambers of Parliament, to the consent of the citizenry in a general election, to the tacit consent in social practices that are generally accepted.

10. Sir Edward Coke highlighted (*supra* note 1 in the Preface to Vol IX of his *Reports*) the effects of a discerning reason, as captured in well rendered judgments:

“A substantial and a compendious Report of a case rightly adjudged doth produce three notable effects: 1. It openeth the Understanding of the Reader and Hearer; 2. It breaketh through difficulties, and thirdly, It bringeth home to the hand of the studious, variety of pleasure and profit; I say it does set open the Windows of the Law to let in that gladsom Light whereby the right reason of the rule (the Beauty of the Law) may be clearly discerned; it breaketh the thick and hard Shell, whereby with pleasure and ease the sweetness of the kernel may be sensibly tasted...” (*Selected Writings* at 307.)

11. Each of these three other ways for decision-makers to use their ‘reason’ can be associated with a modern theorist who sought to undermine the Aristotelian ‘right reason’ that was at the core of the English Common Law: Hobbes, who would found civil society on the psychology of fear; Locke, who would found it on the protection of private property; and Bentham, who would found it on the calculation of utility. Each of these thinkers would have a huge impact, not just in Common Law countries but throughout the world.
12. See Aristotle, *supra* note 6 at 1137a-b (Book V, ch 10).

PREROGATIVE AS PRIVILEGE AND DUTY

With this sketch of the Westminster system and its formal elements of official decision-making as background, we are now in a better position to turn to our designated topic: *Consulting Parliament before Exercising a Prerogative*. To begin with, there are a couple of things wrong with the wording of this topic.

First, it may seem like a small matter, but the title of our session should read “the prerogative”, not “a prerogative”. The only way the phrase makes sense now is to read ‘prerogative’ as an adjective and to supply, as understood, the noun ‘power’. But that is to rob ‘prerogative’ of its substance. The prerogative is not the expression of political power, the result of some tug-of-war. Contrary to Dicey’s teaching, the prerogative is not anything that can be diminished whenever legislation is passed by Parliament in the same subject-area, as if we were involved in some political zero-sum game: the more statute law, the less prerogative.¹³ The prerogative is not a power that one possesses and that can be lost to one with a stronger will; quite the contrary, one is possessed *by* the prerogative, as we have now to explain.

Although for the purposes of our topic, the adjective ‘royal’ is understood to qualify the noun ‘prerogative’, the concept of prerogative can arise in other social contexts. Generally speaking, prerogative refers to the privilege of being the first to decide, a privilege accompanied however by the responsibility or duty of exercising that privilege for the purpose of enhancing the common good. It is this duty that takes hold or possesses the individual who appears to be privileged. At a fundamental level, the Common Law recognizes that all human beings, in so far as they stand out from other creatures of the animal kingdom and from their own brutish nature, are entitled or privileged to exercise their judgment. Even when they are severely restricted externally, human beings retain an inner freedom to choose. What makes for the prerogative is that special kind of reason identified above as forming the crux of the Common Law: the capacity that

13. A V Dicey, *supra* note 9, defined prerogative – “a term which has caused more perplexity to students than any other expression referring to the constitution” – in his typically reductionist manner:

“The ‘prerogative’ appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown. The King was originally in truth what he still is in name, ‘the sovereign’, or, if not strictly the ‘sovereign’ in the sense in which jurists use that word, at any rate by far the most powerful part of that sovereign power.” (*Introduction* at 348)

human beings have to pause during the course of their daily lives, to reflect on issues confronting them, to become informed, and to try to discern the right course of action to pursue.

While potentially all members of society, as human beings, are equally worthy of exercising the prerogative, in practice, the issues facing different members of society vary in complexity: some decisions require more knowledge, experience, and insight than others. Thus, there developed, under the Common Law, a highly differentiated realm of official decision-making, with levels determined by the nature of the subject matter being treated and falling within the three broad categories outlined above. The result is a system of governance where different responsibilities have been apportioned to different moral persons and different institutions – councils and courts of one sort or another, each with their own set of appropriate procedures.

Let us look briefly at how the double-edged concept of prerogative (privilege/duty) can be found at work throughout the Westminster system.

To begin at the base of civil society, all members have not only a duty to obey the laws of the land, but they also have the privilege to question the laws and to point out where, morally, they feel there may be an injustice. That is the fundamental privilege to seek redress before a court or to petition the monarch. As citizens with the privilege and duty to vote, they can decide who they want to represent them to bring forward their public grievances. As members of a jury, citizens also have the privilege and duty to decide the facts in certain cases brought before the courts. As elected Members of Parliament, a smaller number of citizens have the further privilege and duty to debate in public and to express their consent or dissent with regard to domestic legislation. As appointed public office holders, a sizeable number of citizens have the privilege and duty to serve the government of the day and help maintain the well-being of the State. Finally, at the apex of civil society, as members of the Queen's Privy Council, a few select citizens have the great privilege and duty to steer the government and direct the affairs of State. It is in this last capacity that we speak of the royal prerogative, of that privilege and duty to act for the good of the whole realm, the prerogative that takes possession not only of the Sovereign or the viceroy representing her, but all the members of her Council.

The solemnity of this official decision-making is marked by the fact that before engaging in the decision-making process, the subject,

at all levels under the common law – from king or queen to new citizen, through a multitude of public office-holders, has taken an appropriately worded oath. The oath highlights the transcendent dimension of official decision-making: i.e., that it is to be undertaken not on the basis of some calculation or in fulfilment of some contract, but as a duty, freely taken on by oneself, to act for the good of the whole. The ethical nature of the duty, the fact that it is not simply a matter of externally complying with some set of rules or procedures, is emphasized by the fact that the duty is taken on publicly, in the presence of God and of others who witness it.

From our consideration of prerogative and its two facets (privilege/duty), we see that all decision-making under the Westminster system of governance must result in synthetic judgments, that is, judgments that incorporate two orders of being: the empirical and the ideal. Decision-makers in the Westminster system need to consider, on the one hand, all the facts that capture the properties of things and persons involved in a given act; and on the other, the concepts that inform the given act and make sense of it. Among the concepts to be determined, one of the most important is the purpose or the end of the drama as a whole; or to be more precise, it is the direction that the drama as a whole is heading in.

It follows that one can arrive at a synthetic judgment – one can discover the norm expressing the rule of law in a given set of circumstances – either deductively, from the general law of nature through specific maxims, or inductively, from the particular facts of the case, through specific precedents. In other words, one can illuminate a given situation either by bringing light from outside into a cave or by enlarging the opening of the cave from within.¹⁴ What matters is that, by the end of the process, the judgment be synthetic and that the two kinds of data – the empirical and the transcendental – be adequately taken into consideration. Without both elements informing the decision-making – the detection of invisible patterns as well as the detection of visible points – the judgment arrived at will be one-dimensional: it may be correct; it may be legal and require external compliance, but it will not be normative or inwardly compelling.

14. It could be argued that, until the time of Francis Bacon, the preference for commentators on English law was to argue deductively; but with fuller reporting on cases, more printed reference books, and the growing influence of the natural sciences, the inductive method came to be favored.

THE ROYAL PREROGATIVE

It is time now to focus on the prerogative that belongs to the Queen (in the sense of being appropriate to her, not in the sense of being a possession of hers).

There are matters of State, matters involving the peace, order, and good government of society as a whole, that transcend the agenda of whatever Government happens to be in power. In the Westminster system, the privilege and duty of dealing with these issues of State fall on the Sovereign and the members of Her Privy Council.

What then are these matters of State that come under the rubric of the royal prerogative?¹⁵ The subject-areas covered can be grouped

-
15. Sir William Blackstone, in his *Commentaries on the Laws of England* (Toronto: University of Toronto Press, 1973), has a chapter on the royal prerogative that opens with a reassuring comment: “that the powers, which are vested in the crown by the laws of England, are necessary for the support of society; and do not entrench any farther on our *natural* liberties, than is expedient for the maintenance of our *civil*”. (90) He goes on to make a very important distinction that is usually ignored nowadays: i.e., that the royal prerogative can either be *direct* or *incidental*:

“The *direct* are such positive substantial parts of the royal character and authority as are rooted in and spring from the king’s political person, considered merely by itself, without reference to any other extrinsic circumstance; as, the right of sending ambassadors, of creating peers, and of making war or peace. But such prerogatives as are *incidental* bear always a relation to something else, distinct from the king’s person; and are indeed only exceptions, in favor of the crown, to those general rules that are established for the rest of the community”. (92)

Thus, when we hear complaints about the expansion of executive authority, the kind of prerogative usually referred to is of an *incidental* nature: they are cases where authority has been delegated from Parliament back to the Crown for the sake of expediency or for ease of minute regulation.

In examining *direct* royal prerogative, Blackstone finds that it can come under three headings: it can pertain to (i) the dignity or character of the royal person (understood as the body politic and not as a natural body); (ii) to the royal authority (obedience to his commands); and (iii) to the royal income. With regard to the royal dignity, Blackstone finds that there are three qualities “of a great and transcendent nature” that have been attributed to the body politic of the king (what today we would refer to as the Crown or the embodiment of the State) and which make him a superior being: one that is sovereign, infallible, and immortal. With regard to the royal authority, Blackstone points out how it is:

“wisely placed in a single hand by the British constitution, for the sake of unanimity, strength, and dispatch... the king of England is therefore not only the chief, but properly the sole magistrate of the nation... For otherwise the power of the crown would indeed be but a name and a shadow, insufficient for the ends of government, if, where its jurisdiction is clearly established and allowed,

under several headings: the power to summon, prorogue and dissolve Parliament; the granting of honours and decorations; the granting of mercy; the proclamation of an emergency; and the two areas that interest us more particularly: appointments, which includes the appointment of ministers, Senators, judges, chief officers of the military and civil services, ambassadors and high commissioners, senior executives and directors of Crown Corporations, officers of Parliament and officials reporting to Parliament, and members of regulatory boards, tribunals and agencies; and international affairs, which includes the full spectrum of collective security, defense, diplomacy, trade and development, which can cover everything from the declaration of war and peace, the deployment of armed forces, the making of treaties, the acquiring or ceding of territory, and the issuing, refusing, and revoking of passports. With globalization and the movement of capital, people and ideas, this spectrum of international relations has become more complex and weightier than ever before. For this reason alone, the royal prerogative has never been as crucial as it is today for the good governance of a country.

For the purposes of this discussion, we need not enter into a debate about which of these subjects reserved for the Crown are today recognized as belonging to the Sovereign acting on her own judgment, which on the *recommendation* of her Chief Councillor, which on the *advice* of her chief Councillor, and which on the *advice and consent* of her Council. The point here is that the subjects enumerated above do not require the consent of Parliament or even that Parliament be consulted.

In keeping with the Westminster form of decision-making – the greater the privilege, the greater the duty – matters of State affecting the well-being of society as a whole are subject to the strictest of formal procedures. Extra precautions are taken regarding the classification of information, the preparation of Memoranda to Cabinet, the deliberation in Committees of Cabinet, etc. The following ele-

any man or body of men were permitted to disobey it, in the ordinary course of law.”(100-1)

Blackstone concludes his chapter on the royal prerogative by returning to the independent role of the courts; he reminds us how the abolition of the Star Chamber under Charles I was a crucial step in checking royal absolutism: “...effectual care is taken to remove all judicial power out of the hands of the king’s privy council; who, as then was evident from recent instances, might soon be inclined to pronounce that for law, which was most agreeable to the prince or his officers. Nothing therefore is more to be avoided in a free constitution, than uniting the provinces of a judge and a minister of state”. (103)

ments highlight the very privileged nature of the decision-making involved:

- privileged access to secret and confidential information;
- privileged access to intelligence reports;
- the need for urgent or precisely timed action;
- the discussion of persons as potential appointees;
- the need for a strategic approach in complex negotiations (linkages, single undertakings);
- privileged personal relations among the parties involved in negotiations;
- the asymmetry among those involved in negotiations or among those potentially impacted by negotiations.

These *raisons d'état* make for a decision-making of a different order than that involved in the drafting of legislation for Parliament or the drafting of Orders-in-Council pursuant to a statute.

Yet, for some time now, Canada appears determined to abandon its Common Law understanding of the royal prerogative. In two of the prerogative's most important areas – appointments and treaties – Canada is gradually abandoning the Westminster system and trying to take up the US model, where “advice and consent” has been displaced from an executive council to a legislative chamber – from Councillors to Assemblymen – before an appointment can be confirmed or a treaty can be ratified.

At a time when Canada seems increasingly attracted to the US model, the UK itself appears to be giving up on the Westminster system. Typically, the UK has remained true to one aspect of the Westminster system, however, in not wishing to effect any changes by revolution or by a radical break but rather through dozens of small gradual cuts and ‘reforms’. A clear and startling indication of this intention to abandon its centuries-long tradition was manifest in 2007 when Gordon Brown took over the government of the UK for the Labour Party. In a document grandly entitled “The Governance of Britain”, Brown announced sweeping changes to the constitution.

Building on the changes introduced since 1997 by his predecessor, Tony Blair, Brown promised to go further and “to forge a new relationship between government and citizen, and begin the journey

towards a new constitutional settlement – a settlement that entrusts Parliament and the people with more power”.¹⁶ He then went on to declare war on the royal prerogative, listing all the matters of State where the Government would turn over decision-making to Parliament and the people. While the Labour government failed to achieve much of what it sought, it did manage, just before its defeat in May 2010, to pass the *Constitutional Reform and Governance Act*. In addition to the ratification of treaties, which will be discussed below, other parts of the *Act* dealt with the appointment and conduct of civil servants, Parliamentary standards, and the transparency of government financial reporting to Parliament.

We could go on, in more detail, to examine the oddities and contradictions of this British statute as an example of the road Canada should never take, but let us turn now to Canadian practice.

APPOINTMENTS

In December 1984, a Special Committee on the Reform of the House of Commons was struck, which produced six months later, in June 1985, what would become known as the McGrath Report. In the preface to that Report, the Committee members declared their ambition in the following terms: “The recommendations of this Committee are the most ambitious attempt to pursue major and comprehensive reform in the more than one hundred-year history of the Canadian House of Commons”.¹⁷ Indeed, up until 1968 when Standing Committees were made more prominent, the Standing Orders governing the procedures of the House had hardly changed. Now, Committee members felt, it was time for a second wave of modernization. Although the scrutiny of Order-in-Council appointments was not on the long list of matters to be examined in the Committee’s Order of Reference, Committee members nevertheless decided to devote a whole chapter to the subject.

Chapter V of the McGrath report opens with a short two sentence paragraph stating that:

“One of the turning points in parliamentary democracy was the victory secured by the Commons over the Monarch in the choice of ministers

16. UK, Ministry of Justice, “The Governance of Britain”, (July 2007) 5.

17. House of Commons, Special Committee on the Reform of the House of Commons, *Report* (June 1985) XI.

to advise the Crown. Most aspects of the Crown's prerogative are now exercised on ministerial advice for which the ministers and the cabinet as a whole are answerable to Parliament".¹⁸

Apart from distorting English constitutional history and reducing the notion of responsible government to the notion of accountability to Parliament, the authors of the Report made no attempt to define the royal prerogative or its *raison d'être*.

Having set off on the wrong foot, they then, at some length, go into what can be learned from the American experience. They conclude that:

"...the potential benefits of the confirmation process would outweigh the problems. It should result in greater prior consultation by governments to avoid embarrassment. This type of informal mechanism is the hallmark and strength of responsible government. Parliament's traditional relationship with the executive comes not only through approval, rejection or alteration but also through the deterrent effect of bad publicity".¹⁹

The Committee went on to recommend:

"...that the name of the person appointed to the position of deputy minister of a department be laid upon the table of the House of Commons immediately upon the appointment being made. The appropriate standing committee may call the appointee for questioning on matters relating to the appointment within thirty days of tabling".²⁰

The Report then explained that this would be "sufficient authority" for the Committee to conduct an inquiry as to the appropriateness of the appointment. The Committee would have 10 sitting days from the commencement of its inquiry in which to complete its work and report to the House. The Committee recommended that the same procedure be adopted for the directors and chief executives of Crown Corporations.

While boldly advancing their recommendation, Committee members acknowledged nevertheless that "we are heading into uncharted waters" and concluded that:

"Of all the subjects the Committee considered this was by far the most difficult. But it is also the one that holds the most potential for the

18. *Ibid* at 29.

19. *Ibid* at 31.

20. *Ibid* at 32.

kind of change we believe members of all parties desire. We have heard repeatedly about the need for new attitudes towards Parliament. However, unless imaginative new procedures are put in place, little progress can be made in developing new attitudes”.²¹

Following the McGrath Report’s recommendation, the House of Commons instituted Standing Orders 110 and 111, which call on the Government to table Order-in-Council appointments or nominations for appointment so that the appropriate Standing Committee may take these appointments or nominations up for consideration within a 30-day period.

The McGrath report did acknowledge that it was not necessary to scrutinize all Order-in-Council appointments. To begin with, there were just too many of them: some minor positions could be ignored; as well, Committee members felt that “there are good reasons for excluding certain appointments from any political scrutiny process at this time”.²²

Twenty years later, such scruples had vanished among parliamentarians. In May 2004, the House of Commons Justice Committee reported that it had:

... reached a consensus that, whatever the quality of judgements produced by the Supreme Court, the process by which Justices are appointed to that body is secretive or, at the very least, unknown to Canadians. This could lead to the perception that appointments may be based upon improper criteria. The Committee agreed that more credibility in the appointments process would be beneficial to the Supreme Court and lend it more legitimacy in the eyes of Canadians.²³

The process for appointing individuals to the most important offices in the land had to be broken wide open in order that it may appear more credible and legitimate in the eyes of Canadians. But, we may ask, what Canadians did the Members of the Committee have specifically in mind? How were the ignorant among them to be satisfied?

Following up on the Committee report, the Martin government, later in the year, struck an Ad Hoc Committee of House of Commons

21. *Ibid* at 34.

22. *Ibid* at 31.

23. House of Commons, Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, “Improving the Supreme Court of Canada Appointments Process” in *Report* (May 2004).

Members to review the nominations of two Supreme Court Justices before the appointments were to be made.

Dimly aware that it had strayed well beyond the pale of the Westminster system, the Ad Hoc Committee constituted itself not as a parliamentary committee but rather as a committee of parliamentarians. It would no longer be bound by the Standing Orders but be free to make up its own rules of procedure; strangely, it would also include two non-parliamentarians (what, in the UK, are referred to as ‘lay persons’) as Members. Finally, recognizing that the authority to make such appointments is constitutionally vested in the Governor in Council, the Committee would cleverly make the point that it was only *advising* the Government, not *consenting* to the nominations.

The Government of Stephen Harper was happy to carry on with this Paul Martin abomination and to take it still one step further by causing the nominees to be scrutinized in person by parliamentarians of the Ad Hoc Committee. On February 23rd 2006, the PM announced that: “Marshall Rothstein’s candidacy was scrutinized by a comprehensive process initiated by the previous Government that included members from all the political parties”; four days later, Justice Rothstein appeared before the Ad Hoc Committee and on March 1st he was appointed to the Supreme Court.²⁴

This same process was followed for the appointments of Justices Andromache Karakatsanis and Michael Moldaver in 2011, Justice Richard Wagner in 2012, and for the controversial (and ultimately unsuccessful) appointment of Justice Marc Nadon in October 2013.²⁵ As the Minister of Justice explained before the Committee of Parliamentarians on October 2nd, “The goal of today’s hearing is of course to inform the Prime Minister’s eventual final decision with respect to the next appointment to the Supreme Court of Canada”.²⁶

24. “Prime Minister Announces Appointment of Mr. Justice Marshall Rothstein to the Supreme Court” *Prime Minister of Canada: Stephen Harper*, online: Prime Minister of Canada <<http://www.pm.gc.ca/eng/news/2006/03/01/pm-announces-appointment-mr-justice-marshall-rothstein-supreme-court>>.

25. “Prime Minister Announces Appointment of Justice Marc Nadon to the Supreme Court of Canada” *Prime Minister of Canada: Stephen Harper*, online: Prime Minister of Canada <<http://www.pm.gc.ca/eng/news/2013/10/03/pm-announces-appointment-justice-marc-nadon-supreme-court>>; for more on the selection process, see Backgrounder of 2013/09/30/supreme-court-canada-appointments-selection-process.

26. *Department of Justice* online: Government of Canada <http://www.justice.gc.ca/eng/news/judicialappointments/2013/doc_32972.html>

By 2014, the Government appears to have come to its senses, as the practice of having a hybrid selection panel and a hybrid committee of parliamentarians was not used in the most recent appointments to the Supreme Court of Clément Gascon in June and of Suzanne Côté in November. This return to normalcy was deplored by Michele Hollins, president of the Canadian Bar Association, who was quoted as saying: “We’re moving in the wrong direction in terms of making that process more transparent and understandable, a process that would build confidence in the system”; and by Irwin Cotler, the former Liberal minister of justice, who wrote that these last two appointments represent “an utter regression to the kind of closed, unaccountable, unrepresentative and enigmatic approach that, 10 years ago, all parties agreed must change”.²⁷

In reality, the involvement of parliamentarians during the last thirty years in matters of appointments has no constitutional basis in the Westminster system. As explained, under the Common Law, it is the nature of the subject-matter that determines the degree of appropriate consultation before a decision is to be made and the degree of appropriate consent to be obtained after a decision is made. Thus, under the Westminster system, parliamentarians have a right to be consulted and to give their consent to appointments having a direct bearing on the operation of their organization: in other words, the officers and officials of Parliament. For these appointments, the appropriate way to proceed would be to have the leader of Her Majesty’s Official Opposition, who should, *ex officio*, be sworn in as a member of the Privy Council, take part in the deliberations of a Special Committee of Council struck for that purpose.

But for all the rest, the scrutiny of appointments, in general, is of a very different nature than the review of draft legislation or delegated legislation, two topics that were quite legitimately covered in the McGrath Report.

Appointments to the highest offices of State are systemic in their effect; they set the tone for an entire organization, which is much more important than the sum of any number of individual administrative decisions taken within the legislative scope of the organization. Decision-making at the level of the State or even at the level of Government demands intelligence (in every sense of the word) and discernment of a different order than at the level of Parliament. MPs do not have the knowledge or the experience on which to base their

27. Both quotes are taken from *The Globe and Mail* (28 November 2014).

scrutiny. Nor is it reasonable that they can be educated overnight on the subject. Nor is there any parent statute that MPs can turn to in order to ensure that regulatory decisions have not strayed beyond the purpose of the original Act. As a result, MPs find themselves in an embarrassing position they were never meant to occupy: unable to appreciate the requirements of the office in question, they are reduced to commenting in the abstract on a candidate's official curriculum vitae.

Without any constitutional *raison d'être*, practices such as those entailed in Standing Orders 110 and 111 and Ad Hoc Committees of Parliamentarians are bound to have deleterious effects. At a superficial level, they appear to be a weak imitation of the US confirmation process and a yearning for fifteen minutes of media attention. At a more serious level, the whole appointment process is reduced to an exercise in political correctness, during which a 'zoological balance', in terms of sex, physical traits, and habitat, is sought after for the Bench. Not wishing to demean themselves by submitting to such a process, qualified candidates are deterred from considering high office. Though carried out in the name of transparency and accountability, such practices effectively debase the nature and quality of our public service. Canada as a State cannot afford this kind of political self-indulgence. As a small step in bringing about a return to our Westminster system, the Standing Orders in question should be repealed and there should be no more Ad Hoc Committees of Parliamentarians.

TREATIES

With regard to treaties, the Harper Government announced in April 2006 that, once a treaty has been signed but before it is ratified, it would be tabled in Parliament for assessment and a possible vote.²⁸ In this case, the new Government was aping not only American constitutional practice but British practice as well. Indeed, it was adopting the Ponsonby Rule, a practice first introduced in 1924 by Arthur Ponsonby, the Parliamentary Undersecretary of State in the first Labor government of the UK. Enactment of the Ponsonby Rule in Part Two, sections 20 to 25 of the *Constitutional Reform and Governance Act* became one of the highlights of Gordon Brown's new 'settlement'.

28. Canada, Department of Foreign Affairs, Trade and Development, *Policy on Tabling of Treaties in Parliament*.

Like the Ponsonby Rule, the Canadian government policy states that, while allowing for certain exceptions, all treaties would be placed before Parliament for 21 sitting days; only after a positive vote or the expiry of the allotted period of time would the treaty then be ratified.

The first point to be made about this practice is the significant difference among the three countries in how far consent has been shifted to legislative assemblies. In the US, under Article II of the Constitution, consent is to come exclusively from the Senate, which until the 17th Amendment in 1913, was not a popularly elected chamber. In the UK, treaties are to be tabled in both Chambers. In Canada, the policy states that treaties are to be tabled exclusively in the House of Commons. But common sense would seem to dictate that, if either Chamber were in a position to scrutinize a complex treaty, it should be the more leisurely and experienced Upper Chamber. The only explanation for this radical innovation is that Canada would appear to be more revolutionary in this case than the US and the UK – more determined to shift the locus of sovereignty from the Queen and her Councillors to the Chamber closer to the people.

This apparently minor point of referring treaties only to the House of Commons in fact reveals a fundamental shift in how many Canadians understand sovereignty. Sovereignty, for many Canadians, now resides in the popular will, a will that is manifest directly and constantly in surveys of all sorts and periodically in general elections. It is that same popular will that many Canadians now believe should be expressed indirectly or re-presented by the members they have elected to Parliament.

But this shift rests on a confusion between power and authority. The popular will is an expression of power, of the free exchange of consent or agreement between or among free individuals to embark on a shared or common project, as when a political party in opposition tries to marshal as much support as possible among the electors. Political power has nothing to do with the moral authority required for the enactment of laws, let alone for the founding of States or the interaction of one State with another. In these cases, the judgment arrived at by decision-makers, as explained above, must be synthetic and incorporate the norm uncovered by human inquiry and expressing the rule of law in a given set of circumstances.

Although it has been greatly misunderstood, Rousseau's concept of the general will can shed light on the true locus of sovereignty and on the distinction between power and authority. In his

Social Contract, Rousseau has sketched out a dialectical process of reasoning that is very similar to that followed by jurists in the Common Law tradition: beginning with what is given as fact – for example, conflicting social practices – the decision-maker works his way through different interpretations or perspectives regarding those practices; to discover, finally, the norm or general will that holds the situation together, renders it intelligible, and assigns purposive duties to the actors involved.²⁹ For both Rousseau and

29. It is remarkable how Rousseau's concept of the general will can be understood to refer to the same centripetal ethical force as that found in the writings of traditional English jurists, who thought of this force as right reason embodied in tacitly agreed-upon custom. Let us see how the neo-classical Rousseau can shed light on the classical liberalism of English jurisprudence:

Rousseau introduces his concept of the general will while making the following fundamental distinction about liberty: "... we must distinguish natural liberty, which knows no bounds but the power of the individual, from civil liberty, which is limited by the general will;" *The Social Contract* (New York: Hafner Publishing, 1947)19. He then goes on to explain:

"...that the general will alone can direct the forces of the State agreeably to the end of its institution, which is the common good; for if the clashing of private interests has rendered the establishing of societies necessary, the agreement of the same interests has made such establishments possible. It is what is common in these different interests that forms the social bond; and if there was not some point in which they all unanimously centered, no society could exist. It is on the basis of this common interest alone that society must be governed."(23)

Rousseau goes on to emphasize the wholeness of the general will: "for the will is general or it is not; it is either the will of the whole body of the people, or only of a part. In the first case, this declared will is an act of sovereignty and constitutes law; in the second, it is but a private will or an act of magistracy, and is at most but a decree."(24); and how the general will can be distinguished from the popular will:

"It follows from what has been said that the general will is always right and tends always to the public advantage; but it does not follow that the deliberations of the people have always the same rectitude. Our will always seeks our own good, but we do not always perceive what it is. The people are never corrupted, but they are often deceived, and only then do they seem to will what is bad. There is frequently much difference between the *will of all* and the *general will*. The latter regards only the common interest; the former regards private interests, and is indeed but a sum of private wills; but remove from these same wills the pluses and minuses that cancel each other, and then the general will remains as the sum of the differences".(26)

Towards the end of his work, in a chapter entitled "That the General Will Cannot be Destroyed", Rousseau emphasizes again how the ethical dimension is always present, whether we recognize it or not:

"Finally, when a state upon the brink of ruin supports only a vain illusory form and the social bond no longer unites the hearts of the people, and when the sacred name of public good is made use of to cover the basest interest, then the general will is silenced... But does it follow that the general will is annihilated or corrupted? No: it will remain always constant, unalterable, and pure; but

Common Law jurists, there is a transcendent element of a binding, ethical nature that can illuminate a mass of partial, uninformed and conflicting opinions.

The second point to be made about the Government's policy with regard to treaties has to do with the significance being accorded to their *signing*.

The signing of a treaty should not be confused with the agreement-in-principle arrived at between the parties to the negotiations. There is still much work to be done to the text before it is ready for signature: the text must undergo a close legal review ('scrub') whereupon issues may arise that need to be negotiated and that had not been foreseen by the subject-matter specialists; translations have to be carefully prepared, which often give rise to questions of assumptions and interpretation that may have been taken for granted by the negotiators; and administrative matters covering the signature, entry into force, amendment procedures, termination clause, etc, have to be worked out to the satisfaction of both parties. In complex treaties, this period between agreement-in-principle and official signing may take years of work.

Once the final text of the treaty has been signed, consequential amendments may have to be made to domestic legislation. Thus we read at section 132 of the *Constitution Act, 1867* that "The Parliament and Government of Canada shall have all Powers necessary or proper for *performing the Obligations of Canada or of any Province thereof...arising under Treaties...*" (my italics).³⁰ For example, international trade treaties usually require amendments to the *Customs Tariff Act*.³¹ In such cases, prudence dictates that the government, not wanting to risk a conflict between two orders of law, may well want to have those domestic changes in place before taking on obligations under international law. This makes even more sense in the case of a federation like Canada where, despite the express wording of section 132 just cited, it may be prudent to have the implementing

it is rendered subordinate to other wills, which domineer are over it...Even by selling his vote for money he does not destroy his own general will, he only eludes it. The fault which such a man commits is that of changing the state of the question, and answering something else than what he was asked: instead of saying by his vote, "it is advantageous to the State," he says, "It is advantageous to such a man, or to such a party, that such a motion should pass". (93)

30. (UK), 30 & 31 Vict, c 3, s 132, reprinted in RSC 1985, App II, No 5 [*Constitution Act*].

31. SC 1997, c 36.

legislation carried out at the provincial level.³² It also makes sense that, in such cases, parliamentarians be provided with enough information in the form of explanatory notes to have some context for the bill placed before them; the signed treaty may even be in the public domain by this time. In any event, given that treaties are matters of State, passage of any consequential amendments should be treated as a motion of confidence in the government.

But throughout this technical implementation process, the text of the treaty itself can never be subject to parliamentary scrutiny. Thus it is disingenuous and misleading of the Government to have inserted the following clause into the Bill implementing the Canada-Colombia Free Trade Agreement: “The Agreement and the related agreements [on the environment and on labour cooperation] are approved”.³³ Apart from infringing on the Crown’s jurisdiction, this legislative provision defies any notion of prudence: why would any government put at risk years of hard work and delicately worked out compromises by submitting the treaty to the whims of party politics? Why subject to arbitrary deconstruction a text that has just been painfully constructed? This is the situation that Canada needlessly put itself in for over two years, between the signing of the *Foreign Investment Promotion and Protection Agreement* with China in September 2012 and its ratification in September 2014.³⁴

Although ratification, under the government’s new tabling of treaties policy, is still technically done by the Governor-in-Council, practically, the consent has been shifted to Parliament. We recall that the same gambit was attempted in the case of appointments. To its great credit, the Supreme Court of Canada has made it very clear what it thinks of such legal tactics. In its recent decision on the Reference regarding Senate Reform, we read:

In our view, the argument that introducing consultative elections does not constitute an amendment to the Constitution privileges form over substance. It reduces the notion of constitutional amendment to a

32. As treaties penetrate more deeply beyond borders, they begin to tread on areas of provincial jurisdiction, such as labour conditions; for a brief discussion of why provincial jurisdictional rights should be kept in mind, see D Michael Jackson, “Did the Judicial Committee of the Privy Council Subvert the Fathers of Confederation?” in *The Crown and Canadian Federalism* (Toronto: Dundurn, 2013) at 104-112.

33. *Canada-Colombia Free Trade Agreement Implementation Act*, SC 2010, c 4, s 9 (Assented to 2010-06-29).

34. *Foreign Investment Promotion and Protection Agreement*, Canada and China, 12 September 2014, (entered into force 1 October 2014).

matter of whether or not the letter of the constitutional text is modified. This narrow approach is inconsistent with the broad and purposive manner in which the Constitution is understood and interpreted, as discussed above. While the provisions regarding the appointment of Senators would remain textually untouched, the Senate's fundamental nature and role as a complementary legislative body of sober second thought would be significantly altered.³⁵

In this case, the Court has rightly picked up on how government lawyers have made use of the innocent-sounding term 'consultative' in their attempt to reform the Senate. The Court has explained how a consultative election would not simply be a formality, it would have an impact on the substance of the decision to be made. Allowing this practice would do nothing less than change the Constitution. In light of section 24 of the *Constitution Act 1867*,³⁶ which in turn rests on the formal elements of Westminster decision-making described above (regarding the scope of consultations and of obtaining consent), the general electorate should have no role to play in the appointment of Senators. Analogously, there is no role for private members of Parliament to play in the signing of treaties. By the nature of the decision to be made, what pertinent information could they possibly bring forward that would not already be available to Privy Councillors?

This abuse of language by Government lawyers brings me to my second objection to the wording of the theme under discussion, which reads, we recall, "*Consulting Parliament before Exercising a Prerogative*". Here, as in the reference case to the Senate, the term 'consulting' has been used to cloak an attempted alteration to the Constitution. There are many ways of characterizing the relation between Parliament and Government, but consulting is not one of them. At one level of jurisdiction, Parliament may have its own form of consultations (as in the case, for example, of the House of Commons' Finance Committee's annual pre-budget consultations) whereupon it will then offer advice to Government in the form of policy recommendations before the Government proceeds to craft its budget. At another jurisdictional level, in a different manner, and for different purposes, Government may also consult with interest groups, organizations or experts from civil society as part of its internal policy development work. But in neither case, does one level of jurisdiction 'consult' with the other. Nor does the term 'consulting' make any sense when we consider the sequence in the decision-

35. *Reference re Senate Reform*, 2014 SCC 32, at para 52, [2014] 1 SCR 704.

36. *Supra* note 30 at s 24.

making process. A lesser authority cannot second-guess a decision already taken by a higher authority.

We have seen how the Government's policy on the tabling of treaties is unconstitutional, both in terms of the formal elements of Westminster decision-making and the particular wording of section 132 of the *Constitution Act 1867*.³⁷ Moreover, we have seen how practically imprudent it is of the Government, in terms of organizing their work and achieving their goals. But the policy is also morally offensive. What makes it so objectionable is the following statement: "Once a treaty and its Explanatory Memorandum have been tabled in the House of Commons and the waiting period has passed: the Government will consider any concerns raised by the Opposition Parties during the tabling process...The Government will then decide whether to ratify the treaty..."³⁸

This statement reveals a misunderstanding of the nature and purpose of the royal prerogative and sends exactly the wrong signal to one's own citizens and to the world about the Government of Canada's attitude in matters of State. Far from "...lending greater legitimacy to decisions of the executive", to use the language of our theme for discussion, it does precisely the opposite: it calls into question the good faith of Canada in entering into negotiations. Who can have confidence that the signing of the final legal text represented the culmination of everyone's best efforts? The seriousness of Canada's original intent is undermined as the whole exercise is freely subjected, after-the-fact, to second-guessing by some other party or parties pursuing unrelated goals. Apart from exposing the Government's lack of respect for the State it is negotiating with, this tabling policy also exposes just how insecure the Government is in understanding its own interests and its potential contribution to international law.

When Canadians act on the world stage they have to do so with one voice; in other words, they have to try to be statesmen, acting as a single moral person. As much as possible, they have to transcend the divisions of domestic politics. The rest of the world does not care whether Canada's government of the day has 'consulted' with Parliament or whether or not it reflects popular opinion. In today's world, a country's sovereignty is really measured by its degree of moral authority, which does not mean a mantra-like incantation of abstract

37. *Ibid* at s 132.

38. *Policy on Tabling of Treaties in Parliament*, section 6.6 (a) and (b), *supra* note 28.

principles, but by its freedom of mind, by its ability to shed original light on a given situation and to point the way forward.

The Senate is well-equipped to conduct medium-term policy studies that could provide some context to ongoing or possible treaty negotiations. Such studies would also be of an educational nature: for example in the trade area, they could serve to make businesses more aware of possible new market opportunities. And parliamentarians in both Chambers can continue to ask questions, either orally or in writing, of the appropriate ministers. Politicians can make the conduct of international relations a campaign issue during a general election campaign. But at the end of the day, it does not behoove Parliament and especially the House of Commons, to concern itself with matters coming under the royal prerogative. Elected politicians have all the work they can handle in trying to carry out their own constitutional duty of keeping tabs on Canadian tax-payers' dollars.

For at least a century now, the rest of the world has had to put up with the US practice of requiring that treaties be approved by two thirds of the US Senate: from, most notably, the US Senate's failure to ratify the treaty creating the League of Nations to today's prolonged failure to bring the IMF governance structure in line with current economic reality. At a time when technology is making for closer ties and better understanding among countries, why would any civilized country want to follow the American example and subject any framework for global rapprochement to local party politics?

CONCLUSION

We have touched upon two recent practices pursued by the Government of Canada that betray an abandonment of the Westminster system of governance we have inherited.

Canada has an important choice to make: it can continue down the path that it has been following for decades, a path expressly advocated by the Reform Party and Preston Manning; the path of gradually putting aside or marginalizing Canada's own constitutional history and becoming more of a US-style liberal democracy.³⁹ Another possi-

39. Preston Manning's *A New Vision for a Canada Strong and Free* (Vancouver, Fraser Institute, 2007) captures his twin obsession with a "more assertive application of market-oriented thinking" in different areas of public policy and a "more responsive democracy" in our institutions of governance; see, in particular, chapter 10

ble option for Canada is to do as little as possible, while keeping an eye out for current UK practices that can be copied here, as if nothing has changed in Canada's relation to the UK since the Statute of Westminster, the loss of India, the period of decolonization, the Suez crisis, and the UK's decision to join the EU.

I would argue that to follow either of these paths would be provincial and colonial-minded. Canada can be proud of its constitutional legacy, of its tradition going back to the end of the 18th century of having repeatedly understood and appreciated the wisdom of British institutions, and of how that wisdom can be perpetuated independently in North America. If we are to remain loyal to that tradition, two great constitutional tasks lie before us: on the written side, the work of understanding how our two basic documents, the *Constitution Acts* of 1867 and 1982 build upon one another in the spirit of the Common Law;⁴⁰ and on the unwritten side, the work of uncovering in a rapidly changing society the ethical norms that make for best

for his treatment of public officials and Chapter 11 for his menu of democratic reforms.

40. With regard to the *written* part of our constitution, we need to return to the 2nd edition of Elmer Driedger's *Construction of Statutes*, (Toronto: Butterworths, 1983) where he explains how an equilibrium should be attained between the spirit of the law and the letter of the law. At a macro level, this equilibrium is the achievement of a centuries-long historical synthesis: "First, it was the spirit and not the letter, then the letter and not the spirit and now the spirit and the letter."⁽⁸³⁾ Given this historical achievement, there was now only one approach or principle for interpreting statutes:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. (87)

The equilibrium sought after is a harmony between the ordinary meaning of words and all the elements making up their context as a whole. Further on, in Chapter 6, Driedger expands his concise definition of the one approach to interpreting statutes into a method or a set of procedures, which should be taken to heart by everyone involved in legislation in Canada:

The decisions examined thus far indicate that the provisions of an enactment relevant to a particular case are to be read in the following way:

1. *The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).*

2. *The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament embodied in the Act as a whole, the object of the Act and the scheme of the Act, and if they are clear and unam-*

practices in all of the Westminster system's different institutional fields of operation.⁴¹

Canada may be the only country in the world that needs to hold on to the Westminster system: for it is what has differentiated us from the US for nearly two and a half centuries. But if we are to continue down this path of loyalty, it behooves us, as a first step, to explain,

biguous and in harmony with that intention, object and scheme and with the general body of the law, that is the end.

3. If the words are apparently obscure or ambiguous, then a meaning that best accords with the intention of Parliament, the object of the Act and the scheme of the Act, but one that the words are reasonably capable of bearing, is to be given them.

4. If, notwithstanding that the words are clear and unambiguous when read in their grammatical and ordinary sense, there is disharmony within the statute, statutes in pari materia, or the general law, then an un-ordinary meaning that will produce harmony is to be given the words, if they are reasonably capable of bearing that meaning.

5. If obscurity, ambiguity or disharmony cannot be resolved objectively by reference to the intention of Parliament, the object of the Act or the scheme of the Act, then the meaning that appears to be the most reasonable may be selected. (105)

41. With regard to the *conventional* part of our constitution, we should be resuming the heroic efforts of Henry Davis who put together, in true Common Law spirit, a guide book for the Privy Council to assist senior officials in their decision-making: Privy Council Office, *Manual of Official Procedure of the Government of Canada*, (Ottawa: Government of Canada, 1968). Constructed like an encyclopedia with subjects covering all the major elements of governance ranging from Ambassadors to Visits of Foreign Dignitaries, each subject is then divided into its different aspects. Most remarkably, each aspect of a subject is then treated at five different levels. As we learn in the instructions to users:

1. The Position describes the situation calling for a decision to be taken or discretion to be exercised in a given set of circumstances.

2. The Background outlines the pertinent background which has led to the present position.

3. The Procedure prescribes the administrative action necessary to implement a decision and identifies those responsible for such action.

4. The Ceremonial deals with those situations calling for the organisation of a public event.

5. The Documentary provides examples or suggested texts for implementing decisions as well as background papers.

As Lester Pearson, then Prime Minister, wrote at the time in the Introduction, "I do not believe that a guide to procedure of this nature has been produced elsewhere". The unique structure of the manual allows officials to focus quickly on the kind and level of information that they require; it also allows for easy maintenance and the addition of new subjects and new aspects of a subject. For more on the Davis manual, see James W J Bowden and Nicholas A MacDonald, "Cabinet Manuals and the Crown" in D Michael Jackson and Philippe Lagassé, ed, *Canada and the Crown; Essays on Constitutional Monarchy* (Montreal and Kingston: McGill-Queen's University Press, 2013) at 183-186.

to ourselves and to the rest of the world, the difference between *Pax Britannica* and *Pax Americana*. The rest of the world does not understand that the modern liberal democratic tradition, as propagated by the US, is based on a break away from the Westminster system and the latter's classical liberal humanism. As a second step, we should be making it clear that, in a pluri-centric world, it is neither possible nor desirable to have only one system of governance accepted as legitimate. In the spirit of the Common Law, one can be proud of one's constitutional heritage without trying to impose it on others.

CHAPTER 8

THE CROWN AND CONSTITUTIONAL AMENDMENT IN CANADA

Philippe Lagassé* & Patrick Baud**

Paragraph 41(a) of the *Constitution Act, 1982* provides that amendments to “the office of the Queen, the Governor General and the Lieutenant Governor of a province” require the consent of “the Senate and House of Commons and of the legislative assembly of each province”. Although the decision to place the Crown under the most stringent amending procedure, alongside matters as important as the “use of the English or the French language” and “the composition of the Supreme Court of Canada”, suggests an intent to protect the place of the monarchy in the Canadian constitution, the scope of paragraph 41(a) is far from clear.¹

The explanatory notes to the April Accord, which served as the basis for the amending procedures in the *Constitution Act, 1982*, note that paragraph 41(a) is “self-explanatory”.² An ongoing challenge to the *Succession to the Throne Act, 2013* demonstrates that this is far from the case.³ At issue in the challenge is whether the rules of royal succession form part of Canadian law, and if so, whether changes to the law governing royal succession should be understood to affect the “office of the Queen”. If they do, then making such changes requires the use of the unanimity procedure.⁴

* Associate Professor, Graduate School of Public and International Affairs, University of Ottawa.

** BCL/LLB student, Faculty of Law, McGill University.

1. *Constitution Act, 1982*, s 41, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].

2. Government of Canada, “Proposed Constitutional Accord of April 16, 1981” in James Ross Hurley, *Amending Canada’s Constitution: History, Processes, Problems and Prospects* (Ottawa: Minister of Supply and Services Canada, 1996) 221 at 228.

3. Michel Bédard, *Legislative Summary of Bill C-53: Succession to the Throne Act, 2013* (Ottawa: Library of Parliament, 2013) at 9.

4. See Philippe Lagassé & James WJ Bowden, “Royal Succession and the Canadian Crown as Corporation Sole: A Critique of Canada’s *Succession to the Throne Act*,

The same sorts of questions would be raised by other proposals to alter the place of the Crown in the Canadian constitution. It is clear that the outright abolition of the monarchy would require the use of paragraph 41(a) as would the elimination of the offices of Governor General and Lieutenant Governor. It is possible that proposals to reform the vice-regal powers to dissolve and prorogue Parliament and the provincial legislative assemblies could engage paragraph 41(a) as might efforts to resolve long-standing concerns about the Crown's legal personality, immunities and privileges.⁵

Even reforms to key legal instruments that define and shape the role and status of the Crown in Canada, such as the Letters Patent, 1947 and several federal statutes, including the *Seals Act*, *Royal Style and Titles Act*, *Governor General's Act* and *Oath of Allegiance Act*, might require the use of paragraph 41(a).⁶ It is also possible that efforts to reform core prerogatives exercised by the prime minister and cabinet on behalf of the Crown, including foreign relations and war powers, could also engage paragraph 41(a).⁷

Political support for these sorts of reforms is growing. In 2012, the federal Liberal convention debated a motion that would have committed the party to end Canada's relationship with the "British monarchy".⁸ Several prominent Liberal and New Democratic MPs, including Nathan Cullen and Marc Garneau, favour Canada becom-

2013" 23 Constitutional Forum 17; Peter W Hogg, "Succession to the Throne" (2014) 33 National Journal of Constitutional Law 83.

5. See e.g. Peter Aucoin, Mark D Jarvis & Lori Turnbull, *Democratizing the Constitution: Reforming Responsible Government* (Toronto: Emond Montgomery, 2011) at 217-227; Law Commission of Canada, *The Legal Status of the Federal Administration* (Ottawa: Law Reform Commission of Canada, 1985).
6. *Letters Patent Constituting the Office of Governor General and Commander-in-Chief of Canada*, RSC 1985, App II, No 31 [Letters Patent, 1947]; *Seals Act*, RSC 1985, c S-6 [Seals Act]; *Royal Style and Titles Act*, RSC 1985, c R-12 [Royal Style and Titles Act]; *Governor General's Act*, RSC 1985, c G-9 [Governor General's Act]; *Oaths of Allegiance Act*, RSC 1985, c O-1. For the idea that section 41(a) extends to these sorts of instruments, see Patrick J Monahan & Byron Shaw, *Constitutional Law*, 4th ed (Toronto: Irwin Law) at 208. *Contra* Peter W Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2014) at 4.13-4.14, 4.26 [Hogg, *Constitutional Law of Canada*].
7. Philippe Lagassé, "Parliamentary and Judicial Ambivalence Toward Executive Prerogative Powers in Canada" (2012) 55 Canadian Public Administration 157 [Lagassé, "Parliamentary and Judicial Ambivalence"]; Irvin Studin, *The Strategic Constitution: Understanding Canadian Power in the World* (Vancouver: University of British Columbia Press, 2014).
8. Jane Taber, "Liberals vote to keep monarchy, legalize pot at convention", *The Globe and Mail* (15 January 2012).

ing a republic.⁹ Controversy over the use of prorogation at the federal and provincial level in recent years has prompted proposals for reform.¹⁰ In the past decade, successive British governments have undertaken significant constitutional reforms aimed at curtailing executive prerogatives; future Canadian governments may follow a similar course.¹¹

Beyond its significance for the fate of these sorts of reform proposals, paragraph 41(a) is also important because of its close relationship to the rest of the amending procedures in Part V of the *Constitution Act, 1982*. Paragraph 41(a) functions as a structural limit on the sorts of amendments that can be undertaken using the other amending procedures.¹² A broader interpretation of paragraph 41(a) means that the scope of the general procedure and by extension, the unilateral federal and provincial procedures is necessarily narrower. Likewise, a narrower interpretation of paragraph 41(a) means that Parliament and the provincial legislatures have broader scope to undertake structural reforms.

The meaning of paragraph 41(a) as whole has not yet been directly treated by the courts. The Quebec Superior Court will get the opportunity to do so as a result of the challenge to the *Succession to the Throne Act, 2013*. If the Supreme Court ends up hearing the case, it will have an opportunity to build on its past treatment of the unanimity procedure and apply it to paragraph 41(a).¹³ A more definitive way to get the Supreme Court to do so would be for a future government interested in pursuing reforms that might affect the Crown to ask a reference question on the matter as the Harper government recently did on both the Senate and the Supreme Court.

In anticipation of these possibilities, this chapter aims to analyze how the meaning and scope of “the office of the Queen, the Gov-

9. *Ibid*; Jane Taber, “Put monarchy to a vote, NDP leadership hopeful says”, *The Globe and Mail* (30 November 2011).

10. See e.g. Aaron Wherry, “A Liberal agenda for parliamentary reform? A to-do list for fixing this place”, *Macleans* (19 September 2014); Bill 24, *Legislative Assembly Amendment Act, 2013*, 2nd Sess, 40th Leg, Ontario, 2013 (referred to committee 7 March 2013).

11. James Strong, “Why Parliament Now Decides on War: Tracing the Growth of Parliamentary Prerogative Through Syria, Libya and Iraq” 16 *British Journal of Politics & International Relations* [forthcoming in 2014]

12. Benoît Pelletier, *La modification constitutionnelle au Canada* (Toronto: Carswell, 1996) at 146-149, 190-191, 211-217.

13. *Reference re Senate Reform*, 2014 SCC 32 at paras 40-41 [*Senate Reference*]; *Reference re Supreme Court Act*, ss 5 and 6, 2014 SCC 21 at para 74 [*Supreme Court Reference*].

ernor General and the Lieutenant Governor of a province” might be interpreted. For the sake of simplicity, the chapter focuses on potential changes to the Crown at the federal level, but the way in which paragraph 41(a) is interpreted could have significant consequences for provinces’ ability to reform their constitutions under section 45 of the *Constitution Act, 1982*. In doing so, this chapter seeks to understand which changes to the Crown would require a constitutional amendment under paragraph 41(a) and which changes could be made by regular statute, under the general amending procedure in section 38 of the *Constitution Act, 1982* or under the federal or provincial unilateral procedures in section 44 and 45 of the *Constitution Act, 1982*.

This chapter argues that paragraph 41(a) is open to three possible interpretations. The first and narrowest interpretation — the textualist perspective — holds that paragraph 41(a) applies only to the Queen, Governor General and Lieutenant Governors as they appear in the written texts of the *Constitution Acts, 1867 to 1982* and the statutes listed in the Schedule to the *Constitution Act, 1982*. The second — the functionalist perspective — holds that paragraph 41(a) applies to the textual provisions concerning the regal and vice-regal offices *and* the other essential features that are necessary for three offices to fulfill their current constitutional roles. The third and broadest interpretation — the formalist perspective — incorporates both the written and unwritten aspects of the Crown’s essential features and also includes the essential features of the legal and political architecture that supports the monarchy’s position in Canada’s constitutional order.

To illustrate the three interpretations and draw out their implications, this chapter considers how these perspectives might affect approaches to three types of changes to the Crown: 1) changes to the powers, privileges and immunities of the Crown; 2) changes to the status of and constitutional relationship between the Queen and Governor General; and 3) reforms to the Crown’s status in law, particularly its place as both the concept and legal personality of the state and particularly, the executive.

The chapter concludes with a discussion of which of the three perspectives on paragraph 41(a) is the most plausible. Whether through the current challenge to the *Succession to the Throne Act, 2013* or in the course of a future government’s reform efforts, it is likely that the Supreme Court will have to interpret paragraph 41(a). It is unlikely that it would adopt a textualist perspective. It seems most likely that it will take the functionalist perspective. However,

this chapter will argue that it is not only possible that it will adopt the formalist perspective, but that it may be desirable to do so.

I. TEXTUALIST PERSPECTIVE

Section 41 of the *Constitution Act, 1982* outlines which matters in the “Constitution of Canada” can only be amended by the unanimous consent of the federal government and the provinces. The “Constitution of Canada”, which is defined by section 52 of the *Constitution Act, 1982*, “includes (a) the *Canada Act 1982*, including [the *Constitution Act, 1982* itself]; (b) the Acts and orders referred to in the schedule [including, most importantly, the *Constitution Act, 1867*, as amended]; and (c) any amendment” to anything in either category.¹⁴ From a textualist perspective, “includes” should be read narrowly to mean that the “Constitution of Canada” is limited to these written constitutional texts.

On such a literal reading, the amending procedures provided in Part V of the *Constitution Act, 1982* apply only to those matters specifically mentioned in the constitutional texts. Under this interpretation, matters not explicitly listed in these texts are not part of the “Constitution of Canada” and should not be subject to any of the amending procedures. Although such an interpretation was favoured by lower courts in the first decade or so after the adoption of the *Constitution Act, 1982*, it has been largely discredited in favour of a broader interpretation by the Supreme Court that extends constitutional protection to unwritten constitutional principles and arguably, to some of the most fundamental constitutional conventions.¹⁵

Despite the trend towards the adoption of a broader definition of the “Constitution of Canada”, there remains significant ambiguity about its scope, even in the wake of the *Senate* and *Supreme Court References*. It is likely that the Department of Justice’s lawyers arguing on behalf of a reform-minded government would take advantage of this ambiguity. Following some commentators, they might argue that a textualist approach is a prudent one for the Supreme Court to take when it comes to reforms to the Crown so as to preserve the

14. *Constitution Act, 1982*, *supra* note 1 s 52 [emphasis added].

15. Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel* (Cowansville, Québec: Éditions Yvon Blais, 2014) at 235-236; Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics*, 2nd ed (Oxford: Oxford University Press, 2014) at 229-230.

ability of the federal government and the provinces to make reforms to the functioning of their respective executives.¹⁶

Such a textualist perspective would suggest that paragraph 41(a) applies only to those aspects of the constitutional texts, especially the *Constitution Acts 1867 to 1982*, that mention the Queen, Governor General and Lieutenant Governors. Since these provisions are not given nearly as much attention in constitutional litigation and scholarship as those concerning the division of powers between the federal government and the provinces, the separation of powers between the judiciary and the political branches and the limitation of powers through individual and group rights guarantees, it is worth examining them in detail.¹⁷

Part III of the *Constitution Act, 1867* includes a number of provisions concerning the Queen and Governor General's executive role and powers that would require unanimous consent to alter according to a textualist perspective. Chief among those are: section 9, which holds that "The Executive Government and Authority of and over Canada is hereby to continue and be vested in the Queen"; section 10, which identifies the Governor General and specifies that he or she acts in the Queen's name; section 11, which provides that the Governor General chooses, summons and removes members of the Queen's Privy Council for Canada; section 12, which ensures that the Governor General acts on the advice of the Queen's Privy Council for Canada; section 13, which identifies the "Governor General in Council" as the Governor General acting on the Queen's Privy Council for Canada's advice; section 14, which allows the Governor General to appoint Deputy Governors General; and section 15, which vests the "Command-in-Chief...of all Navy and Military Forces, of and in Canada...in the Queen".

Part IV of the *Constitution Act, 1867* includes several provisions concerning the Queen and Governor General's legislative role and powers, which would also require unanimous consent to amend. Section 17 provides that the Queen is part of Parliament alongside the House of Commons and Senate. With respect to the Senate, section 24 provides that the Governor General summons senators in the Queen's name; section 26 provides that the Queen can summon an additional four

16. Monahan & Shaw, *supra* note 6 at 208-209.

17. This tendency is the subject of an eloquent and persuasive lament in David E. Smith, "Bagehot, the Crown and the Canadian Constitution" (1995) 28 *Canadian Journal of Political Science* 619.

to eight senators upon the recommendation of the Governor General; section 32 notes that the Governor General can summon senators to fill Senate vacancies; and under section 34, the Governor General appoints a senator to serve as Speaker of the Senate.¹⁸ (It should be noted, however, the Supreme Court did not place section 24 under the unanimous procedure as part of the *Senate Reference*.)

With respect to the House of Commons, section 38 provides that the Governor General summons and calls together the Commons in the Queen's name, and section 50 adds that the Governor General can dissolve the Commons. Section 54 requires that the recommendation of the Governor General be secured to "adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of the Public Revenue, or of any Tax or Impost". Section 55 further provides that the Governor General grants royal assent in the Queen's name to bills passed by the House of Commons and Senate. Sections 56 and 57, which are widely considered spent, allow for the Queen, acting on the advice of her imperial Council, to disallow or reserve a statute passed by the Commons and Senate and assented to by the Governor General.

Unanimous consent would also be required to amend the role and powers of the Governor General and the provincial Lieutenant Governors found in Part V of the *Constitution Act, 1867*, which provides the broad strokes of provincial constitutions. Part V provides that each province will have a Lieutenant Governor appointed by the Governor General, that the Lieutenant Governor appoints members of the provincial executive council and acts on their advice and that the Governor General can appoint an administrator to act on behalf of Lieutenant Governor "during his Absence, Illness or other Inability". Part V, read alongside province-specific statutes listed in the Schedule to the *Constitution Act, 1982*, such as the *Alberta Act* and *Manitoba Act, 1870*, further provides that the Lieutenant Governor is part of the legislative assemblies and will be responsible for providing the royal recommendation in the provincial legislatures.

Paragraph 41(a) would also seem to apply to the Governor General's power to appoint superior court judges under section 96. Unanimity would also be required to alter the Governor General's and Lieuten-

18. A bill currently before the Senate would remove the Governor General's power to appoint the Speaker of the Senate under section 54 of the *Constitution Act, 1867* through a unilateral constitutional amendment under section 44 of the *Constitution Act, 1982*. See Bill S-223, *An Act to amend the Constitution Act, 1867 and the Parliament of Canada Act (Speakership of the Senate)*, 2nd Sess, 41st Parl, 2014 (first reading 17 June 2014).

ant Governors' authority to oversee the oath of allegiance under section 128. The oath of allegiance itself might be considered part of the "office of the Queen" according to the textualist perspective since the oath itself appears in the Fifth Schedule to the *Constitution Act, 1867*. Likewise, alterations to the constitutionally-specified use of Canada's great seals could also be seen to affect the regal and vice-regal offices.¹⁹

Finally, the textualist perspective might consider how the wording of the preambles to the *Constitution Act, 1867* and the *Statute of Westminster, 1931* help define the "office of the Queen" for the purposes of section 41(a). The preamble to the *Constitution Act, 1867* provides that Canada is federated under "the Crown of the United Kingdom of Great Britain and Ireland", which suggests that Canada's status as a constitutional monarchy is intimately linked with the "office of the Queen". This might suggest that in addition to abolition, at least some essential features of Canada's constitutional monarchy might enjoy protection under paragraph 41(a).

The *Statute of Westminster, 1931*, which is an imperial statute included in the Schedule to the *Constitution Act, 1982*, states in its preamble that Canada's "common allegiance to the Crown" requires that its assent be given to "any alteration in the law touching the Succession to the Throne or the Royal Style and Titles".²⁰ This might be taken to mean that the British law of royal succession applies in Canada, but that any change to the way in which that law applies requires a unanimous constitutional amendment.²¹ Similarly, the preamble could mean that a change to the Queen's Canadian style and title as Queen "of the United Kingdom, Canada and Her other Realms and Territories...Head of the Commonwealth, Defender of the Faith" requires unanimous consent.²²

Considering the prominence of the Queen, Governor General and the Lieutenant Governors in the constitutional texts, even a

19. The use of the great seals is required in several places in the *Constitution Acts, 1867 to 1982*, such as for the appointment of senators and Lieutenant Governors, the summoning of the House of Commons and legislative assemblies and the proclamation of constitutional amendments. They are also used to signify that state documents are invested with the authority of the Queen as source of legitimate authority in Canada.

20. *Statute of Westminster 1931* (UK), 22 Geo V, c 4.

21. Robert Hawkins, "The Monarch is Dead, Long Live the Monarch': Canada's Assent to Amending the Rules of Succession", (2013) 7 *Journal of Parliamentary and Political Law* 593.

22. *Royal Style and Titles Act*, *supra* note 6 s 2.

narrow construction of paragraph 41(a) proposed by the textualist perspective would extend constitutional protection to a wide range of constitutional matters. However, because it focuses on the letter rather than the spirit of the constitutional texts, this perspective would allow significant reforms to essential features of the regal and vice-regal offices that are not explicitly provided in the texts. The textualist perspective could thus permit profound reforms being made to the Crown by regular statute, the general procedure under section 38 or the federal or provincial unilateral procedures under sections 44 and 45, respectively.

A) Powers, privileges and immunities

Peter Aucoin, Mark Jarvis and Lori Turnbull propose that the Governor General's powers to prorogue and dissolve Parliament should be transferred to the House of Commons.²³ Under a textualist reading, however, legally transferring the authority to prorogue and dissolve Parliament would require a constitutional amendment under paragraph 41(a). But reforms that constrained the Governor General's powers by giving parliamentarians a veto over prorogation and dissolution would not engage paragraph 41(a). It might be possible to require that the Governor General only accept the prime minister's advice to prorogue or dissolve Parliament after the House of Commons passed a motion approving the advice.²⁴

A similar textual logic could be used to grant the legislature a binding advisory role in the exercise of vice-regal powers with respect to government formation. While paragraph 41(a) would prevent these powers from being transferred from vice-regal offices to the legislature, the procedure surrounding the way in which the Governor General exercises these authorities could be altered by regular statute, the general procedure or the unilateral federal or provincial procedures. For instance, it might be possible to establish an institutional mechanism by which the Governor General would appoint a government only once the House of Commons had met and expressed support for a particular group of parliamentarians.²⁵

23. Aucoin, Jarvis & Turnbull, *supra* note 5.

24. See e.g. B Thomas Hall & WT Stanbury, "Can the Prime Minister's Power Over Prorogation Be Restricted Without Amending the Constitution?", *The Hill Times* (15 February 2010). For the sake of simplicity, federal terminology is used here, but such reforms could also be pursued at the provincial level.

25. Aucoin, Jarvis & Turnbull, *supra* note 5. This would mirror the procedure followed in the nonpartisan legislative assemblies in the Northwest Territories and Nuna-

Likewise, it might also be possible to undertake significant reforms to the manner in which judges and senators are appointed. It might be feasible to require that the Governor General only accept the prime minister's advice as to which senators or judges to appoint after the House of Commons passed a motion approving the advice. The responsibility for approving judicial and senatorial nominees might also be given to an independent appointments commission modelled on Britain's House of Lords Appointments Commission.²⁶ Such a move would likely require the use of paragraphs 42(1)(b) and 42(1)(d) of the *Constitution Act, 1982* for senators and Supreme Court justices, respectively, given the broad interpretation of those sections given by the Supreme Court in the *Senate* and *Supreme Court References*.²⁷ It may be that Parliament has greater latitude to reform appointments for superior court judges appointed under section 96 and Federal Court and Federal Court of Appeal judges appointed under section 101 of the *Constitution Act, 1867*.

Owing to section 9 of the *Constitution Act, 1867*, Canada's executive power cannot be removed from the Queen, except through a paragraph 41(a) amendment. Under a textualist interpretation, however, section 9 only enshrines the Queen's status as the fount of executive authority and would not place any particular executive prerogatives within the "office of the Queen".²⁸ Thus, paragraph 41(a) would not protect the Crown's core executive prerogatives, such as the foreign affairs prerogatives.²⁹ Any of the Crown's executive prerogatives could be limited, displaced or abolished by regular statute, or through a unilateral federal or provincial constitutional amendment.³⁰

Likewise, a textualist interpretation of section 15 of the *Constitution Act, 1867* ensures that the removal of the Queen's power of command-in-chief would require a unanimous constitutional amendment. But if section 15 does not incorporate any of the Crown's national defence prerogatives, such as the authority to deploy the

vut, see e.g. Graham White, "Traditional Aboriginal Values in a Westminster Parliament: The Legislative Assembly of Nunavut" (2006) 12 *Journal of Legislative Studies* 8; Graham White, "Westminster in the Arctic: The Adaptation of British Parliamentaryism in the Northwest Territories" (1991) 24 *Canadian Journal of Political Science* 499.

26. See Meg Russell, *The Contemporary House of Lords: Westminster Bicameralism Revived* (Oxford: Oxford University Press, 2013).

27. *Senate Reference*, *supra* note 13; *Supreme Court Reference*, *supra* note 13.

28. For a discussion of the Crown's executive prerogatives, see Noel Cox, "The Gradual Curtailment of the Royal Prerogative" (2012) 25 *Denning Law Journal* 65.

29. For a discussion of the significance of these prerogatives, see Studin, *supra* note 7.

30. Lagassé, "Parliamentary and Judicial Ambivalence", *supra* note 7 at 164-170.

armed forces overseas or send them into hostilities, into the “office of the Queen”, these prerogatives can be limited, displaced or abolished by regular statute or unilateral federal amendment, if necessary.³¹

Although the Queen’s common law privileges and immunities have largely been swept away by statute and case law, the Crown retains privileges that are important to the conduct of government and the Crown’s relationship with the law.³² Since the constitutional texts make no mention of the Queen’s common law privileges and immunities, a textualist interpretation would hold that they do not enjoy protection under paragraph 41(a).

One privilege that could be targeted is the Crown’s general immunity from statute, which is found at common law and codified in federal and provincial interpretation acts.³³ This immunity means that the Crown is not bound by statute unless it is specified by the statute.³⁴ The effect of this immunity has been to insulate the executive from a variety of statutes that bind other persons.³⁵ It has also shielded Crown prerogatives from statute that were apparently intended to bind the executive.³⁶ A reform effort that sought to subject the executive and the state generally to a greater degree of equality before the law could therefore seek to end or restrict the Crown’s general immunity from statute.³⁷ From a textualist perspective, both of these reforms could be brought about by regular statute or if the Crown’s immunities were given constitutional weight, either the general amending procedure or federal or provincial unilateral amending procedures.

31. *Ibid.*

32. For a discussion in the British context, see Maurice Sunkin, “Crown Immunity From Criminal Liability in English Law” (2003) Public Law 716; Joseph M Jacob, “From Privileged Crown to Interested Public” (1993) Public Law 121.

33. See e.g. *Interpretation Act*, RSC 1985, c I-21, s 17 [*Interpretation Act (Canada)*]; *Interpretation Act*, RSO 1990, c I.11, s 11 [*Interpretation Act (Ontario)*].

34. However, statutes may also bind the Crown by necessary implication, see Lagassé, “Parliamentary and Judicial Ambivalence”, *supra* note 7.

35. See e.g. *R v Eldorado Nuclear Ltd*; *R v Uranium Canada Ltd*, [1983] 2 SCR 551 (holding that the federal *Combines Investigation Act* does not apply to the Crown and its agents as the Crown is immune from statute unless the statute expressly binds the Crown).

36. See *Turp v Canada (AG)*, 2012 FC 893 (CanLII). The now repealed *Kyoto Protocol Implementation Act, 2007*, SO 2007, c 30, which made itself out to be binding on the Crown, obliged the government to implement the Kyoto Protocol. When the government withdrew from the Kyoto Protocol in 2011, its decision was challenged on the grounds that it violated the Act, but the Federal Court rejected the challenge on the ground that the Act did not, explicitly or by necessary implication, alter the royal prerogative over foreign affairs.

37. Law Commission of Canada, *supra* note 5.

Symbolically, the Queen's sovereign immunity from prosecution remains a potent symbol of the Crown's privileges before the law. Although this immunity extends only to the Queen herself rather than those acting in her name and despite the fact that it is hard to imagine a situation where it would be invoked, the notion that the Queen cannot be tried before one of her own courts speaks to the continued deference the law shows to the Crown.³⁸ A textualist reading of section 41(a) would not incorporate sovereign immunity into "the office of the Queen", which would allow Parliament and the provincial legislatures to bring it to an end in Canada.

B) Status of the sovereign and vice-regal representatives

According to a textualist reading of the constitution, democratizing and republican-inspired reforms could be made to the roles and appointment procedures for the Governor General and Lieutenant Governors without engaging paragraph 41(a). Since there is no provision in the constitutional texts which explicitly prevents it, unanimity would not be required to put in place popular elections to select a Governor General, provided that the Queen formally continued to appoint the Governor General on the advice of the prime minister. Likewise, the responsibility for selecting a Governor General could be vested in Parliament or an independent body.³⁹ Similar procedures could be established for the nomination of provincial Lieutenant Governors, provided that the Governor-in-Council formally continued to appoint them.

If there were a desire to eliminate the pensions and other benefits granted to former Governors General and Lieutenant Governors, this could be done by Parliament through an amendment to the *Governor General's Act* and the *Lieutenant Governor's Superannuation Act*.⁴⁰

38. Sunkin, *supra* note 32. For a recent Canadian example, see *Trudel Thibault c La Reine*, 2012 QCCA 2212 (CanLII) at para 1, leave to appeal to SCC refused, 35223 (23 April 2013).

39. A private member's bill to this effect is currently before the House of Commons. It would require the prime minister to request that the Queen appoint as Governor General only someone nominated by the Advisory Committee on Vice-Regal Appointments. See Bill C-569, *An Act respecting the procedure for the appointment and removal of the Governor General*, 2nd Sess, 41st Parl, 2014 (first reading 29 January 2014) [Bill C-569].

40. *Governor General's Act*, *supra* note 6; *Lieutenant Governors Superannuation Act*, RSC 1985, c L-8.

Paragraph 41(a) would not protect the benefits that the former holder of either vice-regal office enjoy.⁴¹

The relationship between the Queen and the Governor General could also be altered with a view to distancing Canada from the monarchy. An amendment to the *Governor General's Act* or the issuing of new letters patent, could serve to make the Governor General a permanent regent in Canada. Since neither the *Governor's General Act* or the Letters Patent, 1947 are considered part of the "Constitution of Canada" from a textualist perspective, this could be done without modifying the "office of the Queen [and] Governor General" for the purposes of paragraph 41(a). Although the Letters Patent, 1947 already allow the Governor General to act in a manner akin to a regent in the event the Queen cannot fulfill her constitutional functions, an amended *Governor General's Act* or new letters patent could declare that all of the Queen's Canadian constitutional functions will be performed by the Governor General in the future.⁴²

Indeed, the law could be changed such that the Governor General would serve as the regent of the monarch in their natural capacity.⁴³ In effect, this would allow the Governor General to replace the monarch in a natural capacity as the embodiment of the sovereign in a legal capacity. (The distinction between the legal and natural capacities is discussed below.) Coupled with an alteration to the *Formal Documents Regulations* to replace the Queen's signature on the Governor General's commission with the Governor General's own signature, making the Governor General a permanent regent would push the Queen to the farthest margins of the Canadian constitution, all without engaging paragraph 41(a).⁴⁴ If this were done alongside the introduction of popular election of the Governor General, this would

41. Section 105 of the *Constitution Act, 1867* allows Parliament to set the Governor General's salary, which would arguably allow Parliament to adjust the office's pension as well.

42. Letters Patent, 1947, *supra* note 6 art 2.

43. The Governor General is a "corporation sole", which means that it has both a perpetual, legal capacity and a natural capacity, the latter being the person who is serving as Governor General at any given time. See *Governor General's Act*, *supra* note 6 s 2.

44. *Formal Documents Regulations*, CRC, c 1331, s 4. This resembles the relationship between the Queen and Governor General proposed by the Trudeau government as part of its 1978 constitutional amendment proposals. See Bill C-60, *An Act to amend the Constitution of Canada with respect to matters coming with the legislative authority of the Parliament of Canada, and to approve and authorize the taking of measures necessary for the amendment of the Constitution with respect to certain matters*, 3rd Sess, 30th Parl, 1978 (first reading 20 June 1978).

bring Canada as close to becoming a republic as possible without triggering paragraph 41(a)'s requirements.⁴⁵

C) Crown's status in law

The Queen has a particular status in Canadian law. As in the United Kingdom, legally the Queen most closely resembles a corporation sole.⁴⁶ Like a corporation sole, the Queen is a corporate personality with both a perpetual legal personality and a mortal natural capacity. The principal purpose of the corporation sole is to allow an office-holder (the natural capacity) and an office (the legal capacity) to be treated as one in law when required to ensure automatic succession and continuity.⁴⁷ Another purpose is to allow the holder of an office to hold property in their natural capacity separately from the property they hold in their legal capacity.⁴⁸ Recent rulings on Canada's citizenship oath have used the distinction between the Queen's two capacities to uphold the requirement to swear the oath.⁴⁹

The perpetuity provided by the Queen's legal capacity has several advantages. As a perpetual corporation, all the Queen's powers, properties and attributes transfer automatically to each successive monarch who holds the office of sovereign.⁵⁰ There is no need to reiterate that laws affecting a particular monarch apply to her successors when a new monarch ascends to the throne, since the law assumes that the new monarch is legally the same person as the late King or Queen. The Queen referred to in Canada's *Constitution Acts, 1867 to 1982* has been the same legal person, as the role of monarch has passed from Queen Victoria to King Edward VII to George V to Edward VIII to George VI to Elizabeth II in a natural capacity.⁵¹

45. Such a move would raise significant federalism concerns since provincial Lieutenant Governors are considered representatives of the Queen in their own right. See *Liquidators of the Maritime Bank of Canada v Receiver General of New Brunswick*, [1892] AC 437 (PC).

46. *Canadian Broadcasting Corporation v Ontario (AG)*, [1958] OR 55, 27 CR 165 (CA) at paras 60-61; Paul Lordon, *Crown Law* (Toronto: Butterworths, 1991).

47. William Blackstone, *Commentaries on the Laws of England*, vol 1 (Philadelphia: JB Lippincott, 1891) at 469.

48. *Ibid* at 475.

49. See e.g. *McAteer v Canada (AG)*, 2014 ONCA 578 (CanLII) at paras 52-54 [McAteer].

50. Lagassé & Bowden, *supra* note 4.

51. The original section 2 of the *British North America Act, 1867* (now the *Constitution Act, 1867*) reflected this principle, but it was repealed in 1893 because it was considered redundant and unnecessary. This principle is reflected in federal and

Furthermore, because the executive government of Canada is vested in the Queen by Part III of the *Constitution Act, 1867*, the Queen's status as corporation sole allows the federal or provincial government to act as a person under the law.⁵² Among other things, this allows the federal and provincial governments to hold property, enter into contracts and undertake more other legal transactions in the same manner as natural and other legal persons can.⁵³

In Canada, moreover, the Queen arguably serves as the concept of the state.⁵⁴ Although the *Constitution Act, 1982* refers to an entity called "Canada", this can be read as a reference to the federation established under the sovereign authority of the Crown described in the preamble of the *Constitution Act, 1867*.⁵⁵ According to this interpretation, the Canadian state remains the Crown's sovereign authority flowing through the executive, legislative and judicial branches at the federal level and in the provinces.⁵⁶

At law, however, the Crown is synonymous with the Queen; they are treated as equivalent. This means that the Crown refers to the Queen in both her legal and natural capacities and that the Queen acts as both the personification and legal concept of the state.⁵⁷ It is for this reason, according to this interpretation, that all acts of state are done in the Queen's name, that the Queen is considered Canada's head of state and that all oaths of allegiance and citizenship are sworn to the Queen.⁵⁸

provincial interpretation acts, see *Interpretation Act (Canada)*, *supra* note 33, s 46; *Interpretation Act (Ontario)*, *supra* note 33, s 20.

52. *Canadian Doctors for Refugee Care v Canada (AG)*, 2014 FC 651 at paras 354-402.

53. Lordon, *supra* note 46.

54. For a general discussion of the Crown's as the concept of state, see Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge: Cambridge University Press, 2012); Noel Cox, "The Theory of Sovereignty and the Importance of the Crown in the Realms of the Queen" (2002) 2 *Oxford University Commonwealth Law Journal* 237.

55. Using the two schools of thought described by McLean this idea of the Crown as the state belongs with a Hobbesian-Blackstonian perspective which conceives of the state as "a persona ficta with a distinct moral personality which is in turn represented by the sovereign which is itself an artificial person." See McLean, *supra* note 54 at 3.

56. Philippe Lagassé, "The Contentious Canadian Crown" in D Michael Jackson & Philippe Lagassé, eds, *Canada and the Crown: Essays on Constitutional Monarchy* (Kingston and Montreal: McGill-Queen's University Press, 2013) 271 [Lagassé, "Contentious Canadian Crown"].

57. Ernest H Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton: Princeton University Press, 1957) at 316; Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003).

58. *McAteer*, *supra* note 49 at paras 16-18, 20, 60, 62, 65.

Neither the Queen's status as corporation sole, nor the Crown's equivalence with the Queen at law, are mentioned in the constitutional texts. Accordingly, from a textualist perspective, these legal concepts could be altered without pursuing a constitutional amendment under paragraph 41(a). Such changes might be undertaken to ensure that Parliament is able to exert greater control over the executive by requiring that any action the executive undertakes find its source in a statutory provision.⁵⁹ They might also be motivated by a desire to reduce the Crown's prominence in Canada's constitutional framework.

The fact that the Queen's status as corporation sole allows governments to act as a person under the law has been a source of controversy. Because natural persons can legally do that which the law does not specifically forbid, treating the executive as a person under the law suggests that the government, too, can do whatever the law does not proscribe. This grants the executive significant source of non-statutory power and could invite reform efforts that would redefine the Queen's status as corporation sole either by statute or unilateral federal or provincial amendment.

As part of an effort to bring the Canadian constitution in line with republican ideals, the fusion of the Queen's legal and natural capacities could be broken without recourse to paragraph 41(a). In principle, the succession of a designated office-holder to the office of sovereign could be contingent on a proclamation by cabinet or parliamentary resolution. Without such a proclamation or resolution, the legal capacity of the Queen could be deemed effective without being personified. In effect, the law could allow for the office of the Queen to remain operational yet vacant.⁶⁰ Alternatively, as noted above, owing to the physical absence of the monarch from Canada, the *Governor General's Act* could be amended to allow the Governor General to fulfill the functions of the office of the Queen as a permanent regent.

In either case, the application of the British law of succession to Canada supposed by a textualist interpretation would not be disturbed, since the successor to the office would be known but not confirmed as the office-holder or acknowledged and instead replaced by the Governor General as the holder of the office of the Queen. By dis-

59. For such a proposal, albeit in the British context and so without the need to consider the application of complex amending procedures, see Adam Tomkins, *Our Republican Constitution* (Oxford: Hart Publishing, 2005).

60. For such a proposal, see Edward McWhinney, *The Governor General and the Prime Ministers: The Making and Unmaking of Governments* (Vancouver: Ronsdale Press, 2005).

mantling the fusion of the office and office-holder, successors to the throne could be kept in a sort of constitutional limbo with the Governor General making the “office of the Queen” operational in accordance to the Letters Patent, 1947 or as a formal regent.

The monarch’s place in the Canadian constitution could be further diminished by ending the equivalence between the Crown and the Queen. Rather than treating the Crown as synonymous with the Queen as a corporation sole, the Crown could be recast as a “corporation aggregate” with the Queen as the head of the Crown’s corporate structure — in effect, the chair of the corporation’s board of directors.⁶¹ Proceeding with this reform would preserve the Crown as concept of state for the purposes of the preamble to the *Constitution Act, 1867*, but it would make the Queen only one part of the Crown. Simply put, this alteration to the concept of the Crown would make the Queen a component of the state, rather than the state itself.

Once this was done, the Queen would be reduced to an office of state that stands at the apex of the executive and the armed forces and is a part of Parliament and indirectly, the provincial legislative assemblies. The Queen would no longer be head of state, at least according to the current Canadian definition, since her office would no longer be equivalent to the state. Indeed, under this reconstituted definition of the Crown, the *Governor General’s Act* could be amended to make the Governor General Canada’s head of state in law, while formally preserving his role as the Queen’s agent in the executive and legislative branches of government.

To give further effect to this change, the *Seals Act* could be amended to allow for the removal of the Queen’s name from Canada’s great seals and to vest the Governor General with the formal authority to approve orders and regulations regarding the seals and royal instruments. If these changes were carried alongside reform that would allow the Queen’s office to remain vacant or making the Governor General a permanent regent, the Queen’s status in the constitution would be diminished to that of a cipher.⁶²

61. The House of Lords described the British Crown as a corporation aggregate in *Town Investments Ltd v Department of the Environment*, [1978] AC 359 (HL). For an argument in favour of this view and an analysis of the consequences for the Queen’s relationship with the Crown, see Martin Loughlin, “The State, the Crown and the Law” in Maurice Sunkin & Sebastian Payne, eds, *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999).

62. As mentioned above, this would have in effect been the consequence of implementing the Trudeau government’s 1978 constitutional reform bill. See Bill C-60, *supra* note 44.

II. FUNCTIONALIST PERSPECTIVE

According to a functionalist interpretation of section 41(a), the “office of the Queen, the Governor General and the Lieutenant Governor of a province” includes, as it does for the textualist perspective, all references to these offices in the constitutional texts. However, a functionalist interpretation supplements the provisions relating to these offices in the constitutional texts with the principles and practices that allow the Queen and her representatives to fulfill their existing constitutional roles and responsibilities. In addition, a functionalist perspective allows for the principles reflected in statutes not listed in the Schedule to the *Constitution Act, 1982*, but closely related to the constitutional roles and responsibilities of these offices, to enjoy protection under paragraph 41(a).⁶³ From a functionalist perspective, then, unanimity is not only required to amend the letter of the constitution when it comes to the Crown, but also to alter its spirit by changing the constitutional roles and responsibilities of the Queen, Governor General and Lieutenant Governors.

From a functionalist perspective, the authority that the Governor General and Lieutenant Governors exercise when proroguing or dissolving the legislature cannot be limited by a legislative veto absent a paragraph 41(a) amendment. Nor can the exercise of this authority be made contingent upon the approval of the legislature without such an amendment. In keeping with the *Constitution Act, 1867* and the conventions of responsible government, the role and responsibility of the vice-regal offices is to act on the advice of the Crown’s first minister when proroguing and dissolving the legislature. In exceptional circumstances, the vice-regal officers can refuse a first minister’s advice to prorogue or dissolve the legislature, which would lead to the resignation or dismissal of the first minister.⁶⁴ Yet this would be followed by the immediate appointment of a new first minister to advise the Governor General or Lieutenant Governor.⁶⁵

Since the power to prorogue and dissolve the legislature is a fundamental authority of the vice-regal officers as representatives of the Queen and insofar as the requirement to act on the advice of the first minister when exercising Crown authorities is a central

63. *Supreme Court Reference*, *supra* note 13 at para 91.

64. For an exhaustive discussion of the Governor General and Lieutenant Governors’ powers, see Heard, *supra* note 15 at 35-83.

65. Vernon Bogdanor, *The Monarchy and the Constitution* (Oxford: Oxford University Press, 1997).

constitutional convention, any effort to impose a binding statutory constraint on the exercise of these powers by the vice-regal officers on the advice of the first minister would constitute a significant change to the constitutional role and responsibilities of the Governor General and Lieutenant Governors. Such a change could only be made through a paragraph 41(a) amendment.⁶⁶

A similar logic would ensure that vice-regal powers for government formation could not be altered or limited without triggering paragraph 41(a). The appointment of a first minister is a principal discretionary authority of the Governor General and Lieutenant Governor and it is one of their primary duties to ensure that there is a first minister to advise them on the exercise of Crown powers.⁶⁷ Hence, from a functionalist perspective, this discretionary authority and the associated duty would be considered part of their offices. Furthermore, while it may be possible to establish a committee to make binding recommendations to the prime minister on judicial and senatorial appointments, these recommendations cannot be made binding on the Governor General without an amendment under paragraph 41(a).

A functionalist interpretation would prevent the Governor General and Lieutenant Governor from being elected without a paragraph 41(a) amendment. As with senatorial and judicial appointments, the recommendations of the existing Advisory Committee on Vice-Regal Appointments could be strengthened to be binding on the prime minister, but the appointed nature of the vice-regal offices would be considered an essential feature of their offices.⁶⁸ Granting the vice-regal officer a popular mandate could significantly alter how their roles and responsibilities are performed. Bringing about this reform would thus constitute a change that touches on the existing understanding and performance of their duties.⁶⁹

In the same vein, reforms that could be seen to undermine the independence and neutrality of the vice-regal offices would require a paragraph 41(a) amendment to carry out. For instance, the annuity

66. See Warren J Newman, "Of Dissolution, Prorogation and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions During a Parliamentary Crisis" (2009) 27 *National Journal of Constitutional Law* 217.

67. Hugo Cyr, "De la formation du gouvernement" (2013) 43 *Revue générale de droit* 381.

68. For a proposal to this effect currently before the House of Commons, see Bill C-569, *supra* note 39.

69. For a similar discussion of the effects of a transition from an appointed to an elected Senate, see *Senate Reference*, *supra* note 13 at paras 54-63.

provided by the *Governor General's Act* and the pensions provided by the *Lieutenant Governors Superannuation Act* could be protected by paragraph 41(a) since the guarantee of an annuity or pension upon retirement is meant to guard vice-regal officers against financial intimidation or the risk that their actions while in office will be perceived as an attempt to secure employment following their departure from office.⁷⁰ While the amount of the annuity or pension would remain amenable to being altered by statute, the principle that vice-regal officers should be shielded from financial risk or coercion might well be interested as falling under their offices from a functionalist perspective.

The Queen's existing relationship with the Governor General would also fall under their respective offices under a functionalist perspective. While the Governor General might be able to appoint his or her successor if necessary, the Governor General could not be made a permanent regent without a paragraph 41(a) amendment. Nor could the Governor General be made to occupy the office of the Queen. A functionalist interpretation would hold that the Governor General's position as the Queen's representative is a paramount part of their respective roles and responsibilities in the constitution.

In fact, from a functionalist viewpoint, the relationship between the Queen and Governor General outlined in the Letters Patent, 1947 would be protected by paragraph 41(a) and the letters patent themselves might be accorded constitutional status.⁷¹ Similarly, because Canada's great seals represent markers of the Queen's place in the Canadian constitution, those portions of the *Seals Act* that define Canada's great seals and the Queen's authority to approve the use of seals over them could be considered part of the Queen's office.⁷²

A functionalist interpretation would further argue that the "office of the Queen" cannot be made vacant with a paragraph 41(a) amendment. Since the Queen's roles and responsibilities are fulfilled by successive monarchs under the current constitutional arrange-

70. For a similar discussion of the importance of financial security for judges, see *Ref re Remuneration of Judges of the Prov Court of PEI*; *Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3 [*Provincial Judges Reference*].

71. For a review of arguments surrounding whether the Letters Patent, 1947 are susceptible to constitutional amendment, see Malaika Bacon-Dussault, "Amending the Letters Patent Constituting the Office of Governor General and Commander-in-Chief of Canada" (2011) 5 *Journal of Parliamentary and Political Law* 177.

72. *Seals Act*, *supra* note 6.

ment, a functionalist perspective would hold that the succession to the Queen's office cannot depend on a cabinet proclamation or parliamentary resolution. The principle of automatic succession would therefore form part of the "office of the Queen".

However, there could be more than one functionalist interpretation of what law of succession applies to the Queen's office. According to one functionalist view, the law of succession in Canada is determined by the British Parliament. Building on the textualist perspective, this view holds that there is no Canadian law governing royal succession. Instead, the Canadian constitution operates according to a "rule of recognition" or a "principle of symmetry" which states that whoever is the Queen of the United Kingdom is the Queen of Canada.⁷³ There are several possible constitutional sources for such a rule or principle. It may be that Canada remains connected to the British Crown despite the *Canada Act 1982*, that the preamble to the *Statute of Westminster, 1931* has legal force or that Canada simply follows British law of succession by convention. But no matter the source, the result is the same: matters of royal succession are determined by the United Kingdom and any change to this practice requires a paragraph 41(a) amendment.

Another view holds that the royal succession was incorporated into Canadian law during the crisis triggered by Edward VIII's abdication in favour of his brother George VI. In December 1936, the Canadian cabinet requested and consented that the British *His Majesty's Declaration of Abdication Act, 1936* apply to Canada under section 4 of the *Statute of Westminster, 1931*.⁷⁴ From that point forward, the law of succession in Canada was determined by the provisions of the *Abdication Act*, which refers to the *Act of Settlement, 1701*, arguably thereby incorporating it into Canadian law as well.⁷⁵ Reinforcing this argument is the idea that the Queen of Canada is separate and distinct from the Queen of the United Kingdom in matters of law and government, and the passage of the *Canada Act 1982*, which ended the British Parliament's ability to legislate for Canada.⁷⁶ If the Queen of Canada is legally separate and distinct from the Queen of the United Kingdom and the British Parliament can no longer legislate

73. Hogg, "Succession to the Throne", *supra* note 4; *O'Donohue v Canada*, 2003 CanLII 41404 (ONSC).

74. *His Majesty's Declaration of Abdication Act, 1936* (UK), 1 Edw V & 1 Geo VI, c 3.

75. Garry Toffoli & Paul Benoit, "More is Needed to Change the Rules of Succession for Canada" (2013) 36 Canadian Parliamentary Review 10.

76. *Canada Act 1982* (UK), 1982, c 11, s 2; *R v Secretary of State for Foreign and Commonwealth Affairs Ex parte Indian Association of Alberta*, [1982] QB 892 (CA).

for Canada, then legislative authority over royal succession to the office of the Canadian Queen must reside in Canada alone.⁷⁷ Changes to the Canadian law of succession therefore relate to the office of the Queen and engage paragraph 41(a).

Sovereign immunity would also qualify for paragraph 41(a) protection from a functionalist perspective. The principle that the Queen can do no wrong stems from her constitutional position as the fount of justice and from the convention that the Crown only acts through its servants and agents.⁷⁸ Since justice is done in the Queen's name, she is understood to act justly at all times. When the Crown acts contrary to the law in a justiciable area, it is assumed that one of the Queen's servants or agents is liable.⁷⁹ Hence, the liability of the Crown extends to those who act in the Queen's name, such as government departments, ministers, crown corporations, or the armed forces, rather than the Queen herself.

Were sovereign immunity to be removed, it is possible there would be little practical effect on the Queen's role and responsibilities, which would suggest that immunity should not be considered part of her office. Yet it is not difficult to imagine scenarios where, in the absence of immunity, plaintiffs might argue that the Queen should be held personally liable for government actions done in her name. Should this occur, the Queen's basic role and responsibility under sections 9 and 15 of the *Constitution Act, 1867*, namely to act as the personification of the executive, would leave her open to liabilities in her natural capacity. To forestall against this possibility, however remote, sovereign immunity would likely be considered a critical attribute of the Queen's office from a functionalist perspective.

A functionalist interpretation of paragraph 41(a), therefore, broadens the scope of the offices to protect the Queen and her representatives' existing role, responsibilities and their relations with first ministers and one another. In that sense, the functionalist perspective focuses on preserving the status quo with respect to these offices and the way in which they interact. However, the functionalist perspective's understanding focuses on their "head of state" duties. This implies that aspects of the Crown that go beyond the roles and responsibilities of the Queen, Governor General and Lieutenant Gov-

77. Anne Twomey, "Changing the Rules of Succession to the Throne" (2011) Public Law 378.

78. *M v Home Office*, [1993] UKHL 5, [1994] 1 AC 377.

79. Hogg, *Constitutional Law of Canada*, *supra* note 4 at 10.2-10.3.

ernors as head of state do not enjoy protection under section 41(a). These broader aspects of the Crown could be reformed by regular statute, the general amending procedure or the federal or provincial unilateral amending procedures.

A) Powers, privileges and immunities

Because the Crown's core executive prerogatives are not tied to the Queen's head of state functions, they would not fall under paragraph 41(a) from a functionalist point of view. In line with the textualist view, a functionalist interpretation would hold that the Crown's executive prerogatives are susceptible to abolition, displacement or limitation by regular statute, or by a unilateral federal or provincial amendment under sections 44 and 45 of the *Constitution Act, 1982*, should any of these prerogatives be given constitutional status by the courts. Crown privileges and immunities that are not related to the regal or vice-regal head of state functions would be excluded from paragraph 41(a)'s ambit as well. For instance, the Crown's general immunity from statute discussed above would not enjoy paragraph 41(a) protection.

B) Status of the Queen and her representatives

Under a functionalist interpretation, nearly all changes to the existing roles and relationships among the Queen, Governor General and Lieutenant Governors would require a paragraph 41(a) amendment. However, there is one circumstance in which a functionalist approach might admit a narrower interpretation of paragraph 41(a). If the Queen were incapacitated and the United Kingdom invokes the *Regency Act* to make the Prince of Wales regent, the Governor General would be able to exercise nearly all the Queen's powers in Canada under the Letters Patent, 1947. Indeed, the Governor-in-Council would only need to amend the *Formal Documents Regulations* to allow a Governor General to appoint his or her successor in the Queen's name.

However, the Governor General might not be able to exercise the Queen's power to name up to eight additional senators on recommendation of the Governor General under section 26 of the *Constitution Act, 1867*. When read alongside section 24, which grants the Governor General the power to summon persons to the Senate, the wording of section 26 suggests an intent to involve the Queen in the

extraordinary step of naming additional senators. The language suggests that the Governor General should not be able to appoint additional senators alone; the power of appointment seems to have been left with the Queen to serve as a constitutional safeguard.⁸⁰ Allowing the Governor General to both recommend and carry out the appointment of additional senators would violate the spirit if not the letter of the *Constitution Act, 1867*.

If a government sought to appoint additional senators during a regency in the United Kingdom, this question would arise. It could either be resolved by applying the Letters Patent, 1947 and allowing the Governor General to appoint the additional senators in the Queen's name in spite of the apparent structural constraint posed by the *Constitution Act, 1867* or having the British regent act perform this Canadian constitutional function on the Queen's behalf. A functionalist interpretation could allow for either approach to be followed without a paragraph 41(a) amendment.

C) Crown's status in law

A functionalist perspective would not accord paragraph 41(a) protection to the executive's power to act as a legal person due to the Queen's legal capacity. Because it does not affect the Queen's role as head of state, the person-like characteristics that governments enjoy thanks to the Queen's legal capacity could be revoked by regular statute or unilateral constitutional amendment.

Likewise, ending the legal equivalence between the Crown and the Queen would not require a paragraph 41(a) amendment according to this perspective. The Crown could thus be made a corporation aggregate, with the Queen as the head of the Crown as a corporation of more than one person. Under such an approach, the Crown would remain the concept of the state in Canada and the Queen would remain head of state by virtue of her position at the apex of the corporate structure of the Crown. But the Crown and Queen would no longer be equivalent and thus the state would no longer be the Queen in law.

80. See Mollie Dunsmuir, *The Senate: Appointments Under Section 26 of the Constitution Act, 1867* (Ottawa: Library of Parliament, 1990). See also *Singh v Canada*; *Leblanc v Canada*, [1991] 3 OR (3d) 429 (CA); *Reference re ss 26, 27, 28 of the Constitution Act, 1867*, [199] 78 DLR (4th) 245 (BCCA).

Unlike the textualist view, however, a functionalist perspective would not suggest that this decoupling of the Crown and Queen could be used to remove the Queen from her position as head of state. Although the Queen would no longer be synonymous with the state, her role as head of state would fall under the protection of paragraph 41(a). According to a functionalist reading, a separation of Crown and Queen in law would need to preserve the Queen's standing as head of state in order to avoid engaging the use of the unanimity procedure.

III. FORMALIST PERSPECTIVE

A third interpretation of paragraph 41(a), the formalist perspective, builds upon the textualist and functionalist approaches and incorporates them into its interpretation. However, the formalist perspective expands the scope of the regal and vice-regal offices to include core executive and administrative powers. Because executive power is vested in the Queen under section 9 of the *Constitution Act, 1867*, a formalist perspective holds that the "office of the Queen" should be interpreted to include the authorities that are required for the Queen to fulfill the executive's constitutional responsibilities in Canada. Similarly, insofar as the modern administrative state relies on the legal personality of the Queen to operate, a formalist perspective views the Queen's legal personality and certain of the Queen's privileges as a fundamental part of the regal office.

The Queen's personification of the Crown as the concept of state, moreover, would fall under the "office of the Queen" since the legal personality of the state remains an important feature of the constitutional relationships between the state, on the one hand, and the civil service, armed forces and Aboriginal peoples, on the other. Lastly, that which allows the Queen and Crown to grant the executive and the state more broadly a legal personality, namely the Queen's status as corporation sole, falls under paragraph 41(a) as well. From a formalist perspective, preserving the Queen's status as corporation sole is vital for ensuring automatic and seamless succession and allows for a concrete definition of the Crown, and thus the state, in the Canadian context.

To serve as an effective fount of executive power and authority, a formalist interpretation holds that the Queen must possess the core prerogatives that allow the government to fulfill its constitutional responsibilities. Accordingly, these core prerogatives should be con-

sidered part of the “office of the Queen”.⁸¹ Among the core prerogative that would enjoy protection under paragraph 41(a) are the foreign affairs power and the powers required to ensure the “defence of the realm”. In more concrete terms, these powers include the authority to conduct diplomacy, negotiate treaties, conduct intelligence gathering and counterintelligence efforts, guard secret information, command and deploy armed forces and act decisively for reasons of state.⁸²

While Parliament can regulate just how the executive administers these authorities and impose certain conditions on the way in which they are used, governments must retain a degree of discretion as to how they use these powers, which they ultimately exercise in the Queen’s name since the Queen is vested with executive power.⁸³ Other aspects of the “executive government of Canada”, such as those that relate to the appointment, responsibility and accountability of ministers and civil servants, are subject to unilateral federal amendment. But the close connection between core prerogative powers and the Queen’s executive role means these powers enjoy the highest degree of constitutional protection under paragraph 41(a), given their importance for the survival of Canada.⁸⁴

The executive’s ability to exercise the powers of a person owing to the Queen’s legal personality would also fall under paragraph 41(a) from a formalist perspective. Government’s power to contract and own property flows from the Queen’s legal personality and the executive’s ability to adapt to new and changing circumstances is greatly enhanced by the fact that the government enjoys the legal freedom accorded to persons. Given the administrative importance of the Queen’s personality for the executive and public administration, a formalist perspective holds that alterations to this aspect of the Queen’s role would not be incidental or minor. Reforms to the relationship between the Queen and the executive would alter the nature of government in law and might even involve a reconceptualization of the legal nature of government in Canada.⁸⁵ As a result, a formalist perspective would suggest that this degree of change should only be undertaken with the unanimous consent of the provinces.

81. Warren J Newman, “Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada” (2007) 37 SCLR (2d) 383.

82. Studin, *supra* note 7.

83. Philippe Lagassé, “The Crown’s Powers of Command-in-Chief: Interpreting Section 15 of the *Constitution Act, 1867*” (2013) 18 *Review of Constitutional Studies* 189 [Lagassé, “The Crown’s Powers”].

84. Pelletier, *supra* note 12 at 208.

85. See Law Reform Commission, *supra* note 5.

The equivalence of the Crown and Queen is not explicitly mentioned in the constitution. Yet, from a formalist perspective, treating the Queen and Crown as synonymous is an axiom of Canada's constitutional order and thus deserves the protection of paragraph 41(a). The fact that the Crown and Queen are equivalent ensures that the Canadian state is personified, which makes it possible to maintain quasi-personal relationships with the state. A number of constitutionally significant relationships depend on the existence of a personified state. Ministers serve at the pleasure of the Queen, as represented by vice-regal officers acting on the advice of their first minister. Ministers legally serve a particular person, which is meant to remind them that the powers they exercise, however potent, are not their own, but only held in trust.⁸⁶ Civil servants are ultimately meant to be loyal to the Queen to remind them that while they work for the government of the day, their fealty belong to the Crown and Queen as the state.⁸⁷ This relationship in turn serves as the foundation of both their independence from *and* service towards the ministers of the Crown. Similarly, military officers are commissioned in the Queen's name and the legal basis of their service to the state is based on this personal obligation towards the Queen.⁸⁸ Likewise, the honour of the Crown towards First Nations peoples flows from treaties and agreements entered into by past sovereigns and indigenous communities.⁸⁹ First Nations communities continue to stress the importance of the personal nature of these agreements.

Altering any of these relationships to one with a particular state official, as opposed to the personification of the state, would represent a significant shift in both purpose and meaning. Simply put, separating the Crown from the Queen in law would transform the sovereign from the personification of the state into a mere office of state. From a formalist perspective, the significance of this change would therefore justify placing the legal equivalence between the Crown and Queen under the "office of the Queen" for the purposes of paragraph 41(a).⁹⁰

86. Frank MacKinnon, *The Crown in Canada* (Calgary: Glenbow-Alberta Institute, 1976) at 72.

87. Lagassé, "The Contentious Canadian Crown", *supra* note 56.

88. *Chainnigh v Canada (AG)*, 2008 FC 69 at para 36.

89. JR Miller, "The Aboriginal Peoples and the Crown" in D Michael Jackson & Philippe Lagassé, eds, *Canada and the Crown: Essays on Constitutional Monarchy* (Kingston & Montreal: McGill-Queen's University Press, 2013) 255.

90. For an overview of how this change has already occurred in fact, see John Whyte, "A Case for the Republican Option" in D. Michael Jackson & Philippe Lagassé, eds, *Canada and the Crown: Essays on Constitutional Monarchy* (Kingston: McGill-Queen's University Press, 2014).

The Queen's personification of the executive and the state is connected to her nature as corporation sole. While it may be more appropriate to say that the Queen is merely *akin* to a corporation sole or that she exhibits the characteristics of a corporation sole, there is no concept that better captures the Queen's legal attributes. Using this concept allows most of the Crown's features and attributes to become intelligible and understandable.

For instance, appreciating that the Queen is a corporation sole allows us to speak to the difference between the legal and natural capacities of the sovereign. It also allows us to grasp the logic behind the view that the notion that "Her Majesty in right of Canada", the Queen in her legal capacity at the federal level, is equivalent to the Crown and the state, and is able to hold property, contract and be liable before the courts as the executive. Moreover, the concept provides a definitive answer as to why references to the Queen or Her Majesty in the constitution and statute law apply automatically to her successors: they have the same legal capacity despite having distinct natural capacities. The principles of automatic succession and perpetuity of the sovereign's legal capacity are a vital part of the Canadian constitution and depend on the Queen being conceived of as a corporation sole. Hence, from a formalist perspective, it follows that the Queen's status as a corporation sole forms a necessary part of the "office of the Queen".

Indeed, given that automatic succession and the perpetuity of the Queen's legal capacity is the product of her being a corporation sole, matters of royal succession are necessarily part of the "office of the Queen". Like the functionalist perspective, however, formalist interpretations can differ as to source of the law of succession to the Queen's office. If the Queen of Canada shares the legal capacity of the Queen of the United Kingdom and by extension, the Crown of Canada and the Crown of the United Kingdom are equivalent, then the law of succession in Canada can be determined by the United Kingdom. If the Queen of Canada and Queen of the United Kingdom are legally distinct, even if embodied by the same natural person, and by extension, the Crowns of Canada and the United Kingdom are distinct, then the law of succession in Canada can be determined by Canada alone.

The former approach holds that the British law of succession applies to Canada, while the latter would hold that royal succession is strictly a matter of Canadian law or that Canada has implicitly decided to mirror British law. If British law of succession applies in Canada in its own right or Canada has implicitly decided to mirror

British laws, then any change to this state of affairs requires a paragraph 41(a) amendment. However, if royal succession is a matter of Canadian law, then any alteration to that law would involve a paragraph 41(a) amendment.⁹¹ No matter the approach to royal succession, it is clear that from a formalist perspective succession forms part of the “office of the Queen” due to the Queen’s nature as corporation sole.

A formalist perspective would also extend the understanding of the “office of the Queen” to include the principles reflected in key statutes that define the Queen’s constitutional position. The *Royal Style and Titles Act* and the *Seals Act* would enjoy paragraph 41(a) protection. Likewise, formalist perspectives holding that royal succession is a matter of Canadian law would also place the British *His Majesty’s Abdication Act, 1936* and the Canadian *Succession to the Throne Act, 1937* under the “office of the Queen”, though formalist perspectives that accept that succession is a matter of British law would not.

This perspective would also suggest that section 2 of the *Governor General’s Act*, which designates the Governor General as a corporation sole, would also fall under paragraph 41(a). As with the Queen, the corporate character of the Governor General is a fundamental part of this office’s definition in law and has great significance for the way in which the Governor General’s vice-regal constitutional role is defined and understood.

The formalist perspective, therefore, sees little room to alter the existing role, responsibilities and legal status of the Crown, Queen, Governor General and Lieutenant Governors by ordinary statute or constitutional amendment under the general or federal or provincial unilateral procedures. The Crown’s prerogatives might be displaced and regulated, but those deemed critical for the executive to fulfill its constitutional responsibilities could not be entirely abolished by the general amending procedure or Parliament under section 44 of the *Constitution Act, 1982*. Relations among the Queen and her representatives would be entirely protected by paragraph 41(a) as would the legal characteristics of the Crown, Queen and her representatives.

Given the expansive view that the formalist perspective takes of section 41(a), it would not be necessary to ascribe constitutional protection to the Queen’s general immunity from statute. Since the

91. Lagassé & Bowden, *supra* note 4.

Queen's statutory immunity would not be needed to protect the Crown's essential attributes, powers and functions since these would already be protected under paragraph 41(a). The scope of regal and vice-regal offices would be so large under a formalist perspective that section 41(a) would offer the Queen, Governor General and Lieutenant Governors all the protection and immunity they might need.

IV. DISCUSSION AND CONCLUSION

This chapter suggests that paragraph 41(a) of the *Constitution Act, 1982* lends itself to three broad interpretations. The narrowest interpretation — the textualist perspective — limits paragraph 41(a)'s application to the textual provisions concerning the Crown, the Queen, the Governor General and the Lieutenant Governors. The functionalist perspective broadens the paragraph's application to include other written and unwritten elements of Canada's constitutional order that allow the offices that constitute the formal executive to fulfill their "head of state" functions. The broadest interpretation — the formalist perspective — would extend paragraph 41(a) to include unwritten elements that support the full range of these offices' functions, including those performed in their name by ministers and civil servants.

As was illustrated by reference to current and potential future reform proposals, adopting one of these interpretations over the others would have significant consequences for the possibility of constitutional reform in Canada. The textualist perspective would offer the greatest latitude for change to the structure of the executive branch, but could still serve as a fairly significant barrier for reform depending on how much meaning is given to the Part III of the *Constitution Act, 1867*, which has been little treated in doctrine or jurisprudence. By contrast, the functionalist perspective and especially the formalist perspective would place much more significant restraints on future attempts to reform the executive by subjecting them to the stringent unanimity procedure.

Given the range of possible interpretations of paragraph 41(a) and the wide-ranging consequences they might have, it seems likely that the Supreme Court will eventually have to resolve these issues. The Court may be called upon to do so within the next few years as the challenge to the *Succession to the Throne Act, 2013* winds its way through the Quebec courts. It would almost certainly have to do in the event of a broader reform effort that touched the formal executive, whether through a constitutional challenge or in response to a refer-

ence put to it by a reform-minded federal government or indirectly, by a provincial government.⁹²

If the question of how to interpret paragraph 41(a) reaches the Supreme Court as part of a challenge to an actual reform, it may be possible for the Court to resolve the challenge without laying out a general approach to paragraph 41(a). For instance, the challenge to the *Succession to the Throne Act, 2013* might be resolved without the courts having to substantially engage with paragraph 41(a) if they adopt the view that Canada has a “rule of recognition” that whoever is the British sovereign is also the Canadian sovereign.⁹³

However, if the interpretation of paragraph 41(a) comes before the Court as part of a reference, whether put to it by the federal government or as an appeal from a provincial reference decision, the Court will be more likely to set out a general approach as it did in the recent *Senate* and *Supreme Court References*.⁹⁴ But even if the Court provides a general interpretation of paragraph 41(a), such an interpretation is likely to leave many open questions about just how far one can go without engaging the unanimity procedure as the Court’s judgments did in both the *Senate* and *Supreme Court References*.⁹⁵

No matter which path the interpretation of paragraph 41(a) takes to the Supreme Court, it is worth considering which interpretation they would be most likely to adopt. Setting aside factors arising from the particular reform under consideration, there are three factors likely to influence the way in which the Court approaches the interpretation of section 41(a). The first factor is the Court’s approach to interpreting section 52 of the *Constitution Act, 1982*, which defines the term “Constitution of Canada” and subjects to the amending pro-

92. Several important Supreme Court references, notably *Re Resolution to amend the Constitution*, [1981] 1 SCR 753 and the *Provincial Judges Reference*, *supra* note 68, did not start at the federal level, but were appealed as of right from provincial courts of appeal.

93. Hogg, “Succession to the Throne”, *supra* note 4.

94. *Senate Reference*, *supra* note 13 at paras 23-48; *Supreme Court Reference*, *supra* note 13 at paras 88-95.

95. In the case of the Senate, it is not clear whether an advisory body on senatorial appointments could be established without the use of the general amending procedure, which extends to the “method of selecting Senators” under subsection 42(1)(b) of the *Constitution Act, 1982*. Likewise, the constitutional status of elections for “Senate nominee[s]” held under Alberta’s *Senatorial Selection Act*, RSA 2000, c S-5 is unclear. In the case of the Supreme Court, it is not clear which of its characteristics beyond its “jurisdiction as the final general court of appeal for Canada...and its independence” enjoy protection under subsection 42(1)(d) of the *Constitution Act, 1982*.

cedures in Part V of the Act, as well as its approach to interpreting the amending procedures themselves.

The second is the Supreme Court's (and the Judicial Committee of the Privy Council's) approach to interpreting subsection 92(1) of the *British North America Act, 1867*, which allowed provincial legislatures to amend their constitutions with the exception of "the office of Lieutenant Governor". Subsection 92(1) was incorporated into the *Constitution Act, 1982* as section 45, but its exclusion of the "office of Lieutenant Governor" provided the courts an opportunity to speak to the scope of that office, which can be analogized to the offices of the Queen and Governor General for the purposes of paragraph 41(a). The third factor is the judicial, both Supreme and otherwise, understanding of the nature of the Crown and its relationship with the ministers.

(a) Textualist perspective

The Supreme Court is very unlikely to adopt a textualist approach to interpreting paragraph 41(a). Following the Judicial Committee of the Privy Council's famous decision in *Edwards v Canada*, better known as the Persons case, Canadian courts have decisively come to use a purposive, living tree doctrine to guide constitutional interpretation.⁹⁶ This has manifested itself not only in the way that constitutional texts, including relatively modern ones like the *Constitution Act, 1982*, are interpreted, but also in what is considered to be part of the "Constitution of Canada" and thus subject to the amending procedures, including potentially paragraph 41(a).⁹⁷

Likewise, before the enactment of the *Canadian Charter of Rights and Freedoms* in 1982, the Supreme Court showed itself to be willing to find that rights supporting Canada's system of government not reflected in the constitutional text are nevertheless implied in the constitution. Much was made, for instance, of the recital in the Preamble that Canada was to have a "Constitution similar in Principle to that of the United Kingdom", which was taken to imply that certain fundamental rights and indeed, fundamental aspects of Canada's system of government enjoyed a degree of protection that might have kept Parliament and the provincial legislatures from legislating them away.⁹⁸

96. *Edwards v Canada (AG)*, 1929 UKPC 86, [1930] AC 124.

97. Hogg, *Constitutional Law of Canada*, *supra* note 4 at 4.13-4.14, 15.47-15.56.

98. *Ibid* at 34.10-34.13. See also Mark D Walters, "The Law Behind the Conventions of the Constitution: Reassessing the Prorogation Debate" (2011) 5 JPPL 131 at 136-137.

Although early post-patriation decisions held the definition of “Constitution of Canada” provided in subsection 52(2) to be limited to the constitutional texts, the Supreme Court has decisively rejected such an understanding.⁹⁹ The “Constitution of Canada” is now understood to include both written and unwritten elements that together form what the Court described in the *Senate Reference* as the constitution’s “architecture [or]...basic structure”.¹⁰⁰ Among the unwritten elements are fundamental constitutional principles recognized by the Court, including democracy, federalism and the rule of law.¹⁰¹ It remains an open question as to whether and to what degree constitutional conventions or the Crown prerogative also form part of the constitutional architecture.¹⁰² Broadening the definition of the “Constitution of Canada” to include unwritten elements decisively undermines the textualist approach to understanding paragraph 41(a).

The textualist approach is also undermined by the interpretation given to the now repealed section 92(1) of the *Constitution Act, 1867*. In *Ontario v OPSEU*, Beetz J. suggested in *obiter* that “it is uncertain, to say the least, that a province could touch upon the power of the Lieutenant-Governor to dissolve the legislature, or his power to appoint and dismiss ministers, without unconstitutionally touching the office itself”.¹⁰³ Beetz J. added that “[i]t may very well be that the *principle of responsible government* could, to the extent that it depends on those important royal powers, be entrenched to a substantial extent”.¹⁰⁴ If the Supreme Court were to take a similar approach to paragraph 41(a), it would seem that far more than the bare textual provisions concerning the Crown would enjoy the paragraph’s protection.

Finally, the textualist approach is further weakened by the emphasis placed by the Court on the intent of the drafters of the *British North America Act, 1867*. In its description of the architecture of Canada’s constitution in the *Senate Reference*, the Court noted that it was the drafter’s intent to have “the Crown as head of state”, as is reflected in the preamble to what is now the *Constitution Act, 1867*.¹⁰⁵ The Queen’s role as head of state as well as that of her vice-regal representatives goes

99. Brun, Tremblay & Brouillet, *supra* note 15 at 235.

100. *Senate Reference*, *supra* note 13 at paras 26-27.

101. Brun, Tremblay & Brouillet, *supra* note 15 at 235-236.

102. For the view that “the most important categories of convention” should be seen as “practical manifestations of...unwritten principles already endorsed by the Supreme Court”, see Heard, *supra* note 15 at 229-230.

103. *Ontario (AG) v OPSEU*, [1987] 2 SCR 2 at para 108 [*OPSEU*].

104. *Ibid* [emphasis added].

105. *Senate Reference*, *supra* note 13 at para 14.

beyond the provisions in constitutional texts. Among other things, this implies that, contrary to the textualist perspective, the transformation of the office of Governor General and Lieutenant Governors into elected positions would require the use of the unanimity procedure.

(b) Functionalist perspective

The Supreme Court is most likely to adopt a functionalist approach to interpreting paragraph 41(a). Such an approach would be consistent with its understanding of the “Constitution of Canada” under subsection 52(2) of the *Constitution Act, 1982* and would apply paragraph 41(a) to the abolition of the offices of the Queen, the Governor General and Lieutenant Governor and changes to those offices that would fundamentally transform their constitutional roles and responsibilities. Distinguishing those changes from those that could be made under the general amending procedure or the federal unilateral procedure would be the most challenging aspect of following such an approach.

In considering changes to other national institutions, including itself, the Senate, and implicitly, the House of Commons, the Court has sought to give full meaning of Part V of the *Constitution Act, 1982*.¹⁰⁶ Abolishing any of these institutions requires the use of the unanimity procedure. Altering what could be called their “fundamental features” — the composition of the Supreme Court, the rule that a province will never have fewer seats in the House of Commons as it does in the Senate and the use of English and French in all three institutions — also requires recourse to the unanimity procedure under section 41 as these features are singled out for a special degree of protection.¹⁰⁷

Changing these institutions’ “essential features” — “the principle of proportionate representation in the House of Commons”, “the powers of the Senate and the method of selecting Senators”, “the number of members by which a province is...represented in the Senate and the residence qualifications of Senators” and “the Supreme Court of Canada” — requires the general amending procedure under section 42. Reforms to these institutions’ other or “nonessential features” can be carried out using the federal unilateral procedure in section 44, which applies to “the executive government of Canada or the Senate and House of Commons”.¹⁰⁸

106. *Senate Reference*, *supra* note 13 at para 48.

107. Pelletier, *supra* note 12 at 208.

108. *Supreme Court Reference*, *supra* note 13 did not clarify whether changes to non-essential features of the Supreme Court can be carried out by the federal govern-

Applying such an understanding of Part V of the *Constitution Act, 1982* suggests that the “fundamental features” of the offices of the Queen, Governor General and Lieutenant Governor and by extension, the Crown, would enjoy protection under paragraph 41(a). Their “essential features” might enjoy protection under section 38 and the remainder would be susceptible to amendment either by ordinary statute or constitutional amendment using the federal unilateral procedure. The challenge then is to identify any fundamental features of these offices and distinguish them from other features, whether essential or nonessential.

The interpretation given to the now defunct subsection 92(1) offers some guidance in this regard. The Judicial Committee’s 1919 decision in *Re Referendum and Initiative Act* held that a province could not use its power to amend its constitution under subsection 92(1) to “seriously...affect the position of the Lieutenant-Governor as an integral part of the Legislature, and to detract from rights which are important to the legal theory of that position”.¹⁰⁹ Among other things, this meant that the province could not eliminate the requirement that the Lieutenant Governor provide royal assent. Citing the Judicial Committee, the Supreme Court reached a similar conclusion in *Manitoba Language Rights Reference* in 1985.¹¹⁰

The “office of Lieutenant Governor” seems also to include the power to dissolve the legislature and to appoint and dismiss ministers according to *Ontario v OPSEU*.¹¹¹ However, it does not seem to include the power to make appointments to provincial legislative councils as Manitoba, New Brunswick, Nova Scotia and Quebec managed to abolish the legislative councils under section 92(1) without encountering great constitutional trouble. Manitoba and Quebec’s abolition of their legislative councils even withstood rather late constitutional challenges in twin 1997 decisions.¹¹²

Extrapolating from the provincial context to the federal level, the interpretation of section 92(1) seems to suggest that the offices

ment by ordinary statute under sections 91 or 101 of the *Constitution Act, 1867* or using the federal unilateral formula. The distinction is significant because unilateral amendments must be made explicitly to be valid: *Eurig Estate (Re)*, [1998] 2 SCR 565 at para 35.

109. *In the matter of The Initiative and Referendum Act being Chapter 59 of the Acts of the Legislative Assembly of Manitoba 6 George V*, 1919 UKPC 60, [1919] AC 935.

110. *Re Manitoba Language Rights*, [1985] 1 SCR 721 at para 135.

111. *OPSEU*, *supra* note 103 at para 102.

112. *Montplaisir c Quebec (PG)*, [1997] RJQ 109 (CS); *R v Somers*, [1997] MJ No 57 (QB).

of Queen, Governor General and Lieutenant Governor for the purposes of paragraph 41(a) include the powers over which the Crown retains constitutional discretion, such as whether to grant dissolution or dismiss a first minister, or those over which no one has meaningful discretion, such as royal assent.¹¹³ However, they do not seem to extend to the powers which fall under the constitutional discretion of ministers by convention, such as the appointment of judges or senators or the exercise of the foreign affairs and war prerogatives.

Drawing a distinction between the constitutional responsibilities exercised by the Crown and those exercised by ministers seems consistent with the Supreme Court's tendency to focus on the Queen's position as "head of state", rather than as embodiment of the state. That tendency is perhaps clearest in the repeated holding, by the both the Supreme Court and provincial courts of appeal, that Crown prerogatives can be abolished, displaced or limited by ordinary statute.¹¹⁴ It also finds support in the intent of paragraph 41(a), which according to a recent reading of the historical record, seems limited to "the status of Canada as a constitutional monarchy and the symbolic role of the Queen as head of state".¹¹⁵

(c) Formalist perspective

The Supreme Court could also adopt a formalist approach to paragraph 41(a). Such an approach is a logical extension of its understanding of section 52(2) of the *Constitution Act, 1982*. If the "Constitution of Canada" includes both written and unwritten elements, among the latter could be both fundamental constitutional conventions and core Crown prerogatives. Incorporating both probably undermines the formalist position as a reading of constitutional conventions would give further support to the need to distinguish those powers that *could* be exercised by Crown from those that *are* exercised in their

113. *Projet de loi fédéral relatif au Sénat (Re)*, 2013 QCCA 1807 at paras 57-61. The Supreme Court itself, albeit in different contexts, also seems willing to differentiate between the powers of the formal and political executives: *Reference re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 546-547 (Sopinka J); *New Brunswick Broadcasting Co v Nova Scotia (House of Assembly)*, [1993] 1 SCR 319 at 389 (McLachlin J, as she then was).

114. For a discussion of a wide range of Canadian decisions on Crown prerogative, see Lagassé, "Parliamentary and Judicial Ambivalence", *supra* note 7.

115. Barbara Cameron, "The Office and Powers of the Governor General: Political Intention and Legal Interpretation" (2012) 6 *Journal of Parliamentary and Political Law* 88 at 92.

name by ministers and civil servants, many of which are sourced in the prerogative.

However, unlike constitutional conventions, Crown prerogatives are simpler for the courts to deal with because they generally do not conflict with the constitutional text.¹¹⁶ Instead, they can be read alongside the constitutional text to give meaning to the executive power vested in the Queen by sections 9 and 15 of the *Constitution Act, 1867*, and exercised in her name by ministers and civil servants.¹¹⁷ Doing so aligns with the way in which textual provisions related to parliamentary privilege and judicial independence have been enriched by unwritten constitutional principles that fill out their meaning.¹¹⁸

There are some indications that the Supreme Court is moving in this direction. In *Operation Dismantle v The Queen*, Wilson J. discusses the federal government's argument that the source for the executive's national defence powers is *both* in section 15 *and* in Crown prerogative and did not reject it, holding that the source of the defence powers did not matter for the purposes of establishing its susceptibility to judicial review.¹¹⁹ The Court arguably went further on some interpretations of the *Patriation Reference* in which it suggested that sections 9 and 15 were examples of how unwritten elements of the British constitutional order were transformed into written provisions of what is now the *Constitution Act, 1867*.¹²⁰

Perhaps the strongest indication of the Court's shift towards recognizing the constitutional link between executive power and Crown prerogative came in *Canada v Khadr*. The Court emphasized that "the executive branch of government is responsible for decisions made under [prerogative] power, and...the executive is better placed to make such decisions within a range of constitutional options".¹²¹ It also noted that it is the "*constitutional responsibility* of the executive to make decisions on matters of foreign affairs".¹²² These passages suggest that at least some aspects of Crown prerogative are required for the executive to fulfill its constitutional responsibilities.

116. Heard, *supra* note 15 at 229-230.

117. For an example of how this might be done, see Lagassé, "The Crown's Powers", *supra* note 83.

118. For a discussion of how this took place and how it might be analogized for the executive branch, see *ibid*.

119. *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at para 50.

120. See e.g. Studin, *supra* note 7 at 17.

121. *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 37

122. *Ibid* at para 39 [*emphasis added*].

This would suggest that those aspects of Crown prerogative are protected from being altered by ordinary statute. If they cannot be altered by ordinary statute, then they must be subject to either the unanimity procedure as a change to the offices that constitute the Crown as the formal executive power, the general amending procedure or the federal unilateral procedure as an amendment to the “executive government of Canada”. Whether paragraph 41(a) applies to core executive prerogatives depends on how closely the Court sees the prerogatives as linked to the Queen as the formal executive.

There is so far little evidence that the Supreme Court is prepared to do so, with one notable exception. In the *Senate Reference*, the Court approvingly cited Benoît Pelletier’s view that “the unanimity rule provided for in section 41 of the 1982 Act is justified by the need...to give each of the partners of Canada’s federal compromise a veto on those topics that are considered the *most essential to the survival of the state*”.¹²³ It is hard to examine powers more central to the survival of the state than the foreign affairs and war prerogatives, which are closely tied to the concept of the Crown as the state. The Court might be prepared to see these authorities as part of the office of the Queen and thus enjoying protection under paragraph 41(a).

At this juncture, however, this analysis remains speculative. Until or unless the Supreme Court accepts to hear a case that involves a consideration of paragraph 41(a), the ambiguity and debate will continue to surround the meaning and scope of the “office of the Queen, the Governor General and the Lieutenant Governor of a province”.

123. *Senate Reference*, *supra* note 13 at para 41 [*emphasis added*].

CHAPTER 9

**SUBTLE YET SIGNIFICANT
INNOVATIONS: THE ADVISORY
COMMITTEE ON VICE-REGAL
APPOINTMENTS AND THE SECRETARY'S
NEW ROYAL POWERS**

Christopher McCreery*

The Crown's flexibility and resilience are the principal qualities that have permitted it to remain at the centre of Canada's system of government for more than four hundred years. There are two elements touching upon the Crown's position and function that have undergone muted yet important changes over the past four years: the creation of an Advisory Committee on Vice-Regal Appointments to advise the Prime Minister on the selection of the governor general, lieutenant governors and territorial commissioners, and the secretary to the governor general's expanded role as deputy of the governor general with the authority to undertake certain constitutional duties hitherto reserved for the governor general and justices of the Supreme Court of Canada. Neither of these changes have elicited much commentary or discussion, yet both are of significance as they touch directly upon the Crown and its position within the Canadian state. As they are both very recent changes we have yet to determine their overall influence on the institution writ large.

**ADVISORY COMMITTEE ON VICE-REGAL
APPOINTMENTS**

Since Confederation, section 58 of the *Constitution Act, 1867*¹ has directed that provincial lieutenant governors are to be appointed in the name of the Sovereign by the governor general in council (by convention on the advice of the prime minister). Until 2014 and the

* Private Secretary to the Lieutenant Governor of Nova Scotia.

1. (UK), 30 & 31 Vict, c 3, s 58 reprinted in RSC 1985, App II, No 5 [*Constitution Act*].

establishment of the Advisory Committee on Vice-Regal Appointments (the committee) no formal consultation process existed, and while there are a few rare instances where prime ministers conferred with their provincial colleagues – when they were of the same political stripe and on friendly terms – this was never the norm.² Other jurisdictions, notably the Isle of Man, employed a panel for the selection of its lieutenant governor in 2010, however in the Realms, notably Australia and New Zealand, such an approach has yet to be employed.

Lieutenant governors have historically been selected by the prime minister, normally with the assistance of the appointments secretariat within the Prime Minister's Office (PMO).³ In earlier times it was a purely patronage appointment selected from the bevy of sitting or retired parliamentarians or the senior party faithful. This reflected the post-Confederation idea that the lieutenant governor was simply a delegate of the Dominion Government, a patronage sinecure infrequently employed to enforce the will of Ottawa, frequently coveted by office seekers. The appointment of governors general has been somewhat more complex; initially appointed on the advice of the British government, as Canadian autonomy advanced, so to did Canadian involvement in the process to the point where the incumbent is appointed solely on the advice of the HM's Canadian first minister. Since the Mulroney era, the prime minister's appointments secretariat has been involved in the process. Since the time of Vincent Massey's appointment in 1952, the prime minister has forwarded a single name onto the Sovereign for sanction. While the establishment of the Advisory Committee on Vice-Regal Appointments has not changed the actual method or mode of appointment of the governor general or the lieutenant governors, it has resulted in the development of a short list from which the prime minister may select a candidate for appointment. The prime minister is not bound to select a name from the list; however, of the four vice-regals appointed since 2010, all designates have been selected from the list developed under the new process.

In January 2010, as the tenure of Governor General Michaëlle Jean approached the five-year mark, the PMO created the Governor General Consultation Committee – an informal body initially

2. John T. Saywell, *The Office of Lieutenant Governor* (Toronto: University of Toronto Press, 1957) at 25-7.

3. Andrew Heard, *Canadian Constitutional Conventions – The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991) at 107 [Heard].

designated the Governor General Expert Advisory Committee.⁴ The Committee began life as an *ad-hoc* affair separate from the Privy Council Office. A six-member committee, composed of subject area experts was created under the chairmanship of the secretary to the governor general, with advisory involvement from the prime minister's director of appointments. The membership included Ms. Sheila-Marie Cook, secretary to the governor general, a long serving public servant, administrator of several Royal Commissions and former legislative assistant to Prime Minister Trudeau; Mr. Kevin MacLeod, Canadian secretary to the Queen, a long serving expert on state ceremonial and the position of the Crown within the Canadian state; Father Jacque Monet, historian of the Canadian Crown and advisor to governors general dating back to the time of General Vanier; Professor Rainer Knopff of the University of Calgary's department of political science, who has written extensively on public law, policy and political thought; Professor Christopher Manfredi, dean of arts at McGill University, political scientist and expert on the role of the judiciary in Canada and the United States; and lastly Dr. Christopher McCreery, private secretary to the lieutenant governor of Nova Scotia, author and historian.⁵

This *ad hoc* committee was charged with the task of developing a list of candidates for the prime minister to consider prior to selecting a name for submission to the Queen. Each member of the committee was given a mandate letter outlining their task of developing a list of candidates who met a specific set of criteria.⁶ The incumbent governor general being a Francophone, by convention the successor had to be an Anglophone thereby maintaining the alternation between Canada's two official languages. The candidates had to possess strong bilingual skills, have an understanding of Canada's system of government and a respect for the Crown's position in the Canadian state/culture/society, and finally, candidates had to have gained "considerable experience through a lifetime of achievement".⁷ The candidates also had to have an understanding of the constitutional duties, constraints and opportunities offered by vice-regal service.

4. The designation Governor General Expert Advisory Committee (GGEAC) was abandoned in favour of Governor General Consultation Committee in July 2010 when it was announced that David Johnston had been appointed Governor General by the Queen.

5. Prime Minister's Office, Press Release, "Governor General Consultation Committee" (11 July 2010) [Prime Minister's Office].

6. Stephen Harper to Members of the Governor General Expert Advisor Committee, 8 April 2010.

7. *Ibid.*

Following the appointment of Michaëlle Jean as Governor General in 2005, there was widespread commentary in the press, and from senior officials in Ottawa, to the effect that the appointment was a courageous one, given that she was almost completely unknown outside of Quebec. A number of different proposals had been advanced in the media and within the government, that a more measured process be developed for selecting the Queen's representative. Many of these are familiar, ranging from the *Globe and Mail's* longstanding (until 2010) recommendation that the governor general be elected by the Companions of the Order of Canada, to more complex plans that called for the Houses of Parliament to elect the governor general, similar to the manner used by Papua New Guinea for the selection of their governor general or India's for the election of the president of the republic. The use of a loose criteria and an *ad hoc* committee to develop a short list for consideration, however, was unprecedented in the selection of a Canadian governor general.

Under the chairmanship of the secretary to the governor general, members of the committee conducted an outreach programme, contacting lieutenant governors, premiers, retired politicians, state officials, and public figures from a wide variety of fields. Each person contacted was apprised of the committee's work, and the overall criteria being used to develop the shortlist for governor general.⁸ From this several hundred names were compiled and vetted against the criteria. Over the course of meetings, one in April and two in May, the list of suitable candidates was discussed and distilled – all based on the criteria outlined in the prime minister's letter, along with that of non-partisanship. While candidates could have had a political career, those who were still active in politics were disqualified. From these deliberations came a list that was submitted to the prime minister for consideration and shortly after the end of the 2010 Royal Tour of the Queen, came the announcement that David Johnston was to be appointed as the 28th governor general since Confederation.

It was the first time that such broad consultation had been used to develop a short list for vice-regal office. The appointments secretariat in the PMO had a long tradition, dating back to the Mulroney era, of developing a draft list for the prime minister's consideration – although anecdotal evidence suggests that Paul Martin's nomination of Mme. Jean came from a list with only one name. Previously lists

8. Prime Minister's Office, *supra* note 5 (the work of the committee was treated as confidential until after the announcement of the Governor General-designate).

of two, three or four names were drawn up and then vetted. This practice dated as far back as the appointment of Jules Léger, while the appointments of Massey, Vanier and Michener were all devised before the PMO appointments secretariat existed in a formal sense. As per tradition and since 1952 a single name was sent forward to the Sovereign for approbation.

In 2012 a similar process was devised for the appointment of lieutenant governors and territorial commissioners. At this point the Privy Council Office became directly involved – along with the Prime Minister’s Office appointments secretariat. On 4 November the terms of reference for the Advisory Committee on Vice-Regal Appointments was announced. The non-partisan committee was being formally established to “provide the Prime Minister with non-binding recommendations on the selection of Governors General, Lieutenant Governors and Territorial Commissioners”.⁹ The Advisory Committee consists of;

- The Canadian Secretary to The Queen (ex officio chair)
- Two permanent members (one Anglophone and one Franco-phone)
- Two temporary members (in the case of lieutenant governor and territorial commissioner appointments, drawn from the jurisdiction requiring a new officeholder)
- A representative of the Prime Minister’s Office as a non-voting observer

The three permanent members of the advisory committee are appointed for a term of not more than six years, with eligibility for reappointment, while temporary members are appointed for a term of not more than six months. All members of the advisory committee are appointed by the Governor-in-Council.¹⁰ The recommendation process has three stages:

1. When a vacancy is anticipated, the Prime Minister launches a recommendation process by sending letters to members of the Advisory Committee, together with guidance on the process to be followed.

9. Prime Minister’s Office, Press Release, “Terms of Reference; Advisory Committee on Vice-Regal Appointments” (4 November 2012).

10. Members of the advisory committee are appointed as “special advisor to the Prime Minister... as a member of the Advisory Committee on Vice-Regal Appointments,” under the Public Service Employment Act. See the appointment of Robert Watt, LVO, Order in Council 2012-1482, 2 November 2012.

2. The Advisory Committee begins deliberations on candidates, and consults with key stakeholders. If required, the Advisory Committee meets twice per appointment. The Advisory Committee reports to the Prime Minister on the process of its deliberations as appropriate.
3. The Advisory Committee presents a report to the Prime Minister with a shortlist of proposed candidates for consideration.¹¹

The permanent membership of the committee includes two members of the original governor general advisory committee, Kevin MacLeod and Jacques Monet. To this group has been added Robert Watt, formerly chief herald of Canada and a part-time citizenship judge. The regional members are required to have an intimate knowledge of the jurisdiction and are appointed to serve as the proverbial ‘eyes and ears on the ground’ in the province or territory in question.

Nominations are solicited much as they were in the selection process for the governor general, however unlike the governor general nomination process, the general public is also encouraged to submit formal nominations consisting of a cover letter and curriculum vitae, they are also, rather awkwardly, asked to contact the individual to ensure that they would be willing to let their name stand and would be willing to accept the position – this must undoubtedly result in some amount of lobbying on the part of those who are keen office seekers.

To date three lieutenant governors have been appointed since the establishment of the Advisory Committee: Newfoundland and Labrador, the Honourable Frank Fagan (2013); Ontario, the Honourable Elizabeth Dowdsweil (2014); and New Brunswick, the Honourable Jocelyn-Roy Vinneau (2014). With lieutenant governors in Quebec, Manitoba and Alberta approaching or having surpassed the traditional period of five years in office, there will be additional appointments in the coming year. In 2015-2016 we will also likely have the appointment of a new governor general.

A review of major print media focussing on the various vice-regal appointments made since 2005 has shown that, other than the appointment of the governor general, where there was some attempt to draw an odd connection between David Johnston and Brian Mulroney, there has been an absence of discussion or revelations of the partisan backgrounds of various lieutenant governors, whereas prior

11. *Supra* note 10.

to 2005 this was the norm and unquestionably had the effect of adding a partisan hue to many appointments – this of course was enhanced on occasions when lieutenant governors would subsequently accept partisan appointments, notably the Senate.

The new process has not been without criticism. Following a gushy editorial written by Ontario committee member, John Fraser, in the *Globe and Mail*,¹² the *Toronto Star*'s Christina Blizzard complained that an advisory committee made up of “dry academics” will inevitably result in the Crown being “viewed as an elitist, out-of touch institution”.¹³ Blizzard is a self-professed supporter of the Crown and the role discharged by the office and person of the lieutenant governor. Her main concern seems to not be in relation to the process, but rather the possibility that the committee is predisposed to selecting elitist functionaries as a method of “rewarding end-of-career bureaucrats with a limo, a plus suite at Queen’s Park and a free trip to Buckingham Palace”.¹⁴ Such views are not unique, and illustrate the great delicacy with which members of the Advisory Committee and those who are selected to serve in vice-regal office must be selected.

The non-partisan nature of almost all vice-regal appointments made since 2006 is likely to continue under the Advisory Committee on Vice-Regal Appointments model. From 1988-2005, 72 percent of appointments were given to former politicians or senior party officials, while such appointments made in the succeeding period have dropped to a mere 7%.¹⁵ The cohort is small and the period elapsed is not yet a decade so it may be premature to proclaim an end to partisan appointments; however, it does signal a significant change – in the nature of the individuals filling vice-regal office. This dovetails nicely with the somewhat expanded role that the lieutenant governors have carved out over the past forty years. The role, having expanded from unic like federal officers to that of “promoter-in-chief” of each province has helped to raise the profile of the Crown in each jurisdiction well beyond the simple discharge of constitutional duties.¹⁶

12. John Fraser, “How Elizabeth Dowdswell became Ontario’s lieutenant-governor”, *Globe and Mail* (23 September 2014).

13. Christina Blizzard, “Dowdswell’s selection process spells doom for monarchy in Canada”, *Toronto Star* (24 September 2014).

14. *Ibid.*

15. Christopher McCreery, “The Provincial Crown: The Lieutenant Governor’s Expanding Role”, in D Michael Jackson and Philippe Lagassé, eds, *Canada and the Crown: Essays on Constitutional Monarchy* (Montreal: McGill-Queen’s University Press, 2013)[McCreery].

16. *Ibid.*

Involvement in presenting honours, awards, swearing-in new citizens and fostering voluntary service while reaching out to both traditional constituents and marginalized communities has transformed the various offices. The increased level of accessibility and openness has played a significant role in changing the way the various vice-regal offices function and are viewed.

Although it is too early to declare the permanence of this process, it does demonstrate that a level of flexibility can be added to the method by which individuals are considered for vice-regal office. Given that this author was involved in the first iteration of this new method, in the selection of a governor general, an overall assessment of the process and the calibre of officeholders is far more suited to a more distant scholarly examination following a more lengthy passage of time.

As significant an achievement as the Advisory Committee on Vice-Regal Appointments is, the true innovation has come in the non-partisan selection of lieutenant governors. The long held, and largely accurate view of the position of vice-regals as little more than patronage sinecure holders – dating from Confederation into the 1970s – is being further eroded, thereby enhancing the position of the lieutenant governor and indeed also the governor general.

SECRETARY TO THE GOVERNOR GENERAL

The secretary to the governor general may seem a peripheral topic in relation to the Crown's place in the Constitution; however, the secretary's role has undergone a recent elevation – well beyond even the wildest imagination of any Victorian constitutional framer. The position and office of the secretary to the governor is one of the oldest in the land. It is one of the first public service posts, dating back to 1604 and the arrival of the first governor of Acadia, Pierre du Gua du Monts.¹⁷ This first Governor brought with him a private secretary, Jean Ralluau, and for the past four centuries successive governors have been served by a person in this position.¹⁸

There have been ebbs and flows to the authority of the secretary that rose significantly as the centralization of colonial government took place in British North America, and then declined rapidly with

17. George MacBeath, *Dictionary of Canadian Biography*, Volume I: 1000 to 1700 (Toronto: University of Toronto Press, 1966), *sub verbo* "Jean Ralluau".

18. McCreery, *supra* note 15.

the achievement of Responsible Government.¹⁹ Following Confederation the role of the secretary was limited largely to administering the vice-regal household and ensuring that the governor general was well informed of the political and social goings on in Ottawa and the provincial capitals.²⁰ Over the past five decades the role has grown to include responsibility for administration of the Canadian honours system (1972) and more recently responsibility for the Canadian Heraldic Authority (1988). While these functions encompass important symbolic elements of the Canadian state they are just that – symbolic – and the secretary’s role is to support the governor general who is ultimately responsible for the honours system and the heraldic authority. Certainly these functions relate to the royal prerogative; however they are not of the kind that are likely to bring the secretary into conflict with ministers or require serious consideration of the application of unwritten constitutional conventions governing the exercise of executive authority. In 2011 the secretary’s role, as deputy of the governor general, was broadened in an unprecedented manner to include:

all the powers authorities and functions vested in and of right exercisable by me as Governor General, saving and excepting the powers of dissolving, recalling or proroguing the Parliament of Canada, or appointing members of the Ministry and of signifying Royal Assent in Parliament assembled.²¹

This much expanded commission as a deputy of the governor general (deputy) permits the secretary to grant Royal Assent by written declaration, authorize orders-in-council, and other statutory and non-statutory instruments, in addition to the previous longstanding authorization to sign warrants, letters patent and commissions. It also permits the secretary to sign a declaration of war, authorize the use of military force or to issue proclamations, including of the *Emergency Act* (formerly the *War Measures Act*).²² Of all the Queen’s realms,

19. J E Hodgetts, *Pioneer Public Service: An Administrative History of the United Canadas, 1841-1867* (Toronto: University of Toronto Press, 1955) at 78.

20. Sir A F Lascelles, *Government House Green Book* (Ottawa: King’s Printer, 1934) at 17-18.

21. See commission constituting Stephen Wallace, Secretary to the Governor General and Herald Chancellor, Deputy of the Governor General, to do in His Excellency’s name all acts on his part necessary to be done during His Excellency’s pleasure; *Debates of the Senate*, 41st Parl, 1st Sess, Vol 148 (15 December 2011) (Hon Noël A Kinsella), (the authority of the secretary to the governor general as deputy of the governor general to grant Royal Assent was first exercised on 15 March 2011, when Wallace granted assent to Bill C-33, *An Act to provide for the resumption of air service operations*, <http://publications.gc.ca/site/eng/396875/publication.html>.

22. *Emergency Management Act*, SC 2007, c 15; *The War Measures Act, 1914*, (5 Geo), c 2.

Canada at the federal level is the only jurisdiction where such extensive authority is now vested in the chief administrator responsible for the governor's household and programme. In no other realm or sub-jurisdiction appertaining – the Canadian provinces or the Australian states – has the role of the secretary been so significantly enhanced.

To understand the secretary's increased role we must first examine the position of the deputies of the governor general and that of the administrator. The *Constitution Act, 1867* empowers the Queen to authorize the governor general to appoint a "deputy or deputies...., and in that capacity to exercise during the pleasure of the governor general such of the powers, authorities, and functions of the governor general as the governor general deems it necessary or expedient to assign to him or them, subject to any limitations or directions expressed or given".²³ Article VII of the *Letters Patent Constituting the Office of the Governor General, 1947* grants the governor general the ability to appoint deputies. Prior to Confederation, senior officials in the Executive Council Offices and Provincial Secretary's Offices, what would later be partly transformed into the Privy Council Office (PCO), were appointed as deputies for signing money warrants, this practice was continued with the same officials reappointed as deputies following the establishment of the PCO in the post-Confederation period.²⁴ Provincial Lieutenant Governors were similarly appointed as deputies for the purpose of authorizing marriage licenses and administering oaths.

It is worth recounting the difference between the administrator of the government of Canada and a deputy of the governor general. The administrator is endowed with all the powers and authority of the governor general and is only on duty during periods when the governor general is out of the country for more than 30 days, or in the event of the governor general's death, incapacity or removal.²⁵ Unlike the deputies of the governor general, the administrator is sworn in each time they commence acting in the governor general's stead, and they are entitled to all the privileges and honours of the governor general. Deputies of the governor general exercise a narrower scope of authority than the administrator or the governor general and are not required to be sworn in on each occasion when they commence

23. *Constitution Act*, *supra* note 1 at s 14.

24. See *Canada Gazette* entries for 7 October 1865, 15 December 1866.

25. Henry F Davis & André Millar, *Manual of Official Procedure of the Government of Canada*, Vol 1 Administrator (Ottawa: Government of Canada, 1968) at 213 [Davis & Millar].

acting as a deputy of the governor general. Justices of the Supreme Court may act variously as administrators (in the event of the death or incapacity of the chief justice), or as deputies of the governor general.

Following the establishment of the Supreme Court of Canada in 1875, the Chief Justice, W.B. Richards, was appointed as a deputy²⁶ with the specific purpose of fulfilling the governor general's duties during brief periods of absence or illness, rather than defaulting to the administrator as had been the practice prior to 1875 and in the pre-Confederation period. This was quite different role from that of the other deputies as they served as signatories for minor classes of documents, whereas the Chief Justice's role as deputy was much wider in scope. The role of the administrator up to 1905 was discharged by the General-Officer-Commanding the regular British Army stationed in Canada, a British general.²⁷ By the time Sir John Young (Lord Lisgar) was appointed as governor general, the Royal Instructions that constituted his appointment were amended to allow for the governor general, rather than the Queen, to make the appointment of deputies.²⁸ In Australia, New Zealand and later the Union of South Africa and other jurisdictions, this model was emulated and the governor general had the power to appoint deputies who were used for "minor or ceremonial duties".²⁹

26. *Canada Gazette*, 5 August 1876, also see *Canada Gazette*, 14 February 1879, appointment of the Honourable William Johnston Ritchie, Chief Justice of the Supreme Court of Canada, to be deputy of the governor general.

27. It is noteworthy that the Governor General designate, if *in situ*, was commissioned as the administrator of the government of Canada in advance of his installation as governor general. This was the case for Sir John Young in the period preceding the departure of Viscount Monck in 1868.

28. Commission Appointing Sir John Young to be Governor General, 29 December 1868, section VIII "it is amongst other things Enacted, that it shall be lawful for Us, if We think fit, to authorize the Governor General of Canada to Appoint Any Persons jointly or severally to be his Deputy or Deputies within any Part of Parts of Canada, and in that capacity to Exercise, during Pleasure of the Governor-General, such of the Powers, Authorities, and Functions of the Governor-General as he may deem it necessary or expedient to assign to him or them, subject to any Limitations or Directions from time to time expressed or given by Us. Now We do hereby Authorize and Empower You, Subject to such Limitations and Directions as aforesaid, to appoint any Person or Persons, jointly or severally, to be your Deputy or Deputies within any Part or Parts of Our Dominion of Canada, and in that capacity, to Exercise, during Your Pleasures, such of Your Powers, Functions and Authorities as you may deem it necessary or expedient to assign to him or them. Provided always, that the Appointment of such a Deputy or Deputies shall not affect the Exercise of any Such Power Authority of Function by you, the Said Sir John Young in Person."

29. Arthur Berridale Keith, *Responsible Government in the Dominions*, (Oxford: Clarendon Press, 1928) at 74.

The reason behind this delegation of authority was twofold; firstly to alleviate the administrative burden placed on the governor general in having to sign a copious number of documents, most of marginal importance. Thousands of land grants, minor commissions and tens of thousands of marriages did not warrant the personal review of the Sovereign's representative.³⁰ The second reason was to provide for an officer to act in the place of the governor general when he was ill, incapacitated or absent for brief periods of time. Dealing with the inability of the governor general to act over short periods of time, rather than periods of more than thirty days of absence when an administrator would assume the responsibilities, was a regular requirement, especially when the governor general was travelling throughout the country and communication with Ottawa was not always guaranteed.

In 1878, when Lord Dufferin was in the midst of challenging negotiation with the Colonial Secretary Lord Carnarvon over the development of standardized *Letters Patent Constituting the Office of the Governor General* and *Royal Instructions*, an early version of the new document failed to include reference to the governor general's ability to appoint deputies. This concerned Dufferin, who requested of his superior in London that the authority be retained in the new set of *Royal Instructions* to allow for the appointment of deputies. Dufferin noted that, "in practice the Governor-General has for years past appointed, on assuming office, deputies, who act in certain matters with which it would be inconvenient for the Governor to deal personally, for example, the signing of money warrants".³¹ Having made the case for retaining the provision in the *Royal Instructions*, provision for the governor general to appoint various deputies remained an integral part of the governor general's authority.

The next significant amendment to the *Letters Patent* and *Royal Instruction* came in 1905 and brought about a number of signal changes, notably the removal of the role of the General-Officer-Commanding the British military in Canada as Commander-in-Chief and default administrator of the government of Canada. The result was the governor general becoming commander-in-chief and the chief justice of the Supreme Court becoming the default administrator of the govern-

30. Statistics Canada, *Vital Statistics: Number of marriages and rate, average age at marriage of brides and bridegrooms, number of divorces, net family formation, Canada, 1921-1974*, vol 1 (Ottawa: Statscan, 1974) at B75 (to get a general idea of the enormity of the documents requiring attention, in 1921, the first year national statistics were retained on the number of marriages undertaken, there were 71,254 marriages).

31. Confidential Memorandum from Lord Dufferin to Lord Carnarvon (21 April 1876) in *Correspondence on the subject of the revision of the Royal Instructions to the Governor General of Canada*, Colonial Office (5 May 1879).

ment – to act as governor general in the absence of the person holding that office.³² Along with this change came the appointment of an official in the office of the governor general to serve as a deputy. The chief clerk in the office of the governor general, and no longer a senior official in the PCO, was appointed as a deputy, with authority to sign “warrants of election, proclamations, writs for the election of members of the House of Commons, and Letters Patent of Dominion and other lands”.³³

With the delegation of authority to a civil servant on the governor general’s permanent staff, a differentiation began to be made between the designations Deputy Governor General/Deputy of the Governor General and the Governor General’s Deputy. The latter phrase has historically been used to describe the Chief Justice and puisne judges of the Supreme Court who were commissioned to act, with broad scope of authority, in the stead of the governor general; while the former described those who were authorized only to sign certain classes of documents. While the differentiation is noted as being “without legal foundation”,³⁴ it reveals that the judges appointed as deputies were treated as much more surrogates of the governor general than the civil servant appointed as a deputy.

Beginning in 1905, various civil servants in the office of the secretary to the governor general have served as deputies of the governor general for the purpose of signing various documents and commissions of the narrow scope previously referenced. In this capacity the role was in essence an extension of the vice-regal signature for documents of minor or modest importance. This changed in 2011 when the secretary to the governor general was entrusted with “all the powers, authorities and functions” except the ability to grant royal assent to bills in Parliament, dissolve, recall or prorogue Parliament or appointing members of the Ministry. It is interesting to note that the wording of the commission issued to the secretary to the governor general to serve as a deputy differs slightly temperately from the commissions granted to justices of the Supreme Court of Canada, in that the justices are only limited from “the power of dissolving the Parliament of Canada”.³⁵ In their role as deputies of the governor general, justices

32. The provision in the Instructions given to Governors General since 1868 allowing for the appointment of a *Lieutenant Governor of the Dominion of Canada*, were never acted upon.

33. *Canada Gazette*, 7 January 1905. Appointment of Charles J. Jones, Chief Clerk in the Governor General’s Office to be the Deputy of His Excellency.

34. Davis & Millar, *supra* note 32 at 210.

35. *Debates of the Senate*, 36th Parl, 2nd Sess, No 84 (20 October 2000) (Hon Gildas L. Molgat).

of the Supreme Court are able to recall or prorogue Parliament and appoint members of the Ministry. The secretary is able to grant Royal Assent through written declaration; however, unlike the justices of the Supreme Court, the secretary cannot preside over a Royal Assent ceremony before Parliament assembled, recall or prorogue Parliament.³⁶ This newly granted authority was first exercised on 15 March 2011, when the secretary, Mr. Stephen Wallace, granted assent to *An Act to Provide for the Resumption of Air Service Operations*.³⁷

The reason for this change is not yet clear, however it seems closely linked to the discomfort that a number of justices of the Supreme Court, who are all commissioned to act as deputies of the governor general, have had over the past decade in relation to their exercise of executive authority on behalf of the Crown's representative. A fear has been intimated, despite the perfunctory nature of granting Royal Assent, that by granting assent, their impartiality and independence as members of the highest court of the land could be impugned by litigants appearing before the Supreme Court – especially in the event a case arises in relation to a bill to which a justice has granted Royal Assent or a regulation they have authorized in their capacity as a deputy. As far back as the First World War, justices have expressed concern about the expectation that they would simply sanction approbate every state document placed before them in their capacity as deputy of the governor general, without a proper briefing.³⁸

This concern has also been raised in other comparable jurisdictions, notably Australia during the tenure of Murray Gleeson as Chief Justice of the High Court of Australia. Gleeson's fear of polluting judicial impartiality with the exercise of executive function resulted in his refusal to serve as chair of the advisory council of the Order of Australia, which advises the executive on who should receive Australia's highest honour for lifetime achievement.³⁹ Gleeson had

36. *Royal Assent Act*, SC 2002, c 15 (allows for assent to be granted via written declaration, as opposed to the previous format whereby it could only be signified "in Parliament assembled." Assent granted by written declaration must be done in the presence of more than one member of each House of Parliament. There is a further requirement that assent be granted in Parliament assembled at least twice a calendar year.)

37. Bill C-33, *An Act to Provide for the Resumption of Air Service Operations*, 1st Sess., 41st Parl., 2011 (first reading 12 March 2012).

38. Sir Joseph Pope, *Public Servant: The Memoir of Sir Joseph Pope* (Toronto: Oxford University Press, 1960) at 249 [Pope].

39. It is worth noting that when the Order of Australia was established in 1975 the constitution, overall structure and advisory council were based entirely on the Order of Canada, which had been established in 1967.

no fundamental disagreement with honours – he was already a Companion of the Order of Australia – however, he was gravely concerned that his involvement in the Advisory Council could be perceived as compromising the independence of the High Court from the executive. Gleeson, a passionate defender of judicial independence, noted:

What is at stake is not some personal or corporate privilege of judicial officers; it is the rights of citizens to have their potential criminal liability, or their civil disputes, judged by an independent tribunal. The distinction is vital. Independence is not a prerequisite of judicial office; the independence of judicial officers is a right of the citizens over whom they exercise control.⁴⁰

As a result of Gleeson's objections, the *Constitution of the Order of Australia* was amended in 1996, removing the chief justice of the High Court as chair of the advisory council and from the advisory council of the Order of Australia altogether.

The role of judges as *ersatz* governors dates back to the period preceding Responsible Government, when chief justices would often sit as members of the Executive Council and fill in for governors when they were travelling back to Britain, or when they had come to an untimely end and there was a vacuum of executive authority. As the independence of the judiciary, and the necessity for the courts to be seen as functionally separate from the executive has grown, especially since the advent of the *Canadian Charter of Rights and Freedoms*, the need has grown to insulate members of the judiciary from the potential – even if incorrect – perception that they are somehow responsible for the creation of laws.

Details outlining how often the Secretary acts as the governor general's deputy in signing orders-in-council and other instruments are not publicly known, nor would it be an easy dataset to compile. Nevertheless, given the public nature of Royal Assent, we have an exact knowledge of how often the secretary has been exercising the newly expanded powers held as a deputy of the governor general.⁴¹ If we examine the method by which Royal Assent has been granted since the promulgation of the *Royal Assent Act*, 2002, which requires that "Royal Assent be signified in Parliament assembled at least twice in each calendar year",⁴² and allows for the granting of Royal Assent

40. Murray Gleeson, *Embracing Independence*, (Paper, delivered at the Local Courts of New South Wales Annual Conference, Sydney, 2 July 2008).

41. All grants of Royal Assent and the individual granting assent have been recorded in the *Journals of the Senate* since 1867.

42. *Supra* note 36 at s 3(1).

by written declaration, a pattern is revealed that sees the role of the deputy once fulfilled by the justices of the Supreme Court, has been by and large transferred to the secretary to the governor general – at least as it relates to the granting of Royal Assent. We have only conjecture to offer evidence that this transformation has also extended the frequency with which justices of the Supreme Court and the secretary are called upon to act as deputy of the governor general in relation to signing orders-in-council and other significant instruments of advice or appointment.

Since the secretary to the governor general was given the authority to grant Royal Assent in 2011, he has granted assent 22% of the occasions in the period 2011-2014. Over this same period, the frequency with which justices of the Supreme Court have granted assent by written declaration has declined by 50% over the previous 48 month period, 2007-2010. The governor general's granting of Royal Assent by written declaration has declined by a modest 11%. These figures reveal that the secretary is not being used as a stop-gap for when the governor general or justices of the Supreme Court are unavailable, but rather that the secretary has begun to supplant the role of the justices of the Supreme Court as the principal deputy.

Table 1.1 Royal Assent, 2003-2014⁴³

Method and person granting Royal Assent	2003-2006 <i>(n=34)</i>	2007-2010 <i>(n=42)</i>	2011-2014[†] <i>(n=22)</i>
In Senate chamber by the governor general	5 (15%)	9 (21%)	6 (27%)
In Senate chamber by a justice of the Supreme Court	2 (6%)	3 (7%)	1 (5%)
Written declaration by the governor general	15 (44%)	18 (43%)	7 (32%)
Written declaration by a justice of the Supreme Court	12 (35%)	12 (29%)	3 (14%)
Written declaration by the secretary	–	–	5 (22%)
TOTAL by written declaration	79%	72%	68%

[†] It was only in 2011 that the secretary to the governor general was granted authorization to grant Royal assent.

43. *Journals of the Senate of Canada, 2003-2014.*

The fact that the secretary is only able to grant Royal Assent by written declaration and not in front of Parliament seems to be an attempt to preserve some of the theatre surrounding the actual Royal Assent ceremony which takes place in the Senate – as if to save parliamentarians the spectacle of a deputy minister *cum* viceroy transforming bills into the law of the land. This is especially true given that the actual Royal Assent ceremony in Canada – both federally and provincially – is unique to Canada. Such ceremonies and symbols “reflect the whole government, culture and tradition”.⁴⁴

So why does it matter what official, other than the governor general, grants Royal Assent? The granting of Royal Assent is something that in Canada’s post-Confederation constitutional history has only been refused in the provinces⁴⁵ – however there remain hypothetical reasons why a governor general might be called upon to refuse assent to a bill on the advice of the Cabinet.⁴⁶ One example would be were there some serious legal flaw with legislation passed through both houses. Although rare, significant legal problems have been found in legislation that has made its way through both houses. The recent example of Bill C-479, *An Act to amend the Corrections and Conditional Release Act (fairness for victims)*,⁴⁷ is one such instance. Had the bill made it through third reading in the Senate before the problems had been identified refusal of Royal Assent by the governor general would have been a tool for preventing a flawed piece of legislation from becoming law.⁴⁸ In the case of the aforementioned Bill the legal error was spotted following second reading in the Senate at the committee stage. Eugene Forsey devised another hypothetical scenario where assent could be refused, however it no longer applies.⁴⁹

44. Frank MacKinnon, *The Crown in Canada* (Calgary: McClelland and Stewart West, 1977) at 116.

45. McCreery, *supra* note 15 at 115 (Royal Assent was refused on 38 occasions in the provinces between 1870 and 1945).

46. Heard, *supra* note 3 at 37.

47. Bill C-479, *An Act to amend the Corrections and Conditional Release Act (fairness for victims)*, 2nd Sess, 41st Parl, 2013, (Reinstated from previous session 16 October 2013); see also Sean Fine “Serious Error Found in Second Tory Crime Bill”, *The Globe and Mail* (5 September 2014).

48. Senate, *Journals of the Senate*, 41st Parl, 2nd Sess, No 80, (25 September 2014) (on 25 September 2014 the Senate adopted the following motion, “That Bill C-479, *An Act to amend the Corrections and Conditional Release Act (fairness for victims)*, be withdrawn from the Standing Senate Committee on Legal and Constitutional Affairs and that all proceedings on the bill to date be declared null and void”).

49. In 1973 Eugene Forsey speculated that Royal Assent could be rightly refused “if the Assembly passed a bill prolonging its own life for more than a comparatively short time, in the teeth of furious opposition protests.” Of course this theoretical situation was created in the context of a province and not at the federal level. In

Such circumstances are extraordinary but not impossible. The granting of Royal Assent and approbating orders-in-council require a governor general, or designate, who can evaluate whether or not an exceptional circumstance requires a different outcome, and furthermore requires a vice-regal who feels he or she can encourage, warn and seek additional information. There is also the additional tool of delay, which could be used in the face of dramatically shifting events or a rapidly changing dynamic in Parliament. What is of greater concern is not that the secretary is granting Royal Assent – which is almost entirely perfunctory – but that the secretary is approbating orders-in-council and other statutory and non-statutory instruments where, from time to time the careful eye of a governor general has requested reconsideration of a matter.⁵⁰ This aspect of the vice-regal role cannot effectively be discharged by an official who does not have the security of tenure of the governor general or the justices of the Supreme Court.

The symbolic issue is the more semantic, yet it is of importance in the context of the spectacle of the state's authority and the Crown as the locus of authority. To reduce the granting of assent to nothing more than an obligatory signature placed onto the paper by a civil servant in the privacy of his office is not befitting the solemnity and significance of the act of law-making. The more symbolic elements aside, who grants Royal Assent, is the more minor element of the secretary's empowerment to act with such sweeping authority – it is, however, at present the only quantifiable indication of how frequently the secretary is acting on the governor general's behalf in other matters of State. The most problematic aspect of this new arrangement is the secretary's ability to authorize orders-in-council, statutory and non-statutory instruments of all type, without the independence, and job security of a governor general or a justice of the Supreme Court. Smith notes the importance of the real and perceived neutrality displayed by a governor general and the justices of the Supreme Court,⁵¹ this is not a cloak that can be adopted by someone who is a career public servant in anywhere near the same manner as the senior most actors in the Canadian state. As noted there are occasions when governors have asked their ministers to reconsider or redraft orders-in-council

any case both jurisdictions are now protected from such an occurrence by section 4 of the *Constitution Act, 1982*. See, Eugene Forsey, *Notes on the Constitutional Position and Powers of the Lieutenant Governor*, 1973, 7.

50. D Michael Jackson, *The Crown and Canadian Federalism* (Toronto: Dundurn Press, 2013) at 59.

51. David E Smith, *The Invisible Crown: The First Principles of Canadian Government* (Toronto: University of Toronto Press, 1995) at 129.

and other instruments. Equally there are occasions when governors have requested a briefing on contentious orders-in-council and other decisions that are requested of the Governor-in-Council. This was the case in 1970 when Governor General Roland Michener was requested to sign an order-in-council authorizing the proclamation of the *War Measures Act*. The secretary to the Governor General, Esmond Butler informed the Clerk of the Privy Council, Gordon Robertson, that in the event of an emergency, Michener would expect a briefing.⁵² It was a day later, very early in the morning that Michener was asked to sign the order.⁵³ Here we have an example of the Crown's representative exercising their right to be consulted, to encourage and to warn. It also serves as a reminder that the governor general's authority to request additional information and background on an issue he or she is asked to deliberate on has been a constant throughout our constitutional history.⁵⁴ The station and person of the governor general or a justice of the Supreme Court naturally place them in a position to be able to make such demands – placing such an onerous responsibility onto the shoulders of a civil servant, in the person of the secretary to the governor general, deprives the Crown of an effective and independent conduit through which to offer consideration of the government's decisions. We should not forget that the secretary is a civil servant and deputy minister – void of independence or security of tenure, subject to the same influences and pressures of any senior bureaucrat.⁵⁵ Unlike a governor general or a justice of the Supreme Court, the secretary to the governor general can be removed, promoted or replaced with alacrity and little public notice; the position has hitherto been that of an administrator and not senior state officeholder.

If we re-examine the most likely reason for the secretary being granted such extensive authority to act as a deputy of the governor general – to mitigate the fear of some justices of the Supreme Court that their judicial independence could potentially be perceived to be impugned by their participation in various executive acts in their role

52. LAC, MG-31 E80, Vol 15, file 17, Papers of Esmond Butler

53. Gordon Robertson, *Memoirs of a Very Civil Servant: Mackenzie King to Pierre Trudeau* (Toronto: University of Toronto Press, 2000), at 263. Peter Stursberg, *Roland Michener: The Last Viceroy* (Toronto: McGraw-Hill Ryerson, 1989) at 198.

54. Pope, *supra* note 38 at 272 (reference to Aberdeen declining to “approve a minute of Privy Council until he had seen some correspondence relating thereto”.)

55. The Secretary to the Governor General is a Governor-in-Council appointment, made at pleasure on agreement between the governor general and prime minister. Most office holders have emanated from the deputy minister rank, some have come to the office with little understanding of the constitution or legal role of the governor general.

as deputies of the governor general – then certainly a more constitutionally sound, independent, if slightly more complicated alternative should be considered. Be it the appointment of a retired justice of the Supreme Court or Federal Courts, or senior “statesman” Privy Councillor who is resident in Ottawa as a deputy or the resurrection of the original Confederation period plan to appoint a *Lieutenant Governor of the Dominion of Canada*, as exists in the Australian States and other jurisdictions throughout the Commonwealth. The appointment of a federal lieutenant governor could supplant the need for justices of the Supreme Court or the secretary to the governor general having to act as deputies. Restoring the position of lieutenant governor in the federal sphere would require an amendment to the *Letters Patent Constituting the Office of the Governor General*, however appointing persons other than members of the Supreme Court of Canada or staff of the office of the secretary to the governor general would require no such change as there are no limitations on who may be appointed as a deputy of the governor general. If having orders-in-council, statutory and non-statutory instruments signed in a timely manner is also an element of the perceived problem, there are an abundance of remedies. British Columbia has devised a unique electronic method to cope with the absence of the lieutenant governor from the capital – they allow the lieutenant governor to sign documents in an encrypted and secure format while away from Victoria, with safeguards in place to ensure that such a system cannot be misused. This has been used for countless orders-in-council. The Queen’s red dispatch boxes are transported around the world and the Canadian Armed Forces has secure communications capable of deployment anywhere on earth – the capability certainly exists to reach the governor general wherever he or she is. While touring the far reaches of the Dominion, Lord Aberdeen managed to have orders-in-council delivered to him while in British Columbia, and this was more than a century ago in an era nearly devoid of electronic communication beyond the telegraph.⁵⁶ One has to question why it is possible for the governor general to personally sign 60,000 of the Queen Elizabeth II Diamond Jubilee Medal certificates in one year, yet not be capable of signing a much smaller number of orders-in-council. The governor general certainly has the ability and willingness to fulfil his role. It could hardly be claimed that it is inconvenient to trespass upon the governor’s time. In Canada officials in the Privy Council Office have historically been quick to extoll what is best described as the “theory of delay and

56. Pope, *supra* note 38 at 271.

inconvenience”⁵⁷ and speak for the governor’s time without actually consulting the person in question – invariably to streamline their workload, even if such economies are achieved at the expense of the Crown’s representative.⁵⁸ Given the principal role of the governor general is to ensure the discharge of his constitutional duties; it is highly unlikely that the desire to delegate down the chain, the duties of the governor general, has emanated from the officeholder himself.

The empowerment of the secretary to act as viceroy is unique in the Commonwealth. Even in colonial times secretaries to governors were not endowed with such authority – at the best they could read the riot act or proclamations before angry crowds. This very recent change is not required in order to address the problems to which it ostensibly responds. It does, however, undermine the exercise of the prerogative powers and therefore requires reconsideration.

57. Christopher McCreery, “Myth and Misunderstanding: The Origins and Meaning of the Letters Patent Constituting the Office of the Governor General” in Jennifer Smith and D Michael Jackson, eds, *The Evolving Canadian Crown* (Montreal: McGill-Queen’s University Press, 2012) at 45 (the “theory of delay and inconvenience” is that the submission of matters to the Sovereign or her representative will invariably result in a delay and cause inconvenience to not only the government of Canada, but also to the Queen or the governor general).

58. *Ibid.*

CHAPTER 10
SUCCESSION TO THE THRONE
AND THE ARCHITECTURE OF
THE CONSTITUTION OF CANADA

Mark D. Walters*

[T]he Constitution should not be viewed as a mere collection of discrete textual provisions. It has an architecture, a basic structure. By extension, amendments to the Constitution are not confined to textual changes. They include changes to the Constitution's architecture.

Reference re Senate Reform, 2014 SCC 32
per curiam at para 27, [2014] 1 SCR 704.

In this essay, I will consider the law governing succession to the throne—the law about who may become King or Queen—and the relationship of this law to the “architecture” of the Constitution of Canada. The law on royal succession has ancient roots in English law. It is an old law in need of reform. To this end, the Parliament of the United Kingdom enacted the *Succession to the Crown Act, 2013*.¹ When proclaimed in force, this Act will abolish two discriminatory rules that form part of the law of royal succession, namely, the preference for males over females in the line of succession and the rule disqualifying from the throne anyone marrying a person of the Roman Catholic faith.

These reforms are not controversial. Indeed, the sixteen states, including Canada, that recognize the Crown as their head of state or government—the ‘Commonwealth realms’—have already agreed

* Professor, Faculty of Law, Queen's University.

1. The *Succession to the Crown Act, 2013* (UK), c 20.

to them.² What is controversial, however, is the question about what the Commonwealth realms need to do to ensure that their laws align with the reforms adopted in the United Kingdom. My objective is to consider this question in relation to Canada. Do changes in the law governing succession to the throne made in the United Kingdom require an amendment to the constitutional law on the Crown in Canada before the substance of those changes may take effect here? The government of Canada says *no*. It acknowledges, however, that by a non-legal constitutional norm, or convention, the Parliament of Canada should “assent” to the reforms in Britain—which it did by enacting the *Succession to the Throne Act, 2013*.³

The government’s position has attracted support.⁴ But it has also produced criticism and a legal challenge in the courts.⁵ It has been argued that the Crown in Canada is now a *Canadian* institution and there is a *Canadian* law governing royal succession. Although this law was incorporated from the United Kingdom, it is now a separate body of law. It follows, on this account, that Canada must amend its law of royal succession so that it aligns with reforms made in the United Kingdom, and as these amendments will affect the “office of the Queen” within the meaning of section 41(a) of the *Constitution Act, 1982*,⁶ they will require the approval of the houses of Parliament and the legislative assemblies of all provinces. The government’s position, it is claimed, assumes that *British* law can determine the identity of

-
2. See Josh Hunter, “A More Modern Crown: Changing the Rules of Succession in the Commonwealth Realms” (2012) 38 Commonwealth L Bull 423 at 433-434.
 3. *Succession to the Throne Act*, SC 2013, c 6, s 2. For the government’s position see Rob Nicholson (Minister of Justice), “Changing the Line of Succession to the Throne” (2013) 36 Canadian Parliamentary Review 8; (on constitutional law and constitutional convention, see AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1915) at 413-434.
 4. 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 Journal of Parliamentary and Political Law 593; Mark D Walters, “Submission to the Standing Senate Committee on Legal and Constitutional Affairs Concerning Bill C-53, *An Act to assent to alterations in the law touching the Succession to the Throne*” (5 March 2013).
 5. Garry Toffoli & Paul Benoit, “More is Needed to Change the Rules of Succession for Canada” (2013) 36 Canadian Parliamentary Review 10 [Toffoli & Benoit]; Philippe Lagassé & James W J Bowden, “Royal Succession and the Canadian Crown as a Corporation Sole: A Critique of Canada’s *Succession to the Throne Act, 2013*” (2014) 23 Const Forum Const 17 [Lagassé & Bowden]; Anne Twomey, “The royal succession and the de-patriation of the Canadian Constitution” (4 February 2014), posted at http://blogs.usyd.edu.au/cru/2013/02/the_royal_succession_and_the_d.html (accessed October 21, 2014); Anne Twomey, “Changing the Rules of Succession to the Throne” (2011) PL 378.
 6. *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11.

the Canadian Crown. Canada must assert ownership over the law identifying its own Queen.

This seems like a powerful argument. It is tempting to assume that because Canada is a sovereign and independent state with its own Crown it must have its own law of royal succession, albeit one originally borrowed from the United Kingdom. I will argue in this essay, however, that if we attend to the structure or “architecture” of the Constitution of Canada, it will become apparent that the identity of the Crown in Canada is based upon a different kind of rule, one that *is* distinctively Canadian and therefore *not* based on laws of royal succession incorporated from the United Kingdom. To put it simply, Canada recognizes the Queen as its Queen for different reasons than the United Kingdom recognizes the same person as its Queen. I will conclude that the Canadian government is right: no constitutional amendment is necessary for Canada’s law to align with recent changes to the law governing succession to the throne in the United Kingdom because that alignment exists without any need to change the rule of Canadian constitutional law governing the identity of the Crown in Canada.

SOPHIA AND THE PROTESTANT HEIRS OF HER BODY

The *Act of Settlement, 1701* provided that (under certain conditions) the Crown would vest in “Princess Sophia Electress and Dutchess Dowager of Hannover and the Heirs of Her Body being Protestants”.⁷ Who was Sophia and why was a Protestant princess of a German palatinate selected as the foundation for the British monarchy?

The answer lies in the story of constitutional and religious struggle in England that stretched across the seventeenth century, a struggle that involved assertions of royal absolutism by the first Stuart monarch, James I, the execution of his successor, Charles I, the restoration to the throne after an eleven-year Puritan interregnum of his son, Charles II, and the forced abdication of his successor, James II, in the Glorious Revolution of 1688. Protestant parliamentarians tolerated James II’s Catholicism so long as his Protestant daughters, Mary and Anne, were his heirs apparent—but that changed with the birth of a son by his (Catholic) second wife.

7. *Act of Settlement, 1701*, 12 & 13 Will, c 2 (Eng), article 1.

Parliamentary support for the King was already tenuous for other reasons, and James was forced to flee England. His eldest daughter Mary and her husband William of Orange were invited to accept the throne in his place.⁸

The transition was affirmed by the *Bill of Rights, 1689*.⁹ To preserve the “auntient Rights and Liberties” of the English people and to deliver them from “Popery and Arbitrary Power”, Parliament enacted that William and Mary were thereby made King and Queen. It directed that they hold the Crown jointly during their lives, and then the Crown was to descend through a defined line that included their direct descendants and Anne and her direct descendants. The Crown went to Anne in 1702. But Parliament, anticipating a failure of heirs and wary of the Catholic Stuarts exiled in France, had already enacted the *Act of Settlement, 1701*. This Act ensured that, if necessary, the Crown would vest in Sophia and the Protestant heirs of her body. Sophia may have been a German princess, but her mother was the daughter of James I. Anne had no heirs and Sophia pre-deceased Anne, so upon Anne’s death the Crown went to Sophia’s eldest son who became King George I in 1714. The rest is, as they say, history. Elizabeth II is Queen in the United Kingdom today because she is the latest Protestant heir of Sophia. The *Succession to the Crown Act, 2013* leaves in place the principal terms set by the *Act of Settlement, 1701*, including the rule that the King or Queen must be Protestant.

What does this story have to do with Canadian constitutional law? In fact, quite a bit. Aside from addressing succession to the throne, the *Bill of Rights* and the *Act of Settlement* affirmed principles relating to parliamentary privilege, legislative supremacy, the rule of law, and the independence of the judiciary that are now part of Canada’s constitutional architecture, having entered, as Chief Justice Antonio Lamer said, through the “grand entrance hall” to the constitution, *i.e.*, the preamble of the *Constitution Act, 1867*, which proclaims Canada’s constitution to be “similar in principle to the Constitution of the United Kingdom”.¹⁰ But what does the convoluted story about how the Crown in the United Kingdom came to be held

8. See in general Steve Pincus, *1688: The First Modern Revolution* (New Haven: Yale University Press, 2009).

9. *Bill of Rights, 1689*, 1 Will and Mar, sess 2, c 2.

10. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 [*Constitution Act, 1867*]. See *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3, per Lamer C J C at paras 83, 87, 107 (on the *Act of Settlement*), and para 109 (“grand entrance hall”); also, *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 63 (on the *Bill of Rights, 1689*).

by the Protestant heirs of Sophia have to do with the Constitution of Canada? The answer, in my view, is *nothing*.

THE SIMPLE RULE OF CROWN IDENTIFICATION

This answer requires some explanation. It will help, I think, to begin by stepping back from history for a moment to think more theoretically about what it means for one state to recognize the Crown of another state as its own. In this respect, it is worth emphasizing that the Commonwealth realms are members of a “voluntary association of independent and equal sovereign states”.¹¹ How the Queen in the United Kingdom gets to be the Queen within a Commonwealth realm is therefore entirely a matter for the internal or domestic constitutional law of that realm.

There are two basic ways by which a realm may recognize the King or Queen in the United Kingdom as its King or Queen. First, a state may adopt a constitutional rule that provides that the King or Queen under its constitution is that person who, at the relevant time, is King or Queen in the United Kingdom under the laws of royal succession in force there. In other words, a state may adopt what I will call a *rule of Crown identification*.¹² Under this approach, the state has no law of royal succession. The simple rule of Crown identification renders the need for a law of royal succession unnecessary. Second, a state may choose to have its own law of royal succession to determine who is the Crown in its country, and then incorporate as the substance of that law the same body of law that governs royal succession in the United Kingdom. In this case, the state will have what I will call an *incorporated law of Crown succession*.

It is within the power of any state wishing to recognize the Crown of the United Kingdom as its Crown to decide for itself whether to have a rule of Crown identification or an incorporated law of Crown succession. There are advantages and disadvantages associated with both. It may seem odd that a state might decide to have as its King or

11. *Charter of the Commonwealth* (14 December 2012), preamble.

12. The rule has also been called the “rule of recognition”: Hogg, *supra* note 4 at 90; Walters, *supra* note 4. To avoid confusion with the version of the “rule of recognition” put forth by H L A Hart in *The Concept of Law* (Oxford: Clarendon Press, 1961), which is an extra-legal social convention that identifies the criteria of legal validity for a legal system, I will here use the expression “rule of Crown identification”—which is, I hasten to add, very much a rule of ordinary constitutional law rather than an extra-ordinary or extra-legal norm.

Queen whoever happens to be King or Queen in a second state under that state's laws. But it may seem even odder for a state to copy and incorporate into its own law a body of law concerning royal succession that developed in another state under social and political conditions peculiar to it. There is a sense of oddity either way.

The rule of Crown identification does not imply any legal connection or unity between Crowns as offices (or "corporations sole").¹³ The rule of identification is just that: it identifies the person occupying the office. That the same person occupies another office (or fifteen other offices) is not inconsistent with the distinct legal identity of each office. The degree of separateness that the office of Crown will enjoy within any realm will be determined by other laws governing the Crown in the country, not the rule of Crown identification, which, again, only serves the purpose of identifying who occupies or exercises the powers of the office.

Furthermore, it is important to emphasize that under neither of the two approaches does the law of the United Kingdom have any force within the realm. For those realms having a rule of Crown identification, the British law of royal succession does not extend to or apply within the realm; changes to that law made in the United Kingdom will affect indirectly who can be King or Queen in the realm, but those changes will not extend as a matter of law to the realm and they will leave the realm's rule of Crown identification wholly untouched. For those realms having an incorporated law of Crown succession, in contrast, change to the law of royal succession made in the United Kingdom will have no effect directly or indirectly on who can be King or Queen in the realm, and so the realm will have to go through the process of updating its law on royal succession to ensure that it remains substantively identical with the law in the United Kingdom.

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 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. The choice between having a rule of Crown identifica-

13. Lagassé & Bowden, *supra* note 5.

tion and an incorporated law of Crown succession, then, is really just a choice between two different default positions regarding the identity of the Crown. Does the realm want to amend its law governing the identity of its Crown each time the law of royal succession in the United Kingdom changes or only when it no longer wishes to have the Crown of the United Kingdom as its Crown? That is the basic question to be answered.

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 within its own constitutional law large swathes of law that only really make sense in light of the social and religious history of England which I briefly summarized above. The attempt by a country to weave the constitutional narrative that explains why the King or Queen must be the direct Protestant heir of Sophia into its own constitutional narrative may even prove damaging to the country's constitutional foundations. I return to this point in the final part of this essay. For now, however, it may be said that there 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.

I have been discussing the decision about whether to have a rule of Crown identification or an incorporated law of Crown succession as if it were a choice to be consciously made by the framers of a constitution. The reality for certain Commonwealth realms, however, is that they have old written constitutions dating from the days of the British empire, and the question is not really about which rule the framers selected but about how best to interpret the constitution today. If the written constitution was adopted when the state was a colony, it probably did assume something like a rule of Crown identification. Given the emergence of the colony into a sovereign state that continues to recognize the Crown, must the constitution now be interpreted differently as embracing an incorporated law of Crown succession? This is, in very general terms, the question confronting Canada today.

THE CANADIAN RULE OF CROWN IDENTIFICATION

Canada's foundational constitutional text is an Act of the United Kingdom Parliament, the *British North America Act, 1867* (or the "*BNA Act*"), now called the *Constitution Act, 1867*.¹⁴ Section 9 provides that the "Executive Government and Authority of and over Canada" is "vested in the Queen", and section 17 provides that there shall be "One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons." But who is the "Queen" as that term is employed within the *Constitution Act, 1867*?

There was no mystery in 1867 about who this "Queen" was: it was the Queen, Victoria, who gave royal assent to the Act. There was also no mystery about who would be the "Queen" after Victoria's death. The Act does not contain any substantive rules of royal succession. However, the preamble to the *Constitution Act, 1867* stated—and still states today—that the provinces are united federally "under the Crown of the United Kingdom of Great Britain and Ireland". Furthermore, section 2 of the *BNA Act* provided:

The Provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.

Finally, section 128 provided—and still provides today—that members of the House of Commons and Senate and members of all provincial legislative assemblies must swear the oath of allegiance that is set out in the Fifth Schedule, namely:

I A.B. do swear, That I will be faithful and bear true Allegiance to Her Majesty Queen Victoria.

Note. The Name of the King or Queen of the United Kingdom of Great Britain and Ireland for the Time being is to be substituted from Time to Time, with proper Terms of Reference thereto.

The *Constitution Act, 1867* seems unequivocal: Canada has a rule of Crown identification not an incorporated law of Crown succession. References to the "Queen" in the Act are to be taken as references to that person, whether King or Queen, who shall, from time to time, occupy the office of "Crown of the United Kingdom". Or at least that is what the written text adopted in 1867 says. Whether the essential structure or architecture of the Constitution of Canada is best

14. *Constitution Act, 1867*, *supra* note 10.

interpreted that way today is a point to which I return below. First, however, it is necessary to consider whether events between 1867 and today altered the written texts that I have just summarized.

THE CAREFUL CLERKS AND THE REPEAL OF SECTION 2

We may begin by addressing briefly the fact that section 2 of the *BNA Act* was repealed by the United Kingdom Parliament in 1893 by a *Statute Law Revision Act* that purported to remove from a host of statutes provisions that were “spent” or had ceased “by lapse of time or otherwise” to be necessary.¹⁵ Section 2 was one of several provisions in the *BNA Act* repealed. Was the identification of the “Queen” in the *BNA Act* as the King or Queen of the United Kingdom spent or unnecessary? There had been no political developments by 1893 suggesting it was. If the substantive point of law recognized in section 2 had been considered obsolete, then the drafters of the 1893 Act would have repealed or amended the preamble and the Fifth Schedule of the *BNA Act* too—but they did not.

Perhaps section 2 was thought to be redundant in light of the enactment of section 30 of the *Interpretation Act, 1889*, which provided a similar interpretive rule for all statutes.¹⁶ But, if so, it is unclear why, a few years later, the *Commonwealth of Australia Constitution Act, 1900* included a provision very similar to the one that had just been removed from Canada’s *BNA Act*.¹⁷ Another possible explanation that has been offered is that the repeal of section 2 was a “clerical error”—that the intention was not to repeal section 2 but section 3, a section that dealt with the proclamation bringing the new Dominion of Canada into existence that was “spent” but inexplicably left un-repealed.¹⁸

15. *Statute Law Revision Act, 1893* (UK), 56-57 Vict, c 14, preamble.

16. *Interpretation Act, 1889* (UK), 52 & 53 Vict, c 63.

17. *Commonwealth of Australia Constitution Act, 1900* (UK), 63 & 64 Vict, c 12. It should be noted that three High Court of Australia judges in *Sue v Hill* (1999) 199 CLR 462 (HCA) assumed (at para. 93) that section 2 of the 1900 Act did not imply what I have called a rule of Crown identification, and this case is taken to establish the view in Australia that changes to the law governing royal succession in the United Kingdom have no direct or indirect effect in Australia unless Australian law is changed (see Twomey, *supra* note 4). It should be noted, however, that the assumption was expressed *obiter dicta* by only three of seven of the judges deciding the case.

18. A R Hassard, *Canadian Constitutional History and Law* (Toronto: Carswell, 1900) at 78.

Whatever the explanation, the 1893 amendments to the *BNA Act* went largely unnoticed by Canadian legal scholars who continued to refer to section 2 and to reproduce the Act without the amendments.¹⁹ Only in 1942 did the renowned constitutional scholar (and poet) F.R. Scott draw attention to them. The 1893 amendments were made, Scott said (facetiously) by “careful law clerks” working for a committee tasked with “lopping off the dead wood” in all English statutes, and they wrongly assumed that the *BNA Act* was just another English statute.²⁰ Something of the nature of the exercise is revealed by the fact that after dealing with Canada’s foundational constitutional document the careful clerks turned their attention to cleaning up the *Dog Licences Act, 1867*.

Scott observed that the amendments went unacknowledged not only in Canadian textbooks but also in copies of the *BNA Act* printed by the King’s Printer in Ottawa, a result of the fact that they had been passed by the United Kingdom Parliament “without the Canadian Parliament being in any way informed”.²¹ This was a violation of the convention that the British Parliament would only legislate for Canada upon its request and consent. Perhaps the entire exercise was a clerical error. Scott conceded, however, that none of the amendments were of practical importance. What about section 2? Here, he admitted, it was difficult to understand why the provision identifying the “Queen” in the Act as the King or Queen of the United Kingdom was repealed. But it did not matter. Wrote Scott: “No doubt this rule remains in our law without the necessity of its statement in the B.N.A. Act, but *cela va bien mieux en le disant*”.²²

Section 2 appears to affirm in Canadian constitutional law a rule of Crown identification. In light of the story behind its repeal, and the fact that the preamble and Fifth Schedule, which also affirm that rule, were left untouched, it would be unreasonable now to infer from the repeal an intention to depart from the rule of Crown identi-

19. W H P Clement, *The Law of the Canadian Constitution*, 2nd ed (Toronto: Carswell, 1904) at 76; A H F LeFroy, *Canada’s Federal System, being a Treatise on Canadian Constitutional Law under the British North America Act* (Toronto: Carswell, 1913), at 2 and 768; A.H.F. LeFroy, *A Short Treatise on Canadian Constitutional Law* (Toronto: Carswell, 1918) at 41; W P M Kennedy, *The Constitution of Canada: An Introduction to its Development and Law* (London: Oxford University Press, 1922) at 459.

20. F R Scott, “Forgotten Amendments to the Canadian Constitution” (1942) 20 Can Bar Rev 339 at 339-340.

21. *Ibid* at 339.

22. *Ibid*.

fication. As F.R. Scott suggested, the language of section 2 continued to capture the meaning of the *BNA Act* regarding the identity of the Queen in Canada.

‘ASSENT’, ‘REQUEST AND CONSENT’ AND THE STATUTE OF WESTMINSTER

It was perhaps not surprising that the *BNA Act* contained a rule of Crown identification, for it was adopted at a time when the Crown was considered “one and indivisible throughout the Empire”.²³ As colonies emerged into self-governing Dominions and then sovereign states, however, the Crown in each jurisdiction came to be seen as legally separate—that “in matters of law and government the Queen of the United Kingdom...[became] entirely independent and distinct from the Queen of Canada”.²⁴ I argued above that there is no legal or logical reason why a sovereign and independent state with its own Crown cannot have a rule of Crown identification. But did the particular legal reforms adopted in response to the independence of Canada and other Dominions involve a decision to move away from that kind of rule?

The independence of the Dominions from the United Kingdom was accepted as a matter of constitutional convention and then constitutional law.²⁵ By 1926, it was recognized that the United Kingdom and the Dominions were “equal in status...though united by a common allegiance to the Crown”.²⁶ Representatives from the Dominions and the United Kingdom meeting in 1929 agreed that the power of the Dominion parliaments to amend or repeal British law extending to them should be affirmed legally.²⁷ But how was this power to be reconciled with their common allegiance to the Crown? The solution proposed was that they should all acknowledge the existence of a “constitutional convention” governing how they would in

23. E.g. LeFroy, *Short Treatise*, *supra* note 19 at 59-60 (“The Crown is to be considered as one and indivisible throughout the Empire; and cannot be severed into as many distinct kingships as there are Dominions, and self-governing colonies.”).

24. *The Queen v The Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*, [1982] Q B 892 (Eng CA), 913 (May LJ).

25. Peter Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand* (London: Oxford University Press, 2005).

26. “Report of the Inter-Imperial Relations Committee of the Imperial Conference 1926” (November 1926) at 2.

27. “Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation 1929”, Cmd 3479 (1930) at para 58.

future exercise their legislative independence in relation to the law of succession to the throne, a convention “similar to that which has in recent years controlled the theoretically unfettered power of the Parliament of the United Kingdom to legislate on these matters”.²⁸ These recommendations were implemented by the *Statute of Westminster, 1931*.²⁹

The *Statute of Westminster* applied to the United Kingdom and six Dominions, including Canada. The heart of the Act is section 2, which conferred upon Dominion parliaments the authority to amend or repeal Acts of the United Kingdom Parliament that extended to them. This power was supplemented by section 4, which provided that in future no Act of the United Kingdom Parliament would extend to form part of the law of a Dominion unless the Act expressly declared that the request and consent of the Dominion government for the statute had been given.

These rules of law were supplemented by constitutional conventions affirmed in the preamble to the Act. The preamble’s third recital corresponded with the legal rule in section 4 and provided that no law made by the United Kingdom Parliament shall extend to any Dominion as part of its law otherwise than at the request and with the consent of the Dominion government. The second recital captured the compromise relating to the Crown described above. It provided that “as the Crown is the 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 was 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 the Parliament of the United Kingdom”.

Finally, the Act addressed the particular concerns of individual Dominions. In Canada’s case, section 7(1) provided that Canada did *not* have the authority to amend or repeal the *British North America Act, 1867* or subsequent *British North America Acts* that had modified or supplemented it. Until the federal and provincial governments in Canada could agree to a constitutional amending formula, they did not wish to have that power. The authority to amend the *BNA Act* thus remained with the United Kingdom Parliament, though by

28. *Ibid* at paras 60, 61.

29. *Statute of Westminster, 1931*(UK), 22 Geo V, c 4.

virtue of the third recital and section 4 of the *Statute of Westminster* that power could only be exercised upon the request and consent of Canada.

What did the various conventional and legal rules articulated in the *Statute of Westminster* mean for changes to the law governing succession to the throne? We may consider this question first from the perspective of the Dominions. Reading section 2 and the second recital of the preamble together in light of the 1929 recommendations mentioned above, it seems clear that the Dominions were to have full legislative power, exercised according to the requirements of their respective constitutions, to enact laws governing succession to the throne subject only to the convention that all parliaments “assent” to any changes made. Section 2 did not itself change the substance of any Dominion’s constitution or laws; it merely gave the green light to Dominions to make changes to their laws if and when they wanted, subject to whatever internal rules regarding amendments their respective constitutions imposed. It follows, then, that if a Dominion had a rule of Crown identification, it could, if it wanted, amend its law to adopt an incorporated law of Crown succession. But until any such change was made, existing constitutional law remained in force.

As a result, whether an “assent” by a Dominion parliament was sufficient to keep laws on royal succession aligned after the United Kingdom or another Dominion acted to amend the law of royal succession depended upon whether the Dominion had a rule of Crown identification or an incorporated law of Crown succession. The statutory “assent” by a Dominion did not itself change any law but only served as a formal indication that changes to the law on royal succession to be made in another quarter were acceptable. For a Dominion with a rule of Crown identification, no further steps were necessary to ensure that its laws were in line with new laws on royal succession, so long, that is, as the United Kingdom made the necessary changes to its law of royal succession. However, those Dominions with an incorporated law of Crown succession (if any) would have had to take the further step, in addition to assenting, of either changing their own laws of royal succession or requesting and consenting to the extension to their jurisdiction of the changes made in the United Kingdom if their law of royal succession was to remain consistent with the reforms.

Of course, these conclusions were modified in Canada’s case by the fact that the power to change its rule of Crown identification to another rule was denied because section 7(1) prevented it from making changes to the *BNA Act*. Writing two years after the *Statute*

of *Westminster, 1931* was enacted, Arthur Berriedale Keith insisted that from a “legal point of view” the Dominions were bound by their respective constitutions to recognize the Crown in the United Kingdom as their Crowns, and pointed in particular to Canada and the terms of the *BNA Act*: “The language of the British North America Act, 1867, is emphatic: the Act was passed to unite the provinces in a federal union under the Crown of the United Kingdom”.³⁰ The *Statute of Westminster* had done nothing to change that.

We can now consider the question from the perspective of the United Kingdom. If the United Kingdom Parliament wanted to enact a statute altering the law of succession to the throne but this statute did not purport to extend to form part of the law of a Dominion, then the convention in the second recital would apply (the assent of all Dominion parliaments would be needed), but the convention in the third recital and the legal rule in section 4 (the need for request and consent of the Dominion government and the express acknowledgment of that request and consent in the statute itself) would not apply.³¹ This approach would have been appropriate in relation to those Dominions, like Canada, with a rule of Crown identification: the law of the United Kingdom on royal succession would change, Canada’s law would remain the same, but the ideal of a common allegiance to the Crown would be maintained. If, in contrast, the United Kingdom Parliament enacted a statute to alter the law touching succession to the throne that was intended to extend to form a part of the law of a Dominion, then not only would the request and consent of the Dominion government be required by constitutional convention (third recital) and a statutory declaration to that effect would be required by law (section 4), but the convention requiring the assent of the parliaments of all the Dominions (second recital) would also apply.³² This approach would have been necessary in relation to those Dominions (if any) that had an incorporated law of Crown succession but that either lacked the authority to change their own constitution on this point or were content to permit British legislation to do the job. Finally, if Canada wanted to amend the *BNA Act* to alter its rule of Crown identification and to adopt instead an incorporated law of Crown succession, then an Act of the United Kingdom Parliament made upon the request and consent of Canada (third recital

30. Arthur Berriedale Keith, *The Constitutional Law of the British Dominions* (London: Macmillan, 1933) at 60.

31. K C Wheare, *The Statute of Westminster and Dominion Status*, 4th ed (Oxford: Oxford University Press, 1949) at 151.

32. *Ibid* at 153.

and section 4) would have been required, but the assent of the other parliaments (second recital) would not be needed unless the Act also purported to amend the substance of the law of royal succession.³³

Under the regime contemplated by the *Statute of Westminster*, then, had the United Kingdom Parliament enacted the equivalent of the *Succession to the Crown Act, 2013*, that Act would have required, by constitutional convention, the assent of the Parliament of Canada and the other parliaments by virtue of the second recital in the preamble to the *Statute of Westminster*; however, because it would not have extended to form part of the law of Canada or to amend the *BNA Act* (because the rule of Canadian constitutional law governing the identity of the “Queen” in Canada would not have been affected), the rules concerning request and consent in the third recital and section 4 would not have applied. As Keith insisted in 1933, the *Statute of Westminster* left Canada’s rule of Crown identification in place. No changes to Canada’s constitution have taken place since then that explicitly alter this rule, though the effect of ‘patriation’ in 1982 has placed the legal power to make changes to that rule in Canadian hands.

THE 1936 ABDICATION ‘PRECEDENT’

A mere five years after the enactment of the *Statute of Westminster*, its provisions on royal succession were put to the test with the abdication of Edward VIII. The outcome is not, at first glance, helpful to the argument that I just made.

Edward VIII came to the throne in January of 1936 and within the year abdicated so that he could marry Wallis Simpson. Edward signed an Instrument of Abdication on December 10, 1936, and a bill was immediately introduced into the House of Commons in response. The next day, Edward gave royal assent to *His Majesty’s Declaration of Abdication Act, 1936* thus sealing his own fate as King.³⁴ Section 1(1) of the Act provided that “His Majesty shall cease to be King” and there shall be “a demise of the Crown” and the person “next in succession to the Throne shall succeed thereto”. The moment the Act came into force, then, Edward ceased to be King and his younger brother, Albert, who would assume the regal name George VI, succeeded him to the

33. *Ibid* at 189.

34. *His Majesty’s Declaration of Abdication Act 1936* (UK), 1 Edw VIII & 1 Geo VI, c 3.

throne. Section 1(2) provided that Edward and his children and their descendants would have no right, title or interest to the throne and the *Act of Settlement* was to be “construed accordingly”.

Whether section 1(2) was legally necessary is doubtful (a point, as we shall see, made by the Leader of the Opposition in Canada). Once the statute provided for a “demise” of the Crown and the accession of the person next in line to the throne, any future children of Edward (there would be none) would have been excluded automatically. It is arguable, then, that the *Abdication Act* did not alter the law of succession to the throne at all but merely advanced the Crown one step through the existing line of succession before it would otherwise have done so.

The Canadian government received word from the British government by cable on the morning of December 10th that the King would abdicate. The Canadian Parliament was not then in session, but the cabinet met and an order in council was made and cabled to London in time for its terms to be incorporated into the preamble to the *Abdication Act*.³⁵ In the language of that preamble, the government communicated that “the Dominion of Canada pursuant to the provisions of section four of the Statute of Westminster 1931 has requested and consented to the enactment of this Act”.

The Canadian Parliament reconvened in January of 1937 and immediately took into consideration the question of what response it should make to the abdication, and the *Succession to the Throne Act, 1937* was in due course enacted.³⁶ In its preamble, this Act recites the fact of the “request and consent of Canada” pursuant to section 4 of the *Statute of Westminster* to the enactment of the United Kingdom *Abdication Act* had been given, and it then quotes the second recital from the *Statute of Westminster* concerning the need for “assent” by the parliaments of the Dominions to changes to the law of royal succession, and the Act then enacts that “[t]he alteration in the law touching the Succession to the Throne” set forth in the *Abdication Act* is “hereby assented to”.

What significance does the abdication crisis have for understanding royal succession in Canadian law today? The crisis raises a

35. Order in Council, P C 3144 (10 December 1936). The events were explained by the Prime Minister in the House of Commons: Dominion of Canada, *Official Report of the Debates, House of Commons*, 18th Parl, 2nd Sess, (18 January 1937) at 40-41.

36. *Succession to the Throne Act, 1937* (Can), 1 Geo VI, c 16.

thicket of legal issues. If the argument that I made above concerning the rule of Crown identification under the *BNA Act* is right, then it would follow that in 1936 Canada did not, as a matter of law, need to request and consent to the United Kingdom *Abdication Act* pursuant to section 4 of the *Statute of Westminster* in order for Canada's Crown to remain aligned with the British Crown. But Canada *did* request and consent to the *Abdication Act*, suggesting that, contrary to my argument, the law of royal succession *was* part of Canadian law and needed to be changed to keep step with changes to the law of royal succession in the United Kingdom. Clearly, the events of 1936-37 deserve closer attention. In fact, the debates in the Canadian House of Commons reveal the existence of a range of views on the 'request and consent' question.

When Parliament reconvened in January, the Liberal government of William Lyon Mackenzie King found itself on the defensive. J.S. Woodsworth, leader of the Commonwealth Cooperative Federation party, insisted that Parliament rather than cabinet should have dealt with Edward's abdication. The Prime Minister defended the government's decision to proceed with the request and consent procedure before Parliament met, and his comments are largely consistent with the view that the accession to the throne of George VI required changes to Canadian law.³⁷ Of course, the Prime Minister spoke as a statesman rather than judge or lawyer, and his approach was informed by two important political factors. First, he emphasized that with Edward's abdication the Commonwealth confronted a crisis and the Canadian government did not have time to recall Parliament but had to act on its own in a common sensical way.³⁸ Second, the Prime Minister emphasized that the government wanted to ensure "imperial unity" during the crisis while also "preserving everything that was essential to national autonomy".³⁹

Woodsworth's main concern was that the Prime Minister had taken it upon himself to choose "our king" when this was, in his view, Parliament's decision to make.⁴⁰ He therefore appeared to think that the rules of royal succession formed part of Canadian law. However, he also argued that the convention of parliamentary "assent" not the legal rule of governmental "request and consent" governed—a position inconsistent with that view. In the end, however, Woodsworth conceded

37. *HC Debates*, *supra* note 35 at 43, 67.

38. *Ibid* at 42-43.

39. *Ibid* at 39-40.

40. *Ibid* at 14-15.

that he did not understand fully the difference between law and convention. “This is obviously a field day for the constitutional lawyers,” he said at one point, and “[n]either by training nor by temperament am I fitted to enter upon the purely legal aspects of this case”.⁴¹

There were, of course, lawyers in the House, and they adopted different approaches to the question. Three main arguments were developed. The first argument was developed by Charles Cahan, a member of the opposition Conservative party and cabinet minister in the previous government. Cahan argued that the request and consent procedure found in section 4 of the *Statute of Westminster* did not apply to the situation at hand because “no constituted parliament or government of any dominion had the legislative jurisdiction to deal with an act of abdication.”⁴² This was particularly so in Canada, he said, because “[w]e are circumscribed by the four corners of the British North America Act” and under that Act the authority to legislate on the royal succession “never was vested in Canada”.⁴³ Cahan insisted that “the King of the United Kingdom is and will continue to be the King mentioned and described in the British North America Act, 1867”.⁴⁴ Canada had been wrong to adopt the request and consent procedure—the transition to a new King required no change in Canadian law.

A second legal argument was advanced by Ernest Lapointe, the Attorney General and Minister of Justice. Lapointe conceded that “strictly speaking, from the legal point of view”, Cahan was right in saying that “at the moment the present king came to the throne he became our sovereign”.⁴⁵ This conclusion followed, said Lapointe, from the fact that by section 7 of the *Statute of Westminster* the *BNA Act* remained binding upon Canada and it provided that “the king of the United Kingdom is our sovereign”.⁴⁶ “The crown is interwoven through many of the sections and so long as the British North America Act is not repealed,” he said, “those sections of the act apply to us in the strictly legal viewpoint”.⁴⁷ Lapointe did say, however, that the situation had evolved as a matter of constitutional convention, and he read from the 1929 recommendations that served as the basis for the

41. *Ibid* at 81.

42. *Ibid* at 73.

43. *Ibid*.

44. *Ibid* at 70.

45. *Ibid* at 76.

46. *Ibid*.

47. *Ibid*.

second recital to the preamble of the *Statute of Westminster* concerning the “assent” procedure.

So why in his view had the request and consent procedure been appropriate? Lapointe reminded the House that the United Kingdom *Abdication Act* had two main parts and he argued that each demanded a different response from Canada. He said that the request and consent from Canada was needed in relation to the accession of George VI to the throne secured by section 1(1) of the Act, which did not involve any alteration to the law on royal succession, and that the “assent” from the Parliament of Canada required by “convention” was needed in relation to section 1(2) “because of the alteration in the law of succession [made by that section], which is quite a different thing”.⁴⁸ His point about section 1(1) is confusing, since he had already stated that, legally speaking, Canada got a new King the instant George VI acceded to the throne in the United Kingdom. But he seems clear in saying that changes to the law governing succession to the throne in the United Kingdom did *not* require Canada’s request and consent, just Parliament’s assent. “In so far as the legislation [the U.K. *Abdication Act*] would operate to alter the law touching the succession to the throne,” he observed, “the assent of the dominion parliament is required in accordance with constitutional convention set out in the second recital to the Statute of Westminster”.⁴⁹

A third legal argument was advanced by R.B. Bennett, the former Prime Minister and then leader of the opposition Conservative party. In Bennett’s view, the abdication of the King and the accession of his successor to the throne did not require any change in the law of royal succession at all: once the abdication was determined to be a “demise” of the Crown the legal consequences were the same as if Edward had died.⁵⁰ Furthermore, like Cahan, Bennett argued that as a matter of law Canada needed to do nothing in response to this transition. “Our written constitution provides,” Bennett argued, “that the crown...shall as of right devolve upon the successors of Her late Majesty, Queen Victoria”.⁵¹ As George VI took the throne as the next of those successors, under Canadian constitutional law there was nothing at all that Canada needed to do. Unlike Cahan, however, Bennett supported the government’s handling of the issue. The request and consent may not have been required as a matter of law, and so

48. *Ibid* at 78, 80.

49. *Ibid* at 80.

50. *Ibid* at 26.

51. *Ibid* at 86.

had no legal effect, but the government confronted a “condition and not a theory” and given the need to act quickly in the face of a crisis concern about legal niceties was inappropriate.⁵²

Outside Parliament, several prominent constitutional scholars also questioned the use of section 4 by Canada. F.C. Cronkite, Dean of Law at the University of Saskatchewan, argued that the request and consent procedure was unnecessary because the Crown was identified by the *BNA Act* as being whoever held the Crown in the United Kingdom.⁵³ W.P.M. Kennedy, later the Dean of Law at the University of Toronto, argued that section 4 “was never intended to deal with succession to the throne” as this topic was a matter within the legislative authority of the United Kingdom and governed only by the convention set out in the second recital of the preamble to the *Statute of Westminster*.⁵⁴ Kennedy later argued that the reference to the “Crown of the United Kingdom” in the preamble to the *BNA Act* as well as the terms of section 2 of that Act established the “fundamental position” regarding the identity of the Queen in Canada, and that this position was “protected” by section 7 of the *Statute of Westminster* and so the United Kingdom *Abdication Act* “became in law automatically operative in Canada” without its request and consent under section 4.⁵⁵ Kennedy did emphasize, however, that Canada’s rule for identifying the Queen was *Canadian* and the choice to keep it was *Canada’s*:

We must...remember that the law today is not imposed on us. The suit that we wear was not cut and tailored in Downing Street. The tariff of constitutional right and custom is too high today to allow Canada to import. We are down—or up—to home-spun.⁵⁶

So how did Kennedy explain Canada’s decision to invoke section 4 of the *Statute of Westminster*? In the second edition of his book, *The Constitution of Canada*, Kennedy praised the Prime Minister for the “statesmanlike manner” in which he handled Canada’s response to the crisis, but then he quickly added that the government had acted “with abundance of caution, to satisfy every conceivable jot and tittle of law and convention” and had “erred on the side of supererogation”.⁵⁷

52. *Ibid* at 86, 89-90.

53. F C Cronkite, “Canada and the Abdication” (1938) 4 *Canadian Journal of Economics and Political Science* 177 at 185-186, 190.

54. W P M Kennedy, “Canada and the Abdication Act” (1937) 2 *UTLJ* 117 at 118.

55. W P M Kennedy, “The Kingdom of Canada” (1939) 17 *Can Bar Rev* 1 at 4.

56. *Ibid* at 6.

57. W.P.M. Kennedy, *The Constitution of Canada, 1534-1937: An Introduction to its Development, Law and Custom* 2nd ed (London: Oxford University Press, 1938) at 562, 563.

Kennedy's final position was not unlike Bennett's: the request and consent was politically wise but legally superfluous.

It is worth observing that in developing his arguments, Kennedy referred to section 2 of the *BNA Act*, apparently not knowing that it had been repealed. He was not alone. So did Cronkite. On this point, the law professors were in good company. In the parliamentary debates of 1937, the Minister of Justice himself had assumed section 2 was still in force.⁵⁸ Nobody in the House corrected him. Had the academic and political actors of the day had the advantage of reading F.R. Scott's account of the 1893 repeal of section 2 written a few years later, would they have altered their arguments? It is fair to say that there is a good chance that, like Scott, they would have considered the deletion of section 2 as substantively immaterial. Kennedy, for example, put equal weight on the reference to the "Crown of the United Kingdom" found in the *BNA Act's* preamble—which of course has never been repealed or amended.

We may now sum up. If there had been a general consensus that the changes to the law governing succession to the throne adopted in the United Kingdom's *Abdication Act* needed the request and consent of Canada under section 4 of the *Statute of Westminster*, then the 'abdication crisis' could now be taken as a kind of precedent in favour of the view that the law of royal succession did indeed extend to Canada to form part of its law and that amendments to that Canadian law were necessary before changes in the United Kingdom on royal succession could have any direct or indirect effect here—and if that was true in 1936 then it remains true today (although we now have a different amendment procedure). But there was no such consensus. Different political actors supported the government's decision to invoke the request and consent procedure for different reasons. The leader of the Official Opposition supported the move as politically wise but legally superfluous. The Minister of Justice appeared to say that the procedure was legally unnecessary in relation to the part of the *Abdication Act* that purported to alter the law on succession to the throne. Prominent legal scholars insisted that the request and consent procedure had not been necessary. It is clear that the government faced an emergency and adopted what it thought was a pragmatic response. Obviously the events of 1936-37 do not establish a precedent one way or the other. Today, the abdication crisis provides important context, but no unequivocal answers.

58. *HC Debates*, *supra* note 35 at 76.

There is one further argument concerning the abdication crisis to consider. It might be said that even if the request and consent by Canada to the *Abdication Act* was not legally necessary, its legal effect, on its own or in conjunction with Canada's *Succession to the Throne Act, 1937*, was to incorporate the entire body of British law governing royal succession into Canadian law.⁵⁹ The main difficulty with this argument is that the terms of neither Act indicate that this was the legislative purpose or effect. The *Abdication Act* merely affirms that there was a single demise of the Crown and the accession of a new King, and it then clarifies that the law of succession is to be "construed" accordingly. In the *Succession to the Throne Act*, the Parliament of Canada merely "assented" to that interpretive clarification in compliance with a constitutional convention. The debates on the bill in the Canadian House of Commons confirm that legislators thought they were responding to a particular crisis, not changing Canadian constitutional law in a general way (something that they could not have done anyway given section 7 of the *Statute of Westminster*).

Under the regime established by the *Statute of Westminster*, then, the "Queen" within Canada's constitution was determined by the same rule as before. The summary provided by constitutional historian Donald Southgate thirty years later therefore seems accurate: "If the Queen opens the parliament of the Dominion of Canada she does so as Queen of Canada not as Queen of the United Kingdom, although by Canadian law it is the person who is monarch of the United Kingdom who is monarch of Canada".⁶⁰

PATRIATION

On April 17, 1982, in the rain on Parliament Hill in Ottawa, the Queen signed a Proclamation that brought into force the *Constitution Act, 1982*. With the stroke of her pen, the 'patriation' of the Constitution of Canada was legally completed. Long after it had emerged as a sovereign and independent state, Canada was finally freed from the last of the legal ties that kept it nominally linked to the United Kingdom.

If Canada had a rule of Crown identification before 1982, the patriation of the Canadian constitution seems to have had no impact,

59. Lagassé & Bowden, *supra* note 5 at 21; Toffoli & Paul Benoit, *supra* note 5 at 11-12.

60. Donald Southgate, "Epilogue" in James A Williamson, *A Short History of British Expansion: The Modern Empire and Commonwealth*, 6th ed (London: Macmillan, 1967) at 377.

explicitly at least, on that rule—other than to change who can amend it. The “Constitution of Canada” is now defined by the *Constitution Act, 1982* as the “supreme law” of Canada (s. 52(1)), and it includes the following written provisions: the “Queen” has the executive authority of and over Canada (*Constitution Act, 1867*, s. 9); the “Queen” is a component of the Parliament of Canada (*Constitution Act, 1867*, s. 17); the provinces in Canada are federally united “under the Crown of the United Kingdom of Great Britain and Ireland” (*Constitution Act, 1867*, preamble); members of federal and provincial legislatures must swear an oath of allegiance to “the King or Queen of the United Kingdom of Great Britain and Ireland for the Time being” (*Constitution Act, 1867*, s. 128 and Fifth Schedule); Canada is a member of a “Commonwealth of Nations...united by a common allegiance to the Crown” and it acknowledges a constitutional convention that no “alteration in the law touching the Succession to the Throne” shall be made without the “assent” of the parliaments of the United Kingdom and the Dominions (*Statute of Westminster, 1931*, preamble); after 1982, no statute of the United Kingdom Parliament may extend to form part of the law of Canada (*Canada Act, 1982*, s. 2; *Constitution Act, 1982*, schedule (repealing ss. 4 and 7(1) of the *Statute of Westminster, 1931*)); and, changes to the “office of the Queen” require a constitutional amendment approved by the Senate and House of Commons and the legislative assemblies of all the provinces (*Constitution Act, 1982*, s. 41(a)). There are no rules or laws expressly set forth within the Constitution of Canada governing succession to the throne or incorporating the law of royal succession from the United Kingdom. The provisions that before suggested a rule of Crown identification are still there.

It should now be apparent why the government has concluded that Canada needs to make no amendments to its constitution to ensure that the identity of the Crown in Canada aligns with the new rules governing succession to the throne established by the United Kingdom’s *Succession to the Crown Act, 2013*. It has assumed that Canada still has a rule of Crown identification. In light of section 2 of the *Canada Act, 1982*, the *Succession to the Crown Act, 2013* cannot extend to Canada or form part of its law. But of course the rule of Crown identification is animated by the principle that the law of royal succession *never* extended to Canada in the first place, and it provides that amendments to that law made in the United Kingdom do *not* extend to Canada either. From this perspective, Canada does not recognize the Queen as its Queen for the same reasons that the United Kingdom recognizes the same person as its Queen. It has its own constitutional rule of Crown identification that is left

unchanged by the reforms to the law on royal succession made in the United Kingdom.

Of course, the United Kingdom is under a duty by virtue of constitutional convention to seek the “assent” of Canada’s Parliament before amending its law of royal succession, and the Parliament of Canada is presumably under a duty by convention to give “assent” to reasonable proposals to reform the law of succession. Given the indirect impact that those changes may have on who can be King or Queen in Canada, the duties associated with the convention articulated in the second recital of the preamble to the *Statute of Westminster*—now part of the “Constitution of Canada”—still make good sense. In relation to the reforms of 2013 to the law of royal succession, both the United Kingdom and Canada have complied with this rule of constitutional convention.

CANADA’S RAMBLING CONSTITUTIONAL MANSION

There are two concerns about the government’s approach that might be raised. It may be said, first, that the government’s argument involves an originalist reading of constitutional text, and, second, that it is a highly technical or formalistic understanding of that text. To be fair, when the government’s argument is reduced to its simplest form—who may be King or Queen in the United Kingdom may have changed, but who may be King or Queen in Canada remains the same because that person is whoever is the King or Queen in the United Kingdom—it might sound not just formalistic but casuistic or sophistical or even silly.

No matter how much support can be found for the government’s argument in either history or text, the argument cannot be accepted unless it can be justified by that theory of underlying value and principle that provides the Constitution of Canada its normative compass today. This, I think, is what the Supreme Court of Canada meant in the *Senate Reform Reference* when it said that the government’s argument in that case “privileges form over substance” and that attention must instead focus on the “architecture of the Constitution”.⁶¹ The question whether Canada has a rule of Crown identification or an incorporated law of Crown succession is, like all hard questions of constitutional law, an *interpretive* question that can only be answered

61. *Reference re Senate Reform*, 2014 SCC 32 *per curiam* at paras 52, 53, [2014] 1 SCR 704.

through the construction of constitutional meaning in its broadest and most generous sense.

It is worth pausing to consider the architectural metaphor briefly. For the real architect, structure has a physical essence: buildings exist in fact and their foundations are concrete. But this sense of physicality is not quite the point conveyed by the image of constitutional architecture. In our constitutional tradition, law is an interpretive discourse that emerges through an on-going effort to understand text, tradition and history in light of a theory of constitutionalism compelling for people today. The Court approaches the Constitution of Canada holistically. Written texts and the underlying or unwritten principles that they presuppose are understood to form a coherent and organic unity—a normative structure with a shape and identity distinct from the particular provisions and norms it embraces.

Law may not be a concrete fact, but the architectural metaphor remains a powerful one. Here we may think of William Paley's famous analogy, that the constitution "resembles one of those old mansions" that was built "in different ages of the art" with continual "additions and repairs suited to the taste, fortune, or convenience of its successive proprietors".⁶² When we speak of respect for constitutional architecture, then, we are interested in locating the structure implicit within a dynamic tradition of constitutional law. The question is not what would make the best constitution—what plans an architect would draw up today. The objective, rather, is to identify the best interpretation of the existing constitution. What interpretive strategies, including possible renovations, will show the rambling mansion that we have inherited in its best light? The deep structure of the evolving constitutional narrative in Canada is one that must include things that we might not necessarily choose if we were writing a new constitution today. The task is to make the best interpretive sense of the structure that we have been given.

The government's position is, in effect, that Canada has a rule of Crown identification rather than an incorporated law of Crown succession. This position *is* consistent with a compelling account of Canadian constitutional architecture. Let me explain why through critical reflection on two recent cases, *Teskey v Canada* and *O'Donohue v Canada*.⁶³

62. William Paley, *The Principles of Moral and Political Philosophy* (London: R Faulder, 1785) at 465-466.

63. *Teskey v Canada (Attorney General)*, 2013 ONSC 5046; aff'd 2014 ONCA 612; *O'Donohue. Canada*, [2003] OJ No 2764 (Ont SC), aff'd [2005] O J No 965 (Ont CA).

In both *Teskey* and *O'Donohue*, the Ontario Court of Appeal upheld lower court decisions that rejected claims concerning the law of royal succession. The gist of those claims was that in discriminating against Roman Catholics the rules governing royal succession found in the *Act of Settlement* violate the right to equality under the *Canadian Charter of Rights and Freedoms*. The response of the first judge to consider this argument, Justice Paul Rouleau in *O'Donohue*, has been accepted by all of the other judges in these two cases, so I will therefore focus on his reasons.

Rouleau J. began by observing that the preamble to the *Constitution Act, 1867* confirms that “Canada is united under the Crown of the United Kingdom of Great Britain” and therefore the principle that Canada is “[a] constitutional monarchy, where the monarch is shared with the United Kingdom” is “at the root of our constitutional structure.”⁶⁴ Following the architectural metaphor, it might be said that any other conclusion would render the “grand entrance hall” (as Lamer C.J.C. called it) to the constitutional mansion a mere façade or false-front.

Rouleau J. then rightly identified as a general principle of Canadian constitutional law the proposition that the adoption of a specific institution or principle of parliamentary government by the written constitution implies the inclusion within the constitution of those parts of British constitutional law “necessary” or “essential” to the “proper functioning” of that institution or principle, an inclusion affirmed by the assertion found in the preamble to the *Constitution Act, 1867* that Canada’s constitution is “similar in principle” to the United Kingdom constitution.⁶⁵

The next step in his argument is critical. Rouleau J. stated:

Applying that reasoning to the present case, it is clear that Canada’s structure as a constitutional monarchy and the principle of sharing the British monarch are fundamental to our constitutional framework. In light of the preamble’s clear statement that we are to share the Crown with the United Kingdom, *it is axiomatic that the rules of succession for the monarchy must be shared and be in symmetry* with those of the United Kingdom and other Commonwealth countries. One cannot accept the monarch but reject the legitimacy or legality of the rules by which this monarch is selected.⁶⁶

64. *O'Donohue v Canada*, [2003] OJ No 2764 at para 21.

65. *Ibid* at paras 26, 27.

66. *Ibid* at para 27 (emphasis added).

The rules of royal succession, he continued, are “essential to the proper functioning of the shared monarchy principle” and so are “by necessity incorporated into the Constitution of Canada” as part of “the unwritten or unexpressed constitution”.⁶⁷ Having determined that the law of royal succession is incorporated into and forms part of the Constitution of Canada, Rouleau J. then concluded that any claim to the effect that this part of the constitution violates another part of the constitution is not justiciable. But, in addition, he observed, “if the courts were free to review and declare inoperative certain parts of the rules of succession, Canada could break symmetry with Great Britain, and could conceivably recognize a different monarch than does Great Britain”, and this would involve the courts “changing rather than protecting our fundamental constitutional structure”.⁶⁸

There is much of value in this reasoning, but it contains a *non sequitur*. The principle of Crown symmetry does lie at the core of our constitutional structure. Any interpretation of the constitution that left Canada united within one Dominion under a Crown of the United Kingdom (to paraphrase the preamble) different from the actual Crown of the United Kingdom would show the constitutional mansion that we have inherited to be a shambles. But it does not follow that the law of royal succession found in the United Kingdom must be incorporated into Canadian law. It is not necessary or essential for the proper functioning of the principle of Crown symmetry for Canada to have a law of royal succession identical to Britain’s; on the contrary, the only meaningful way that the principle of Crown symmetry can be guaranteed is through a rule of Crown identification. Under an incorporated law of Crown succession the principle of Crown symmetry is reduced from an established principle of law to a contingent matter of politics to be negotiated through the constitutional amendment procedure whenever there is a need to alter the law of succession to the throne.

In the end, however, perhaps the most troubling aspect of Rouleau J.’s reasoning is the implication that it has for other aspects of Canadian constitutional integrity. If we accept within our own law the law of royal succession that emerged in England during the seventeenth century, we must defend the idea that our constitutional law contains at its core a principle of religious discrimination inconsistent with our commitment to equality and respect for minorities. Are we prepared to do this? Rouleau J. says that “[we] cannot accept the

67. *Ibid* at paras 21, 28.

68. *Ibid* at para 29.

monarch but reject the legitimacy or legality of the [British] rules by which this monarch is selected". I disagree. We can accept the monarch for other reasons—reasons that better reflect our own sense of constitutional identity.

The law governing succession to the throne in the United Kingdom is the product of a constitutional narrative that is not ours. The seventeenth-century struggle between the Catholic Stuarts and Protestant parliamentarians may shape aspects of our constitutional tradition indirectly, but the legal outcome, that the Crown is vested in "Princess Sophia Electress and Dutchess Dowager of Hannover and the Heirs of Her Body being Protestants", does not resonate with the implicit structure of the Canadian constitutional narrative, and it does need to form part of Canadian law. The story about the struggle between the Stuarts and Parliament explains why Elizabeth II is Queen in the United Kingdom; however, it does not explain why Elizabeth II is Queen in Canada. The reason why the Queen is Queen in the United Kingdom is not the same reason as the reason that she is Queen in Canada. To be sure, she is Queen in Canada because she is the Queen in the United Kingdom. But it is not casuistic or sophisticated or silly to insist upon that distinction. On the contrary, recognizing this distinction explicitly opens the possibility for a uniquely Canadian constitutional narrative on why we recognize the Crown in the United Kingdom as our Crown.

I cannot explore fully how that distinctive constitutional narrative would look. Canada and other common law jurisdictions are still struggling to articulate a theory of the state and still struggling to articulate a place for the Crown in that theory.⁶⁹ There is perhaps the obvious point that we recognize the Crown in Canada because it represents an entire system of parliamentary government and the rule of law to which we are committed—as the recent judgment in *McAteer* affirms.⁷⁰

But the narrative is more than that. It is an autochthonous understanding of the Crown that has emerged over a very long and hard history in Canada. As in England, here constitutional interpretation cannot be detached from the legacy of our past—it is just that our pasts are not entirely the same. In Canada, for example,

69. Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge: Cambridge University Press, 2012).

70. *McAteer v Canada (Attorney General)*, ONCA 578, (2014) 121 O R (3d) 1 (CA) at para 7.

we might point to the issuing of the *Royal Proclamation of 1763* and the subsequent development of a Crown-Aboriginal relationship, a relationship fraught with its own difficulties, of course, but still one in which a distinctive concept of the Crown informed by the perspective of indigenous legal tradition can be seen to have emerged.⁷¹ We may find as well a distinctively Canadian approach to allegiance and religion. The inclusion of a Roman Catholic French Canadian community by force was balanced by subsequent measures to accommodate religious diversity and legal pluralism. The exclusion of Roman Catholics from political life is not part of our constitutional heritage. The *Quebec Act, 1774* is a powerful reminder that here the link between allegiance and religious identity was severed at an earlier point than it was in Britain.⁷²

The development of a Canadian constitutional narrative that exhibits a sense of normative unity and integrity of its own may (counter-intuitively) be encouraged through the continued recognition of the Crown in the United Kingdom as the Canadian Crown. 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 inhibit the emergence of a coherent and uniquely Canadian theory of the Crown and the Constitution of Canada.

The result of my argument may not be of much comfort for the applicants in the *Teskey* and *O'Donohue* cases. It might not make much difference to them that the rule that the Crown cannot be Catholic is a rule of another country that has only indirect effect here. But I am inclined to think that there is an important difference in legal and constitutional principle, and that if we try to justify that difference through an explication of Canadian constitutional architecture that endeavours to honour our commitment to equality, the rule of law, democracy, federalism, and respect for minorities, then what seems at first glance a formalistic or pedantic distinction between the rule of Crown identification and the incorporated law of Crown succession will be understood as a distinction of constitutional substance well worth grasping.

71. Mark D Walters, "Your Sovereign and Our Father": The Imperial Crown and the Idea of Legal-Ethnohistory" in Shaunnagh Dorsett and Ian Hunter eds, *Law and Politics in British Colonial Thought: Transpositions of Empire* (Houndmills: Palgrave Macmillan, 2010) at 91-108.

72. *Quebec Act, 1774* (GB), 14 Geo III, c 83.

The status of the Crown in Canada is, as W.P.M. Kennedy stated back in 1939, entirely “home-spun”. The spinning or weaving of the constitutional narrative that defines that status continues today. It is still worth pondering how best to encourage our own sense of how the Crown fits within that distinctively Canadian constitutional fabric.

CHAPITRE 11

LA MONARCHIE CONSTITUTIONNELLE AU CANADA: UNE INSTITUTION STABLE, COMPLEXE ET SOUPLE

L'honorable Serge Joyal*

L'une des réalités constitutionnelles les moins bien comprises est que dans les seize pays du Commonwealth – les «royaumes» («Realms») – qui partagent le monarque du Royaume-Uni, il y a plusieurs points semblables mais également plusieurs différences importantes dans la manière dont la monarchie constitutionnelle a évolué, et opère à l'intérieur de chacun de ces pays souverains.

La perception populaire nourrit l'impression que comme il s'agit de la même Reine partagée par toutes ces nations, son statut et sa charge sont en fait identiques d'un pays à l'autre et qu'il n'y a rien de vraiment distinctif sous ce rapport.

Chacun de ces États possède une structure constitutionnelle propre ; or le rôle de la Couronne dans ces démocraties est tout à fait particulier et non interchangeable. Les règles qui gouvernent l'institution monarchique dans ces pays diffèrent sous plusieurs aspects, et non les moindres. C'est d'ailleurs ce qui explique à la fois la complexité de l'institution monarchique, et aussi sa capacité à s'adapter à des réalités historiques différentes. La situation la plus récente qui fera ressortir cette particularité au Canada est l'objectif recherché d'adapter les règles de la succession au trône aux valeurs contemporaines d'égalité des sexes et de liberté de religion.

* Sénateur, Sénat du Canada.

Notes de l'auteur : Plusieurs arguments ont déjà été développés dans un mémoire déposé en 2013 à la Cour supérieure du Québec dans la cause *Mottard et Taillon c. Procureur général du Canada*. Tous les soulignés dans le présent texte sont à l'initiative de l'auteur.

La question s'est posée en effet lorsque le Parlement du Canada a eu à donner effet à l'accord qui était intervenu entre seize pays du Commonwealth – les «royaumes – à Perth (Australie) en octobre 2011, pour des modifications à la loi sur la succession au trône afin, entre autres, d'abolir la règle de primogéniture masculine et d'éliminer pour le monarque la prohibition du mariage d'un/une catholique.

Dans un État unitaire comme le Royaume-Uni, la question est relativement simple : le Parlement étant suprême, il suffit qu'un projet de loi soit adopté par les deux chambres, et qu'il reçoive la sanction royale, pour modifier les règles qui gouvernent la ligne de succession. Or, dans un État fédéral complexe comme l'est le Canada, qui de plus est la plus ancienne fédération parmi tous les pays du Commonwealth, la situation constitutionnelle est tout autre lorsqu'il s'agit de formaliser l'accord du Parlement à de telles modifications.

L'institution monarchique demeure souvent peu comprise dans ses éléments ontologiques. Pour mieux saisir la place qu'elle occupe dans notre architecture constitutionnelle, il convient de tenir compte de l'évolution historique du droit au Canada, des principes sous-jacents à la monarchie constitutionnelle et des objectifs que l'institution est appelée à servir, de manière à mieux saisir le caractère distinctif de la Couronne canadienne. D'autant plus qu'actuellement on est confronté à des changements à la loi sur la succession au trône qui auront un impact certain à l'avenir.

I. LES PRINCIPES SOUS-JACENTS À LA MONARCHIE CONSTITUTIONNELLE CANADIENNE

1^{er} Principe: Sa Majesté la Reine au droit du Canada est une institution d'État distincte de sa personne

Le préambule de la *Loi constitutionnelle de 1867* énonce :

Considérant que les provinces du Canada, de la Nouvelle-Écosse et du Nouveau-Brunswick ont exprimé le désir de contracter une Union Fédérale pour ne former qu'une seule et même Puissance (Dominion) sous la couronne du Royaume-Uni de la Grande-Bretagne et d'Irlande, avec une constitution reposant sur les mêmes principes que celle du Royaume-Uni.

Plusieurs conclusions relatives au statut de la monarchie dans le système canadien découlent de ce préambule de la Constitution. Parmi les principes qui s'ensuivent, il convient de souligner :

Le Canada est une monarchie constitutionnelle. Sa Majesté la Reine Elizabeth II est la Reine du Canada ; elle est l'incarnation de la Couronne au Canada et elle est en conséquence, le chef de l'État.¹

À ce titre, Sa Majesté la Reine au droit du Canada² est une institution d'État qui est distincte de la personne qu'est Elizabeth II, et ses successeurs, comme individus. Cette distinction est fondamentale à retenir lorsqu'il s'agit d'identifier les règles qui se rapportent à la personne du souverain, et à la ligne de succession au trône.

La Cour Supérieure de l'Ontario l'a bien compris en 2013 :

60. In the first place, Her Majesty the Queen in Right of Canada (or Her Majesty the Queen in Right of Ontario or the other provinces), as a governing institution, has long been distinguished from Elizabeth R. and her predecessors as individual people.³

Les tribunaux ont eu d'ailleurs l'occasion de préciser, à quelques reprises, que le serment d'office, ou le serment d'allégeance à devoir prêter en certaines circonstances, ne s'adresse pas à la personne même du souverain mais plutôt à notre système de gouvernement, à savoir une monarchie constitutionnelle : «it is not an oath to an individual but to our form of government».⁴

Elizabeth II, comme individu, est l'expression personnelle de la Couronne du Canada. La détermination de la personne qui porte la Couronne du Canada est l'objet de dispositions constitutionnelles précises, et celles-ci ne peuvent être modifiées que selon une procédure définie :

As it was put by Professor Frank MacKinnon, *The Crown in Canada*, Glenbow Alberta Institute, 1976, at page 69: "Elizabeth II is the personal expression of the Crown in Canada". Even thus personalized, that part of the Constitution relating to the Queen is amendable.⁵

1. *Loi sur les titres royaux*, SRC 1985, c R-12, art 2.
2. "Par. 16. As for the Queen's stature as head of state, the ancient common law recognized the monarch as the repository of English sovereignty ... that the Crown sits at the sovereign apex of the legal and political system." *McAteer et al v Attorney General of Canada*, 2013, ONSC, 5895 [McAteer].
3. *Ibid* au para 60.
4. *Ibid*.
5. *Chainnigh c. Canada (Procureur général)*, 2008 FC 69 au para 26, [2008] 2 FCR D-7.

C'est là l'état du droit aujourd'hui, résultat d'une évolution historique continue.

2^e Principe: La monarchie constitutionnelle garantit le gouvernement responsable

En droit britannique, le Parlement est suprême: il dispose de toute la compétence pour déterminer le statut de la Couronne et l'identité de la personne appelée à régner. Ainsi la monarchie n'est pas seulement héréditaire, elle est aussi contractuelle:

In Britain, the monarchy was not only hereditary but also contractual in that the sovereign owed his position not only to hereditary right but also to the consent of Parliament

...since the time of William III, the sovereign has owed his title to Parliament, not merely to the right of hereditary succession

...from that time onwards, the supreme power in the state was not the sovereign but the sovereign-in-Parliament.⁶

Il s'ensuit que depuis l'adoption de l'*Act of Settlement* en 1701 par Westminster, le Parlement britannique a seul le pouvoir de modifier les conditions d'accès et la ligne de succession au trône. Ce pouvoir est en fait le fondement même de l'existence du Parlement qui a seule compétence pour choisir lui-même le souverain qui détient le pouvoir exécutif, législatif et judiciaire. C'est l'essence de la monarchie constitutionnelle britannique.

C'est, entre autres, ce principe qui est enchâssé dans le préambule de la *Loi constitutionnelle de 1867* lorsqu'il y est mentionné une «Union Fédérale ... sous la couronne du Royaume-Uni ... avec une constitution reposant sur les mêmes principes que celle du Royaume-Uni.» Le Canada est fondé sur le principe d'une monarchie constitutionnelle, dont l'existence repose sur les pouvoirs du Parlement de déterminer les conditions prévalant au choix du souverain et d'accès au trône, c'est-à-dire au choix de la personne qui détient le pouvoir exécutif (article 9), législatif (articles 17, 91 et 92) et judiciaire (articles 96-99 de la *Loi constitutionnelle de 1867*). Le souverain exerce son pouvoir exécutif sur «l'avis de conseillers issus de la majorité parlementaire élue», mais il exerce son pouvoir législatif sur l'avis des deux chambres.

6. Vernon Bogdanor, «The Monarchy and the Constitution» (1996) 49 *Parliamentary Affairs* 407 à la p 409.

Au Canada, la monarchie constitutionnelle enchâsse l'existence même du principe du gouvernement responsable, ainsi que le reconnaît l'article 11 de la *Loi constitutionnelle de 1867*, en pourvoyant à l'établissement d'un Conseil Privé de la Reine.⁷

3^e Principe: L'existence de la monarchie canadienne est intrinsèquement liée à l'existence d'une monarchie au Royaume-Uni

Le troisième principe qui découle du préambule de la loi de 1867 est celui de la similitude identitaire du souverain qui porte simultanément la Couronne au droit du Royaume-Uni et la Couronne au droit du Canada.

*Canadian constitutional law has what may be called a rule of recognition according to which the King or Queen in Canada is that person who is, at any given time, the King or Queen in the United Kingdom. Although the rules governing who may be the King or Queen in the United Kingdom are about to change, the simple Canadian rule of recognition identifying the Crown in Canada will not change.*⁸

Les mots « sous la Couronne du Royaume-Uni » du préambule font allusion au fait que les deux ordres de gouvernement, britannique et canadien, partagent le même souverain. C'est le principe constitutionnel de la symétrie des deux Couronnes : la personne qui est titulaire de la Couronne au Canada est de droit celle qui porte la Couronne du Royaume-Uni. Ce principe du droit constitutionnel contemporain est le résultat d'une lente évolution historique depuis George V, George VI et finalement Élisabeth II, reconnue en titre comme Reine du Canada en 1953.

Dans l'esprit des Fondateurs en 1867, le principe de l'unicité de la Couronne britannique apparaissait clair. George-Etienne Cartier, lors des débats entourant la Confédération en 1864, l'a illustré à sa manière dans un discours qui a fait date :

I am living in a Province in which the inhabitants are monarchical by religion, by habit and by the remembrance of past history. Our great

-
7. (R-U), 30 & 31 Vict, c 3, art 11, reproduit dans LRC 1985, ann II, n° 5: « Il y aura, pour aider et aviser, dans l'administration du gouvernement du Canada, un conseil dénommé le Conseil Privé de la Reine pour le Canada; les personnes qui formeront partie de ce conseil seront, de temps à autre, choisies et mandées par le Gouverneur-Général et assermentées comme Conseillers Privés; les membres de ce conseil pourront, de temps à autre, être révoqués par le gouverneur-général. »
8. Étude déposée au Comité permanent des affaires juridiques et constitutionnelles du Sénat du Canada par le professeur en droit à l'Université Queen's Mark D Walters, (5 mars 2013) au para 7 à la p 2.

desire and our great object in making efforts to obtain the federation of the Provinces is not to weaken monarchical institutions, but on the contrary to increase their influence. We know very well that, as soon as confederation is obtained, the Confederacy will have to be erected into a Vice-Royalty, and we may expect that a member of the Royal Family will be sent here as the head.⁹

Selon Cartier, le représentant du souverain devait être un membre de la famille régnante au Royaume-Uni. Il y aurait ainsi, selon lui, filiation identitaire parfaite à la tête de l'ordre constitutionnel au Royaume-Uni, et au Canada.

4^e Principe: La continuité ininterrompue de la Couronne

Le principe de la continuité ininterrompue de la Couronne se retrouvait également perpétué à l'origine à l'article 2 de la *Loi constitutionnelle de 1867*:

2. Les dispositions du présent acte relatives à Sa Majesté la Reine s'appliquent également aux héritiers et successeurs de Sa Majesté, Rois et Reines du Royaume-Uni de la Grande-Bretagne et d'Irlande.¹⁰

Cet article a été abrogé en 1893 après que le Parlement de Westminster eut adopté en 1889 une loi d'interprétation (*Interpretation Act*, 1889) qui visait à assurer une uniformité dans l'interprétation des lois britanniques eu égard à la définition des notions de «Sovereign» et de «Crown» et de la transmission successorale du trône¹¹, confirmant le statut des successeurs et la continuité ininterrompue de la présence d'un souverain :

References to the Crown

30. In this Act and in every other Act, whether passed before or after the commencement of this Act, references to the Sovereign reigning at the time of the passing of the Act or to the Crown shall, unless the

9. Discours de George-Etienne Cartier donné à l'occasion d'un banquet d'honneur lors de la Conférence des délégués du Canada et des autres provinces à Halifax, les 9 et 10 septembre 1864. Edward Whelan, *The union of the British provinces: a brief account of the several conferences held in the Maritime provinces and in Canada, in September and October, 1864, on the proposed confederation of the provinces, together with a report of the speeches delivered by the delegates from the provinces, on important public occasions*, éd, Charlottetown, GT Haszard, 1865 aux pp 26-27.

10. Texte de l'article 2 de la loi de 1867, abrogé par la *Loi de 1893 sur la révision du droit statutaire (R-U)*, art 2, 56-57 Vict, c 14.

11. Walters, *supra* à la note 8 aux para 20-22.

contrary intention appears, be construed as references to the Sovereign for the time being, and this Act shall be binding on the Crown.¹²

Cet article 30 de la loi d'interprétation britannique s'appliquait à l'*Acte de l'Amérique du Nord britannique* (1867), lui-même une loi britannique adoptée quelque 22 ans plus tôt par Westminster.

5^e Principe: La continuité des successeurs au trône garantit la souveraineté canadienne

Le principe de la continuité des successeurs au trône, exprimé à l'origine de la Confédération en 1867, est demeuré tel au Canada. La *Loi constitutionnelle de 1867* y fait d'ailleurs référence dans son article 128 où il est fait mention du serment d'allégeance que doit souscrire chaque député, fédéral ou provincial, et sénateur, avant d'entrer en fonction.

Le texte du serment d'allégeance, contenu à la *Cinquième annexe*, dispose que :

Je, A.B., jure que je serai fidèle et porterai vraie allégeance à Sa Majesté la Reine Victoria.

N.B. — Le nom du Roi ou de la Reine du Royaume-Uni de la Grande-Bretagne et d'Irlande, alors régnant, devra être inséré, au besoin, en termes appropriés.

Cette note qui apparaît au texte constitutionnel souligne clairement que l'héritier du trône britannique demeure toujours par l'opération de la loi le Souverain en titre pour la « Puissance » du Canada.

Le principe de la continuité du souverain sera confirmé dans le serment prévu à la première *Loi sur la citoyenneté canadienne* adoptée en 1947.¹³ Il sera repris dans la *Loi sur la citoyenneté* de 1976 (loi qui entrera en vigueur en 1977)¹⁴ et sa formulation essentielle

12. The *Interpretation Act*, 1889 (R-U), 52 & 53 Vict c 63, s 30.

13. LC10 George VI, 1946, c 15, en seconde annexe: «Je, A.B., jure fidélité et sincère allégeance à Sa Majesté le roi George Six, ses héritiers et successeurs, conformément à la loi, et jure que j'observerai fidèlement les lois du Canada et remplirai de même manière mes devoirs de citoyen canadien. Ainsi Dieu me soit en aide.»

14. *Loi sur la citoyenneté*, 1974-75-76, c 108: «Je jure (ou déclare solennellement) que je serai fidèle et que je porterai sincère allégeance à Sa Majesté la reine Elizabeth Deux, reine du Canada, à ses héritiers et à ses successeurs en conformité de la

demeurera telle. On le retrouve également dans la *Loi sur les serments d'allégeance*.¹⁵

De la même manière, tout citoyen canadien qui s'enrôle dans les *Forces canadiennes* doit, selon les « Ordonnances et règlements royaux applicables aux Forces canadiennes » en vigueur, souscrire l'affirmation ou le serment suivant qui confirme que c'est la loi, i.e. le parlement qui détermine les héritiers ou successeurs au trône du Canada :

Je, (Nom au complet), jure (ou, dans le cas d'une déclaration solennelle, « déclare solennellement ») d'être fidèle et de porter sincère allégeance à Sa Majesté la Reine Élisabeth Deux, Reine du Canada, à ses héritiers et à ses successeurs en conformité de la loi. Ainsi, Dieu me soit en aide.¹⁶

Les principes de la symétrie identitaire des deux souverains, et de la continuité ininterrompue de la Couronne sont des éléments indissociables de la monarchie constitutionnelle telle qu'elle existe au Canada et qui garantissent la perpétuité de la souveraineté canadienne.

II. LA FORCE NORMATIVE DU PRÉAMBULE DE LA LOI CONSTITUTIONNELLE DE 1867 ET LES PRINCIPES SOUS-JACENTS

Les tribunaux canadiens ont à plusieurs reprises¹⁷ affirmé la force normative du préambule de la *Loi constitutionnelle de 1867* et lui ont attribué une portée déterminante dans la définition des principes et du caractère fondamental de la Constitution canadienne.

Par exemple, dans le renvoi sur le Sénat en 1980, la Cour suprême a recouru au préambule pour déterminer le caractère du

loi et que j'observerai fidèlement les lois du Canada et remplirai mes devoirs de citoyen canadien ».

15. LRC (1985), c O-1, art 2 contient le texte spécifique du serment à prononcer dans le contexte « d'une exigence légale ou d'une obligation imposée par une règle de droit en vigueur au Canada » : « Je,, jure fidélité et sincère allégeance à Sa Majesté la Reine Elizabeth Deux, Reine du Canada, à ses héritiers et successeurs. Ainsi Dieu me soit en aide. »
16. « Ordonnances et règlements royaux applicables aux Forces canadiennes (ORFC) », c 6, vol 1, Administration, 6.04 – Serment à prêter au moment de l'enrôlement.
17. *Renvoi : Compétence du Parlement relativement à la Chambre haute*, [1980] 1 RCS 54; *Projet de loi fédéral relatif au Sénat (Re)*, 2013 QCCA 1807, [2013] RJQ 1711; *New Brunswick Broadcasting Co c Nouvelle-Écosse (Président de l'Assemblée législative)*, [1993] 1 RCS 319.

Sénat et sa nature dans le système parlementaire fédéral.¹⁸ La Cour d'appel du Québec, dans une décision rendue le 24 octobre 2013, a mentionné à nouveau le préambule pour rappeler les principes fondateurs qui définissent l'existence du Sénat.¹⁹

Dans le *Renvoi sur la sécession du Québec* [1998], la Cour suprême a reconnu dans le préambule de la *Loi constitutionnelle de 1867* le principe de «la continuité de l'exercice du pouvoir souverain transféré de Westminster» dans l'ordre constitutionnel fédéral.

Malgré sa structure fédérale, le nouveau Dominion allait être doté d'«une constitution reposant sur les mêmes principes que celle du Royaume-Uni» (*Loi constitutionnelle de 1867*, préambule). Malgré les différences évidentes dans les structures gouvernementales du Canada et du Royaume Uni, on estimait important néanmoins de souligner la continuité des principes constitutionnels, notamment les institutions démocratiques et la primauté du droit, ainsi que la continuité de l'exercice du pouvoir souverain transféré de Westminster aux capitales fédérale et provinciales du Canada.²⁰

Dans cette décision charnière, la Cour suprême a fait appel au préambule de la loi de 1867 pour reconnaître que le principe de la succession ininterrompue au trône assure la continuité de l'exercice de la souveraineté du Parlement.

Le préambule de la *Loi constitutionnelle de 1867* constitue donc une importante source de principes sous-jacents à l'opération de la monarchie constitutionnelle au Canada.

Toutefois lorsque la Cour Suprême a eu à examiner la portée de ce préambule, elle n'a pas conclu que les lois constitutionnelles britanniques, tels le *Bill of Rights* de 1689 ou l'*Act of Settlement* de 1701, font d'autorité partie intégrante des textes constitutionnels du Canada.²¹

18. *Renvoi: Compétence du Parlement relativement à la Chambre haute*, [1980] 1 RCS 54, à la p 77.

19. Cour d'appel du Québec, *Renvoi sur le projet de loi fédéral relatif au Sénat*, n° 500-09-022626-121, 24 octobre 2013, au para 4, à la p 3. La Cour a vu dans la mention au préambule d'une constitution semblable en principe à celle du Royaume-Uni une indication claire que la Chambre haute canadienne n'était pas élue tout comme la Chambre des Lords ne l'était pas non plus en 1867 à l'époque de la Confédération.

20. *Renvoi sur la sécession du Québec*, [1998] 2 RCS 217 au para 44, 161 DLR (4^e) 385.

21. *New Brunswick Broadcasting Co c Nouvelle-Écosse (Président de l'Assemblée législative)*, [1993] 1 RCS 319 aux pp 324-25, 100 DLR (4^e) 212: «Bien que la Constitution du Canada repose sans aucun doute, dans une large mesure, sur les mêmes grands principes que la Constitution du Royaume-Uni, les mots du préambule de la *Loi constitutionnelle de 1867* – «une constitution semblable dans son principe à celle

Cette conclusion entraîne des conséquences importantes en droit constitutionnel canadien.

En 1997, dans le *Renvoi relatif à la rémunération des juges de la Cour provinciale*, la Cour suprême réitérait l'importance de la substance des principes constitutionnels britanniques importés dans le préambule de la Constitution canadienne.²²

La Cour a souligné précisément à propos de l'*Act of Settlement*, 1701 :

Les origines historiques de la protection de l'Indépendance de la magistrature au Royaume-Uni et, partant, dans la constitution du Canada remontent à l'*Act of Settlement* de 1701. Comme nous l'avons dit dans *Valente*, précité, à la page 693, c'est de cette loi que «s'inspirent historiquement» les dispositions relatives à la magistrature de la *Loi constitutionnelle de 1867*.²³

De la revue de plusieurs décisions de la Cour suprême sur la portée du préambule de la loi de 1867, il ressort entre autres les constatations suivantes, eu égard à l'opération du principe monarchique dans notre système de démocratie parlementaire :

- 1) La Cour suprême, dans un premier temps, n'est pas encline à rajouter à la liste des lois constitutionnelles du Canada inscrite en Annexe de la *Loi constitutionnelle de 1982*, les lois constitutionnelles britanniques fondamentales tels le *Bill of Rights* de 1689 et l'*Act of Settlement* de 1701 bien que la Cour reconnaisse le caractère fondamental des principes qui y sont sous-jacents et y donne effet dans la Constitution canadienne.

du Royaume-Uni » – ne peuvent pas, sans mention précise, être considérés comme transplantant directement l'article 9 du *Bill of Rights* anglais de 1689 dans notre Constitution et incorporant, de ce fait, les privilèges des corps législatifs. L'histoire vient préciser que les différentes voies de l'évolution du gouvernement des deux pays ont, dès le début, entraîné des différences importantes dans les branches de gouvernement elles-mêmes. Au cours des dernières années, le Canada a divergé encore plus en raison du rapatriement de sa Constitution en 1982. Être semblable en principe ne signifie pas être identique quant aux pouvoirs accordés.»

22. *Renvoi relatif à la rémunération des juges de la Cour provinciale* (Î-P-É), [1997] 3 RCS 3 au para 104, 150 DLR (4^e) 577 [*Renvoi relatif à la rémunération des juges de la Cour provinciale*]: « [Ils] illustrent l'effet juridique particulier du préambule. Celui-ci énonce les principes structurels de la *Loi constitutionnelle de 1867* et invite les tribunaux à transformer ces principes en prémisses d'une thèse constitutionnelle qui amène à combler les vides des dispositions expresses du texte constitutionnel ».

23. *Ibid* aux paras 104, 105 et 106.

En corollaire, ces deux lois demeurant des lois britanniques et seul le Parlement de Westminster est compétent pour les amender.

- 2) La Cour suprême a toutefois parfaitement saisi l'importance de la substance des principes contenus dans ces lois constitutionnelles britanniques qui inspirent et sous-tendent l'ordre constitutionnel canadien et servent « à combler les vides des dispositions expresses du texte constitutionnel ».
- 3) La Cour suprême donne effet à ces principes sans littéralisme, c'est-à-dire sans que le texte même de ces lois ne soit partie formelle de la Constitution du Canada.
- 4) La Cour suprême a bien reconnu en 1998 que « le principe de la continuité de l'exercice du pouvoir souverain » faisait partie des principes de l'ordre constitutionnel du Canada (*Renvoi sur la succession du Québec*).
- 5) Qu'en conséquence les principes contenus dans le *Bill of Rights*, 1689, et l'*Act of Settlement*, 1701 sont inhérents à la stabilité de l'exercice du pouvoir souverain au Canada, compte tenu que le préambule de la Constitution énonce une « Union Fédérale [...] sous la couronne du Royaume-Uni ».

Or, faut-il ajouter, l'article 17 de l'Annexe de la *Loi constitutionnelle de 1982* a reconnu formellement les dispositions du *Statut de Westminster de 1931* comme faisant partie intégrante de la Constitution du Canada. Dans la mesure où il s'applique au Canada en particulier, le paragraphe du préambule du *Statut* qui se rapporte expressément à la *Succession to the Throne Act* et au *Royal Style and Titles Act* confirme un principe fondamental en droit constitutionnel canadien, à savoir le principe de la divisibilité de la Couronne et son autonomie par rapport à la Couronne britannique.

III. LE PRINCIPE DE LA DIVISIBILITÉ DE LA COURONNE RECONNU AU STATUT DE WESTMINSTER DE 1931

Le *Statut de Westminster de 1931*²⁴ a une importance déterminante en droit constitutionnel canadien. Il consacre une évolution historique fondamentale, soit la reconnaissance du principe de la divisibilité de la Couronne et par conséquent l'indépendance du Canada.

24. *Statut de Westminster (1931)* (R-U), 22 Geo V, c 4.

Le *Statut* adopté en 1931 par le Parlement britannique, sous le règne de George V, est l'expression législative de la *Déclaration de Balfour* issue de la Conférence impériale de 1926, et de celle de 1929, réunissant les représentants britanniques et ceux des dominions en particulier du Canada, de l'Australie, de la Nouvelle-Zélande, de l'Afrique du Sud, de l'État libre d'Irlande et de Terre-Neuve.

Cette loi britannique reconnaissait la pleine autonomie législative du Canada et son affranchissement de la suprématie législative du Parlement de Londres, sauf pour les «*British North America Acts, 1867 to 1930*» (article 7(1)), compte tenu qu'à l'époque les gouvernements du Canada et des provinces n'étaient pas encore convenus d'une formule d'amendement au *BNA Act*.

Le *Statut de Westminster* confirmait également un principe nouveau et fondamental pour les dominions membres de l'ancien empire britannique, soit celui de la divisibilité de la Couronne du Royaume-Uni. Ce principe avait été pour la première fois mis en pratique lorsque le Canada signa en son nom le Traité de Versailles le 28 juin 1919.²⁵

Dans une décision rendue à l'unanimité par trois juges de la Cour d'appel d'Angleterre à Londres le 28 janvier 1982, dans une poursuite entreprise par *The Indian Association of Alberta, Union of New Brunswick Indians, Union of Nova Scotian Indians* qui visait à obtenir l'intervention de la Reine pour arrêter les démarches devant mener au rapatriement de la Constitution, Lord Denning M.R. conclut que, en fait, depuis la signature du Traité de Versailles :

However, at the Imperial Conference of 1926 it was recognized that, as a result of constitutional practice, the Crown was no longer indivisible. Thereafter the Crown was separate and divisible for each self-governing dominion or province or territory.²⁶

Lord Justice Kerr précisa :

1. Once an overseas territory has an established government, that government is distinct from the government of the United Kingdom.

25. *Hansard de la Chambre des communes*, 13^e parl, 3^e sess, n^o 1 (2 septembre 1919) à la p 21.

26. *The Queen v The Secretary of State for Foreign and Commonwealth Affairs, ex parte: The Indian Association of Alberta, Union of New Brunswick Indians, Union of Nova Scotian Indians*, [1981] 4 CNLR 86, England and Wales, Court of Appeal (Civil Division), Royal Courts of Justice, London à la page 1.

2. Any obligations of the Crown in such an overseas territory are the responsibility of the Crown in right of that territory; they are not the responsibility of the Crown in the right of the United Kingdom.²⁷

Lord Justice May ajouta :

1. Although the Crown at one time was one and indivisible, with the development of the Commonwealth this is no longer so. In matters of law and government the Queen of the United Kingdom is entirely independent and distinct from the Queen of Canada.²⁸

Cette conclusion sur la séparation des couronnes a des conséquences importantes pour son titulaire et les règles de succession à observer. Les fonctions particulières qui sont rattachées au titulaire de la Couronne au droit du Royaume-Uni, et qui sont précisées, entre autres, dans le serment prévu dans l'*Act of Supremacy*, 1559, à savoir que le Souverain est « Supreme Governor of the Church of England » et dont les termes sont repris dans le serment actuel (1953), se limitent au territoire précis du Royaume-Uni : ces fonctions ne sont pas automatiquement transférées au titulaire de la Couronne au droit du Canada, elles le sont seulement dans la mesure où celles-ci sont conformes aux lois et coutumes du Canada :

Archbishop: 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?

Queen: I solemnly promise so to do.²⁹

La Reine règne sur le peuple du Canada selon les lois et coutumes propres au Canada. Par exemple, le serment royal qui se réfère au statut de l'Église établie d'Angleterre tel que reconnue par la loi britannique en vigueur n'a pas d'application directe au Canada.

27. *The Queen v The Secretary of State for Foreign and Commonwealth Affairs*, à la p 2.

28. *Ibid* à la p 2.

29. «The Queen's Coronation Oath (from the Order of Service for the Coronation)» (2 Juin 1953), en ligne : The Official website of the British Monarchy <<http://www.royal.gov.uk/royaleventsandceremonies/coronation/coronation.aspx>> (consultée le 31 janvier 2014)

La fonction de chef de l'Église anglicane, inhérente à la Couronne d'Angleterre, ne vaut pour le Canada que dans la mesure où les lois et coutumes canadiennes le prévoiraient explicitement. Or il n'y a pas d'église établie dans la *Loi constitutionnelle de 1867*, ni dans la *Loi constitutionnelle de 1982*.

Le texte de ce serment avait d'ailleurs été modifié suite à l'adoption du *Statut de Westminster* pour refléter la dualité de la Couronne et le fait que le Souverain en titre du Canada devait exercer son pouvoir selon les lois et coutumes du Canada.

Cette distinction est capitale, et elle a des conséquences juridiques importantes pour le Canada.

Le *Statut de Westminster* fit l'objet d'un débat à la Chambre des communes du Canada, le 30 juin 1931, et au Sénat, le 6 juillet 1931, à la suite de la présentation par le Premier ministre R.B. Bennett d'une motion portant adresse à Sa Majesté le Roi George V «demandant que le Parlement impérial adopte un statut qui sera connu sous le nom de Statut de Westminster ... que c'est le résultat de longs efforts, depuis l'époque où nous étions une colonie jusqu'au moment où nous sommes devenus un dominion autonome comme nous le sommes aujourd'hui»³⁰.

Et fait d'importance à souligner, toutes les provinces du Canada avaient adopté des résolutions appuyant la teneur du *Statut de Westminster* lors d'«une conférence interprovinciale, tenue à Ottawa, les septième et huitième jours d'Avril en l'an de Notre Seigneur mil neuf cent trente et un»³¹. Les neuf provinces avaient donc, à l'époque, formellement exprimé leur accord à la substance même et aux objectifs du *Statut*.

Or le Préambule du *Statut de Westminster* n'est pas qu'un seul texte législatif britannique. Il a été intégré à la Constitution canadienne à l'occasion de son rapatriement en 1982, à l'article 17 de l'Annexe de la loi constitutionnelle. C'est donc un texte qui a pleine force juridique en droit canadien contemporain.

Le *Statut de Westminster* est particulièrement important puisque le deuxième paragraphe du Préambule énonce explicitement

30. *Débats de la Chambre des communes*, 17^e lég, 2^e sess, n^o 3 (30 juin 1931) à la p 3155.

31. *Ibid* à la p 3185; *Journal du Sénat*, 17^e lég, 2^e sess, n^o 3 (6 juillet 1931) à la p 319.

le processus à suivre pour apporter des modifications à l'*Act of Settlement* de 1701 ou au *Royal Style and Titles Act* :

And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the 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:

3.1. Les implications constitutionnelles du principe de la divisibilité de la Couronne

La disposition du Préambule du *Statut de Westminster* est précise : elle reconnaît compétence au Parlement du Dominion³², c'est-à-dire au Parlement fédéral, pour exprimer l'assentiment du Canada à la modification des règles de succession au trône ou des titres royaux. Lorsque le Préambule mentionne formellement l'unité politique qu'est le « Dominion », c'est le pouvoir législatif du Parlement du Canada auquel il veut référer.

Le Préambule mentionne “the assent of the Parliament of the Dominion”. Le terme « assent » signifie en droit constitutionnel canadien l'« assentiment » ou « l'acquiescement » ; ce terme est différent en substance du terme « consent » (ou consentement) que l'on retrouve au paragraphe suivant du Préambule du *Statut de Westminster* :

And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion.

Le droit parlementaire fait une distinction bien nette entre ces deux concepts. Dans le cas de l'« assent » ou « assentiment », il s'agit essentiellement d'acquiescer à l'ensemble d'un projet de loi qui a déjà fait l'objet d'une étude et d'un débat et qui est dans sa forme complète. Ainsi en est-il du « Royal Assent », ou de la sanction royale,

32. Dans le *Interpretation Act*, CQLR c I-16, art 61(4), le mot « Dominion » signifie le « Dominion du Canada ».

après les votes suivant les trois lectures à la Chambre des communes et au Sénat.³³

Lorsque la Couronne déclare son « assentiment » – « assent » à un projet de loi, elle exprime son accord à l'ensemble des dispositions de la loi dans son état définitif, ce qui a pour effet de lui donner force de loi.³⁴

En droit parlementaire, lorsqu'il s'agit de « consent » ou « consentement » à un projet de loi, ce terme réfère à l'approbation à chacune des étapes, c'est-à-dire à chacune des trois lectures du projet de loi.³⁵

On doit ainsi conclure que lorsque le Parlement du Canada exprime son « assent », son assentiment ou acquiescement, à la modification des règles de succession au trône du Royaume-Uni, il le fait dans le contexte d'un projet de loi qui est déjà arrêté et dans une forme qui apparaît achevée. Il ne s'agit pas pour le Parlement du Canada de reprendre le débat à chacune des étapes ou des lectures, mais plutôt d'exprimer son acquiescement à une initiative de modification déjà dans une forme complète.

Il est également essentiel de souligner qu'au moment de l'intégration formelle du Préambule du *Statut de Westminster* de 1931 dans la Constitution du Canada en 1982, les constituants auraient pu intégrer également l'*Act of Settlement* de 1701, ce qu'ils n'ont pas voulu faire puisque la situation devait demeurer inchangée, à savoir que les conditions d'accès au trône et la ligne d'accession devaient continuer d'être sous la responsabilité législative du Parlement britannique.

L'état du droit à ce sujet était très clair en 1982. Le Premier ministre du Canada, Louis St-Laurent, l'avait auparavant clairement exprimé à la Chambre des communes, le 3 février 1953, au moment du débat sur les amendements à la *Loi sur les titres royaux* :

Sa Majesté est maintenant reine du Canada, mais elle est reine du Canada parce qu'elle est reine du Royaume-Uni et parce que la population du Canada est heureuse de reconnaître comme souveraine la personne qui est souveraine du Royaume-Uni.

33. *Loi sur la sanction royale*, LC 2002, c 15.

34. Norman Wilding and Philip Laundry, *An Encyclopedia of Parliament*, ed, New York, St. Martin's Press, 1971 (1st Am, Assent, Royal – See Royal Assent).

35. *House of Commons Procedure and Practice*, Second Edition, 2009, Consent – Royal Assent.

Il ne s'agit pas d'une position distincte. C'est la reconnaissance de l'évolution traditionnelle de nos institutions; que notre Parlement a à sa tête la souveraine; et que c'est la souveraine qui est reconnue comme la souveraine du Royaume-Uni qui est notre souveraine et qui est loyalement et, je puis ajouter, affectueusement reconnue comme la souveraine de notre pays.³⁶

Rien de cet état du droit ne devait changer au moment du rapatriement de la Constitution en 1982; la procédure d'assentiment à des changements à la ligne de succession au trône devait demeurer identique à ce qu'elle avait toujours été. C'était là la volonté des constituants.

Cette décision de 1982 était consciente et réfléchie comme le donnent clairement à conclure les déclarations du ministre fédéral de la Justice qui avait à répondre à des questions sur le statut de la monarchie au Canada devant le Comité spécial mixte du Sénat et de la Chambre des communes, le 4 février 1981, comité qui étudiait le projet de résolution constitutionnelle et co-présidé par l'auteur lui-même :

M. Chrétien (Ministre de la Justice): ... le texte du gouvernement qui vous a été soumis, est très clair. C'est le même texte qui a été accepté par tous les premiers ministres à Victoria en 1970 ... Alors il s'agit exactement du même texte que celui adopté à l'époque, et il n'y a donc pas de problème. Nous voulons que Sa Majesté demeure chef d'État du Canada, conformément à la tradition.³⁷

Le ministre de la Justice réitérait le statu quo eu égard à la compétence du Parlement fédéral vis-à-vis une modification éventuelle des règles de la succession au trône et des titres royaux.

Le processus qui avait jusqu'alors été suivi, c'est-à-dire un assentiment du Parlement fédéral requis par une convention constitutionnelle britannique à laquelle s'était liée Westminster, était dorénavant constitutionnalisés tel quel, en étant intégré formellement à la Constitution du Canada.

En 1982 il n'y avait donc aucune intention de modifier le processus d'assentiment qui avait été jusque-là suivi par le Canada dans

36. *Débats de la Chambre des Communes*, 2^e lég, 7^e sess, n^o 2 (3 février 1953) «Deuxième lecture du bill n^o 102 concernant désignation et les titres royaux» à la p 1664.

37. *Procès-verbaux et témoignages du Comité spécial mixte du Sénat et de la Chambre des communes sur la Constitution du Canada*. Ottawa, Imprimeur de la Reine pour le Canada, 32^e lég, 1^{ère} sess, (1981) aux pp 53-57.

le passé : en 1936, le Canada avait exprimé son consentement en adoptant une loi fédérale (*His Majesty's* [Edward VIII] *Declaration of Abdication Act 1936*); en 1947, le Canada avait de lui-même adopté des modifications à la loi sur les titres royaux (*Royal Style and Titles (Canada) Act 1947, c. 72*), tout comme il le fera en 1953 (*Royal Titles Act 1953; 1 & 2 Eliz. 2 c. 9*).

Les constituants de 1982 ne voulaient en rien modifier le statut de Sa Majesté, non plus que de « canadianiser » les règles de la succession au trône, c'est-à-dire intégrer précisément ces règles dans la Constitution canadienne. L'objectif était plutôt **d'enchâsser le processus défini au Préambule** du *Statut de Westminster* conformément aux précédents de 1937, 1947 et 1953. La nuance est importante.

La responsabilité législative de modifier l'*Act of Settlement*, 1701, demeurerait, comme elle l'avait toujours été, une prérogative du Parlement de Westminster qui s'était engagé à requérir l'assentiment (assent) du Parlement du Canada en 1931, compte tenu que Sa Majesté du chef du Royaume-Uni, et Sa Majesté du chef du Canada, devait demeurer la même personne, bien que les deux couronnes, c'est-à-dire les deux souverainetés, soient tout à fait distinctes, comme le rappellera la Cour d'appel britannique en 1982.

L'*Act of Settlement*, 1701 demeure depuis toujours une loi britannique et, en aucun cas, il n'a été formellement intégré dans la Constitution canadienne. Ce qui a été intégré, ce sont d'une part les principes sous-jacents, et surtout, d'autre part, l'assentiment aux modifications des conditions d'accès au trône et à la ligne de succession. Il revient au Parlement du Canada, sous l'article 91 de la *Loi constitutionnelle de 1867*, d'exprimer cet assentiment.³⁸

IV. LE CAS PARTICULIER DE LA LOI SUR LA SUCCESSION AU TRÔNE DE 2013

Lors du débat à la Chambre des Lords, le 13 mars 2013, sur le projet de loi portant sur la succession au trône (*Succession to the Crown Bill*), Lord Wallace of Tankerness, « the Advocate-General for Scotland », a précisé, du point de vue britannique, ce que représentait le paragraphe du Préambule du *Statut de Westminster* qui enjoint

38. « Article 91. Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada. »

Westminster de requérir l'assentiment des parlements des Dominions (dont celui du Canada) :

This (le paragraphe en question) being part of a preamble and not being in the body of the Act, these words impose no legal obligations. However, the Government recognise that they carry considerable political weight and as such have undertaken to agree to these changes with other realms' Governments and to seek their consent to the legislation before introducing it into Parliament.³⁹

Plus tôt dans ce débat, le 14 février 2013, Lord Tankerness mentionna que, selon lui, la nature de cette obligation « conventionnelle » (reconnue au Préambule) de requérir l'assentiment des parlements des Dominions, faisait de ce Bill un projet de loi équivalent à la substance d'un traité international :

In many ways, this Bill is akin to an international treaty and it is incumbent on us to give this legislation detailed consideration of what I hope is a Bill with a clear purpose.⁴⁰

Et tout à fait justement Lord Tankerness déclara qu'il revient à chacun des parlements des « royaumes » de déterminer, **en fonction de leur propre loi**, comment cet assentiment doit s'exprimer :

In our view, it is in accord with the principle of the Statute of Westminster that it should be for each realm to decide what, if anything, is necessary or desirable to give effect to the agreement.⁴¹

Il revient ainsi au Parlement du Canada de suivre le processus prévu dans sa propre loi constitutionnelle interne, qui peut, bien sûr, être différente, comme le reconnaissait Lord Tankerness, de celui prévu dans la constitution des autres « royaumes » du Commonwealth. Par exemple, certains autres dominions en vertu de leur propre loi constitutionnelle peuvent laisser à l'exécutif seul le pouvoir d'exprimer l'assentiment requis, d'autres requérir la participation de chacun des états constitutifs de la fédération, ou encore s'en remettre au seul Parlement central.

En intégrant précisément la procédure définie au Préambule du *Statut de Westminster* à l'article 17 de l'Annexe de la Constitution, les constituants de 1982 excluaient les modifications éventuelles des

39. R-U, HL, *Lords Hansard*, vol 744, n° 125, col 309 (13 mars 2013).

40. R-U, HL, *Lords Hansard*, vol 743, n° 114, col 783 (14 février 2013).

41. *Lords Hansard* 13 mars 2013, *supra* note 39.

règles de succession au trône de la portée de l'al. 41a) de la loi de 1982 qui mentionne « la charge de Reine – the office of the Queen ».

La règle d'interprétation bien connue, « le particulier est exclu du général »,⁴² dispose en partie de cette question. De même que la règle qui veut qu'une partie de la Constitution ne puisse pas être contredite par une autre : « The rules of succession are a part of the fabric of the constitution of Canada and incorporated into it and therefore cannot be trumped or amended by the *Charter* »⁴³. Par ailleurs, on ne peut alléguer une autre disposition qui affirmerait la souveraineté législative distincte du Canada vis-à-vis le Royaume-Uni, pour nier la légalité de l'assentiment du Parlement fédéral à une loi britannique valide amendement la ligne de succession au trône. Il s'agit là d'une exception à la souveraineté canadienne tout à fait constitutionnelle parce qu'explicite dans le texte même.⁴⁴

La constitutionnalisation du *Statut de Westminster* confirme également un autre principe juridique : en reconnaissant que c'est le Parlement britannique seul qui peut formellement donner force de loi à des modifications aux règles de la succession au trône, on maintenait le principe constitutionnel de la symétrie du titulaire de la Couronne britannique, et de la Couronne canadienne.

En soumettant toute modification législative des règles de la succession au trône du Royaume-Uni à l'assentiment du Dominion du Canada, on garantissait simultanément la souveraineté du Canada et l'identité synchronique du titulaire de chacune des deux couronnes.

En dernier ressort toutefois, c'est le Parlement de Westminster qui a seul compétence pour donner force de loi à des amendements à la loi sur la succession au trône.

Le principe du partage d'un même monarque par le Royaume-Uni et le Canada est un élément essentiel de la monarchie consti-

42. Ruth Sullivan, *Statutory Interpretation*, 2^e éd, Toronto, Irwin Law, 2007, aux pp 310-311: "The general does not derogate from the specific. In the event of a conflict between a specific provision dealing with a particular matter and a more general provision dealing not only with that matter but with others as well, the specific provision prevails. It prevails even if the general legislation was subsequently enacted. The specific provision is treated as an exception to the rule embodied in the more general provision."

43. *Teskey v Canada (Attorney General)*, 2014 ONCA 612.

44. Comme d'ailleurs la limite imposée à l'extension des privilèges exercés par le Parlement fédéral, lesquels ne peuvent s'étendre au-delà de ceux reconnus à la Chambre des communes à Londres, limite reconnue à l'article 18 de la *Loi constitutionnelle de 1867*.

tutionnelle qui caractérise le Canada, et la structure du pouvoir étatique.

Il serait pour le moins incongru de devoir partager le même monarque mais d'avoir à questionner la légitimité ou la légalité des règles qui en gouvernent la désignation. La Cour supérieure de l'Ontario l'a bien souligné en 2003 :

[27] ... it is clear that Canada's structure as a constitutional monarchy and the principle of sharing the British monarch are fundamental to our constitutional framework. In light of the preamble's clear statement that we are to share the Crown with the United Kingdom, it is axiomatic that the rules of succession for the monarchy must be shared and be in symmetry with those of the United Kingdom and other Commonwealth countries. One cannot accept the monarch but reject the legitimacy or legality of the rules by which this monarch is selected.⁴⁵

L'approche utilisée pour définir la procédure menant à des modifications des règles de la succession est déterminante pour assurer le maintien du principe d'un monarque partagé. Davantage lorsque la loi même qui donne effet légal à des modifications demeure la prérogative du Royaume-Uni. La participation du Canada aux discussions préalables des projets de modifications à être effectuées par Westminster, avec les autres « royaumes » du Commonwealth (à Perth en Australie en octobre 2011), conjuguée à l'assentiment du Parlement canadien à de telles modifications par le Parlement britannique, sont essentiels au maintien de la cohérence du principe du partage d'un même monarque dans des structures étatiques qui demeurent tout à fait souveraines et distinctes.

V. LE CONCEPT CONSTITUTIONNEL DE « CHARGE DE REINE, GARANT DE LA SOUVERAINETÉ »

Il est certainement utile de préciser le concept de « charge de reine »⁴⁶ pour comprendre sa portée et conclure si ces termes recouvrent les conditions d'accession et la ligne de succession au

45. *O'Donohue v Her Majesty the Queen – in right of Ontario*, [2003], Ontario, Superior Court of Justice, 01-CV-217147CM au para 27.

46. Article 41a) de la *Loi constitutionnelle de 1982* : « 41. Toute modification de la Constitution du Canada portant sur les questions suivantes se fait par proclamation du gouverneur général sous le grand sceau du Canada, autorisée par des résolutions du Sénat, de la Chambre des communes et de l'assemblée législative de chaque province : a) la charge de Reine, celle de gouverneur général et celle de lieutenant-gouverneur. »

trône. Dans le passé, les tribunaux ont eu à préciser la substance des termes « la charge de » en référence d'une part au rôle de gouverneur général, et de l'autre à celui de lieutenant-gouverneur.

Dans une décision récente en 2009 dans l'affaire *Conacher c. Canada (Premier Ministre)*⁴⁷, la Cour fédérale conclut que la « charge de gouverneur général » réfère à ses pouvoirs définis dans la loi et à ses prérogatives constitutionnelles.

La jurisprudence antérieure à 1982 relative à la définition du concept juridique « la charge de » s'est portée à déterminer principalement le statut du lieutenant-gouverneur dans la structure législative et l'exercice des pouvoirs exécutifs des gouvernements des provinces⁴⁸:

1. Le lieutenant-gouverneur détient, au nom de la Couronne, la souveraineté législative des provinces tout comme le gouverneur général, comme représentant du souverain, détient la souveraineté législative fédérale.
2. L'autonomie législative des provinces est garantie par la présence d'une souveraineté distincte, incarnée par le représentant du souverain en la personne du lieutenant-gouverneur.
3. La « charge » de lieutenant-gouverneur se rapporte essentiellement aux pouvoirs entre autres législatifs qu'il détient et qu'il exerce sur l'avis des Conseillers issus de la législature; sa présence, son rôle dans le processus législatif est incontournable dans un système de monarchie constitutionnelle et est hors d'atteinte de la compétence d'une province.

Aucun de ces jugements ne permet de conclure que le concept de « la charge de » doit nécessairement être interprété comme incluant les conditions d'accès à la fonction et la sélection de la personne appelée à l'occuper.

Il convient de rappeler que l'article 58 de la loi de 1867 prévoit que les lieutenant-gouverneurs sont nommés par le gouverneur

47. *Conacher c Canada (Premier ministre)*, 2009 FC 920, [2010] 3 FCR 411.

48. Judicial Committee of the Privy Council, *Hodge v The Queen (Canada)* [1883] UKPC 59 (15 Décembre 1883), à la p 12; Judicial Committee of the Privy Council, *Maritime Bank of Canada (Liquidators of) v New-Brunswick (The Receiver General of)*, [1892] AC 437 à la p 4; Judicial Committee of the Privy Council, *re The Initiative and Referendum Act*, reflex, [1919] AC 935, 48 DLR 18, [1919] 3 WWR à la p 943; *Le procureur général de l'Ontario c SEFPO*, [1987] 2 RCS 2 à la p 4.

général, sans quelque mention explicite de leurs qualifications personnelles, ou encore de la capacité des provinces de les modifier ou d'intervenir à ce sujet. La durée du mandat (article 59), la révocation du titulaire (article 59), le traitement (article 60) et le serment à prêter (article 61) sont tous hors de la compétence de la législature provinciale. Tous ces sujets relèvent soit du gouverneur général lui-même (qui nomme le titulaire sur recommandation du Premier ministre du Canada), soit du Parlement canadien.

C'est le gouverneur général, le représentant de Sa Majesté, qui, en ayant à nommer les lieutenants-gouverneurs, assure la continuité, la cohérence, la stabilité et l'uniformité de statut du représentant de la Couronne au droit de chacune des dix provinces.

On ne peut certainement pas conclure que les provinces détiennent quelque pouvoir que ce soit pour modifier les qualifications personnelles ou les conditions de la nomination de la personne appelée à occuper la charge de lieutenant-gouverneur, par exemple pour assurer l'alternance entre un homme et une femme, ou la représentation autochtone. Le pouvoir de choisir le représentant de la Couronne au droit des provinces appartient, selon la loi constitutionnelle, au gouverneur général et ce pouvoir a une logique interne et s'explique : assurer la stabilité de l'ordre constitutionnel dans chacune des provinces.

Les provinces ont un intérêt direct au maintien du principe de la monarchie constitutionnelle puisque leur souveraineté législative en dépend. C'est ce qui est fondamentalement enchâssé à l'al. 41a) où le concours des dix provinces est requis pour modifier le fondement constitutionnel de leur pouvoir au Canada. Toutefois, la modification des règles de succession au trône et de la ligne de succession n'affecte ni l'existence, ni la compétence législative des provinces qui demeure entière, dans la mesure où il y a toujours un souverain qui occupe le trône.

Il tombe sous le sens qu'il ne peut y avoir qu'un souverain légitime et légal. Les provinces ne disposent pas de la compétence requise pour déterminer les conditions d'accès au trône et la personne parmi les membres de la famille royale qui devrait occuper le trône, pas plus qu'elles ne peuvent déterminer seules les conditions de nomination de la personne qui occupe la fonction de lieutenant-gouverneur. La situation contraire pourrait conduire à un résultat aberrant qui verrait l'identification d'un titulaire de la Couronne du Canada différent de celui appelé à porter la Couronne du Royaume-Uni. Ce résultat

paradoxal serait contraire au principe constitutionnel de symétrie identitaire de la personne appelée à porter chacune des deux Couronnes. De plus il n'est pas nécessaire au fonctionnement ordonné du système de monarchie constitutionnelle au Canada que chacune des provinces ait un droit de veto sur les modifications qui peuvent être requises pour ajuster les règles de succession au trône aux valeurs contemporaines. Rien dans de tels amendements ne met en cause les principes qui garantissent la souveraineté législative des provinces et l'existence continue d'une couronne au droit du Canada.

Le fait qu'il y ait dans notre système fédéral (où les compétences législatives sont partagées) une Couronne au droit du Canada fédéral et une Couronne au droit des provinces, ne requiert pas que les provinces doivent nécessairement acquiescer à des modifications susceptibles de déterminer les conditions d'accès au trône et la ligne de succession pour assurer le fonctionnement ordonné du système. L'essentiel est qu'il y ait toujours un titulaire du trône, ce qui est en fait garanti par la personne titulaire de la Couronne au droit du Royaume-Uni qui est simultanément titulaire de la Couronne au droit du Canada.

La constitutionnalisation du serment que tout député (fédéral, provincial et sénateur) doit souscrire est une obligation incontournable liée à la nature même de notre forme de gouvernement. Une province n'a pas la compétence pour le modifier pas plus qu'elle ne peut l'abolir ou réduire le rôle constitutionnel du lieutenant-gouverneur. Prêter le serment prévu à la Constitution n'est pas une obligation facultative ou qui ressort de la seule compétence d'une ou l'autre législature. Ce serment est lié à la garantie constitutionnelle de la souveraineté du fédéral, et de chacune des provinces, incarnée dans la présence intrinsèque du représentant de la Couronne au droit du Canada.

Depuis l'inclusion du Préambule du *Statut de Westminster de 1931* à l'article 17 de l'Annexe de la *Loi constitutionnelle de 1982*, la procédure précise, aux termes de laquelle le Parlement du Canada participe à la modification des règles de succession au trône, est reconnue comme un domaine de compétence fédérale séparé, distinct.

La détermination des conditions d'accès au trône (et de la ligne de succession) partagée en « synchronie » avec le Royaume-Uni (et quatorze autres « royaumes » du Commonwealth) est une composante tout à fait particulière des compétences du Parlement du Canada.

CONCLUSION

La Constitution canadienne est une architecture⁴⁹ juridique cohérente qui garantit la stabilité et la continuité de la souveraineté de l'ordre fédéral et des provinces, grâce au maintien à la tête de l'État d'un monarque partagé simultanément avec le Royaume-Uni.

La procédure constitutionnelle qui doit être suivie au Canada pour modifier les conditions d'accès au trône et la ligne de succession doit être comprise en tenant compte de l'histoire de notre droit, des objectifs que l'institution monarchique est appelée à garantir dans notre démocratie parlementaire, et des principes sous-jacents qui assurent la cohérence et la stabilité de notre architecture constitutionnelle, laquelle est unique et distincte parmi les pays du Commonwealth.

L'histoire de l'évolution constitutionnelle du pays permet de dégager les perspectives qui illustrent comment l'institution monarchique a su s'adapter aux besoins nouveaux que le Canada devait satisfaire pour demeurer en phase avec ses aspirations liées à ses caractéristiques propres et à son identité particulière.

Le Canada, à travers toutes ces années, est demeuré une monarchie constitutionnelle stable et un modèle de démocratie parlementaire témoignant de la souplesse de l'institution et de sa contribution à l'exercice de nos libertés.

49. Concept développé par la Cour suprême du Canada dans le récent *Renvoi relatif à la réforme du Sénat*, 2014 CSC 21, [2014] 1 RCS 704, mentionné aux pp 706, 708, 710, 724, 725, 736, 737, 738, 739, 743, 752.

CHAPTER 12
SUCCESSION TO THE CROWN
OF CANADA

Anne Twomey*

The recent move to change the rules of succession to the throne in the United Kingdom has, for the first time since the 1936 abdication of Edward VIII, forced the various Realms to reconsider fundamental constitutional issues concerning their relationship with the Crown and their independence from the United Kingdom. This has proved particularly challenging in federations, where Constitutions are entrenched and difficult to change and where the Crown plays a constitutional role at both the national and the sub-national level.

In Australia, despite some initial difficulties with the State of Queensland,¹ the issue was settled relatively amicably and without legal controversy. It was accepted that each of the States had an interest in the Crown and the identity of the monarch. It was agreed that the Commonwealth Parliament² would not attempt to enact legislation unilaterally (which would have created a controversy and would undoubtedly have been challenged in the courts). Instead, it was agreed to employ a federally cooperative approach under s 51(xxxviii) of the Australian Constitution, under which the

* Professor of Constitutional Law, University of Sydney.

This chapter draws in part from expert opinion given by the author for proceedings in *Motard and Taillon v Attorney-General (Canada)*, challenging the validity of the *Succession to the Throne Act 2013* (Canada). The case will be heard by the Quebec Superior Court in June 2015.

1. These difficulties were resolved by negotiation at a meeting of the Council of Australian Governments on (19 April 2013), online: Council of Australian Governments <http://www.coag.gov.au/sites/default/files/COAG_Communique_190413.pdf>.
2. References to 'Commonwealth' in this paper mean the national level of government in Australia – not the Commonwealth of Nations.

State Parliaments request Commonwealth legislation and then the Commonwealth Parliament enacts the requested legislation. All six States enacted legislation³ requesting the Commonwealth Parliament to pass a Bill in a particular form. The *Succession to the Crown Act* 2015 was passed by the Commonwealth Parliament on 19 March 2015 and came into effect along with the legislative changes made by other Realms on 26 March 2015. The Australian Act effects a change in the rules of succession in relation to the Crown at all levels in Australia.

In contrast, the Canadian Parliament has chosen to take a unilateral approach and has not sought the cooperation of the provinces. Moreover, in order to do so, it has abdicated its own responsibility to deal with the rules of succession to the Canadian Crown, arguing that succession to the Canadian Crown is, and always has been, determined by the rules of succession to the British throne. The Canadian Parliament enacted the *Succession to the Throne Act* 2013 (Canada),⁴ giving no more than its ‘assent’ to the Westminster Parliament passing its *Succession to the Crown Bill* 2013 (UK). Neither Act made any substantive change to Canadian law concerning the rules of succession to the Canadian Crown. On the contrary, the Canadian Government asserted that no such rules had become part of Canadian law and there was therefore nothing to amend.

The Canadian Government’s approach is most surprising to constitutional lawyers from the other Realms. It appears to be contrary to the historical record and to reverse what had been a well-accepted path of independence by the Realms under a divisible Crown. This chapter seeks to provide an outsider’s perspective, unaffected by local Canadian political influences, on why the Canadian Government’s approach does not seem to be consistent with constitutional law and constitutional history.

3. *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).

4. SC 2013, c 6 (the Act was given royal assent on 27 March 2013).

THE RULES OF SUCCESSION TO THE THRONE

The law of succession to the Crown of the United Kingdom is to be found in the common law⁵ as altered by statute.⁶

The common law rules find their source in the rules of hereditary descent attached to land from feudal times. They include the rule of primogeniture, that the elder heir of the same degree takes precedence over the younger. This rule is modified by the rule of male preference, that male heirs take precedence over female heirs of the same degree. A further rule of 'representation' provides that surviving children take the place of their dead parent in the line of succession. Heirs must also be legitimate.⁷

These common law rules have been altered in other ways by statute. The primary Imperial statutes are the *Bill of Rights* 1688 and the *Act of Settlement* 1700.⁸ Other relevant statutes include the *Union with Scotland Act* 1706, the *Union with Ireland Act* 1800, the *Accession Declaration Act* 1910 and *His Majesty's Declaration of Abdication Act* 1936. The *Royal Marriages Act* 1772 also has the potential to affect succession, at least to the extent that it renders marriages invalid and any children of such marriage will therefore be treated as illegitimate and excluded from succession to the throne.

The line of inheritance was altered by s 1 of the *Act of Settlement* 1700, marking a new starting point of inheritance as Princess Sophia, Electress of Hanover and the 'heirs of her body being Protestant'. It was altered again by *His Majesty's Declaration of Abdication Act* 1936, which excluded any children of Edward VIII from inheriting the throne.

-
5. See further: D Freeman, "The Queen and her dominion successor: the law of succession to the throne in Australia and the Commonwealth of Nations Pt 1" (2001) 4:2 *Constitutional Law and Policy Review* 28 at 29-30. See also Ollivier's characterization of the common law rules as 'amongst the earliest and most important constitutional conventions' of Canada: Maurice Ollivier, *Problems of Canadian Sovereignty: From the British North America Act 1867 to the Statute of Westminster 1931* (Canadian Law Book Co, 1945) at 49.
 6. See further: V Bogdanor, *The Monarchy and the Constitution* (Oxford: Clarendon Press, 1995) at 41-60.
 7. The succession to the throne is not affected by laws that otherwise have removed the legal disadvantages of illegitimacy: *Legitimacy Act* 1976 (UK), Schedule 1, cl 5.
 8. While the dates of 1689 and 1701 are commonly used as a result of the change of calendar, the dates adopted here are those used in the formal British statutes.

Religious qualifications and disqualifications have also been imposed by statute. The *Bill of Rights* 1688 and s 2 of the *Act of Settlement* exclude from succession to the throne ‘any person who shall be reconciled to, or hold communion with, the See or Church of Rome, or profess the popish religion or marry a papist’. Such a person is treated as if he or she was dead for the purposes of the succession. Section 3 of the *Act of Settlement* requires that the monarch join in communion with the Church of England and the *Accession Declaration Act* 1910 requires that the sovereign declare that he or she is a faithful Protestant. Various oaths must also be taken by the monarch to preserve the established Church of England and the Presbyterian Church of Scotland.

The *Succession to the Crown Act* 2013 (UK), once it comes into force⁹, will alter the common law by removing male preference from the rule of primogeniture. This means that the eldest child of the monarch, whether male or female, becomes and remains the next heir to the throne regardless of sex. It also amends statutes by removing the disqualification of persons from the line of succession for marrying a Roman Catholic and providing that only the first six people in line to the throne need the monarch’s permission to marry.¹⁰

RECEIVED LAWS AND LAWS THAT APPLIED BY PARAMOUNT FORCE

The first question is whether and to what extent the common law and these Imperial statutes became part of the law of Britain’s colonies.

Settlers of those colonies brought with them the common law, as their birthright.¹¹ Imperial statutes also applied in British colo-

9. The substantive provisions are not yet in force. Once in force, however, most of the provisions have a degree of retrospective effect. Section 1, in relation to the gender of an heir, applies to any heir born after the Perth Agreement on 28 October 2011. Section 2, concerning marriage to a Roman Catholic, applies to any person, still alive at 28 October 2011, who had previously been disqualified for marrying a Catholic. Section 3, concerning permission for royal marriages, treats prior marriages as never having been void, as long as certain conditions apply.

10. For a more detailed analysis of these changes and their history, see: Neil Parpworth, “The Succession to the Crown Act 2013: Modernising the Monarchy” (2013) 76:6 MLR 1070; Norman Bonney & Bob Morris, “Tuvalu and You: The Monarch, the United Kingdom and the Realms” (2012) 83:2 *The Political Quarterly* 368.

11. *Kielley v Carson* (1842), 4 Moo PC 63, 84-5; 13 ER 225, 233; *Cooper v Stuart* (1889), 14 AC 286, 291 (Lord Watson). See also: B H McPherson, *The Reception*

nies, at least to the extent that they could appropriately apply to the circumstances of the colony. While there were different rules in relation to settled, conquered and ceded colonies,¹² and different dates of ‘reception’ of laws in different parts of Canada, British ‘public law’ applied to all colonies, however acquired.¹³ Received laws became part of the law of the colony, but could be amended or repealed by a local colonial legislature. Moreover, the subsequent amendment or repeal of those same laws by the Westminster Parliament after their reception in the colony had no effect upon their application in the colony, which remained the same as the date they were received, unless they were altered by the local laws of the colony.¹⁴

Certain Imperial statutes, however, had a higher status than received laws. They were the laws that applied to the colonies expressly or by necessary intendment.¹⁵ Many of them were constitutional statutes, while others concerned matters such as shipping, defence, extradition and trade. Such statutes applied by ‘paramount force’, meaning that unlike ordinary ‘received’ laws, they could not be amended or repealed by colonial legislatures and that any colonial law that was ‘repugnant’ to such Imperial statutes was void.¹⁶

Fundamental statutes, such as those altering or qualifying the succession to the throne, fell within that category. Booker and Winterton noted that s 1 of the *Act of Settlement* expressly applies to the Crown of ‘England France and Ireland and of the dominions thereunto belonging’ and that ‘a fundamental law on the identity of the sovereign would apply to the colonies by necessary intendment’.¹⁷ They concluded that when Parliament legislates on fundamental constitutional matters and expressly applies the law to all British possessions or a relevant class of them, then there is a necessary intendment that such a law apply also to subsequently-acquired possessions.¹⁸ McPherson has also observed that ‘provisions affecting the

of English Law Abroad (Supreme Court of Qld Library, 2007) at 241; and *Act of Settlement* 1700, s 4.

12. Peter Hogg, *Constitutional Law of Canada, 5th Edition* (Toronto: Carswell, 2007) Vol 1, at 33-40 ff 2.2-2.3 [Hogg, *Constitution Law of Canada*].

13. *Ibid* at 37 ff 2.3(a).

14. *Ibid* at 34 ff 2.2(a) (unless altered by British laws of paramount force).

15. E Campbell, “Changing the rules of succession to the throne” (1999) 1:4 Constitutional Law and Policy Review 67 at 70.

16. The doctrine of repugnancy was originally a common law doctrine but was later confirmed and limited in its application by the *Colonial Laws Validity Act* 1865 (Imp), s 2.

17. Keven Booker & George Winterton, “The Act of Settlement and the Employment of Aliens” (1981) 12 FL Rev 212 at 214.

18. *Ibid* at 224.

royal succession, which fixed the identity of the sovereign to or from whom duties of allegiance and protection were owed throughout the empire' applied to the colonies by paramount force.¹⁹

While these laws were part of the law of the colony, they could not be repealed or amended by the legislature of the colony. This was for two reasons. First, as the Crown was regarded as 'indivisible',²⁰ it would have been beyond the legislative competence of any colony to legislate with respect to succession to the Imperial Crown.²¹ Secondly, fundamental constitutional laws, such as those that qualified the rules of succession to the throne, applied by paramount force to the colonies. Hence, the one set of rules applied throughout the Empire, even though they were incorporated as part of the local law of different colonies.

The fact that these laws were incorporated as part of the law of the colony has been recognised on many occasions. In Australia, a number of jurisdictions have undertaken audits of the British laws that continued to apply as part of the law of the jurisdiction – covering both received laws and those that applied by paramount force. In 1967 the New South Wales Law Reform Commission completed a report on such laws²², resulting in the enactment of the *Imperial Acts Application Act 1969* (NSW), which confirmed the application of certain Imperial laws as part of New South Wales law and re-enacted some provisions as local laws. All other received laws were then repealed. Section 6 preserved a list of 'Constitutional Acts' and confirmed that they remained in force as part of the law of New South Wales. They include: the *Bill of Rights Act 1688*; the *Act of Settlement 1700*; the *Demise of the Crown Act 1702*; the *Succession to the Crown Act 1707*, s 9; and the *Royal Marriages Act 1772*, ss 1 and 2.²³

In Canada, Rouleau J in the Ontario Superior Court of Justice took the view that the *Act of Settlement* forms part of Canadian law

19. B H McPherson, *The Reception of English Law Abroad* (Brisbane: Supreme Court of Qld Library, 2007) at 237.

20. A B Keith, *The Sovereignty of the British Dominions* (London: MacMillan & Co Ltd, 1929) at 252.

21. G J Lindell, "Applicability in Australia of Section 3 of the Act of Settlement 1701" (1980) 54 Aust L J 628 at 629.

22. Austl, Commonwealth, New South Wales Law Reform Commission, *Report of the Law Reform Commission on the Application of Imperial Acts* (Sydney: Parliament of NSW, 1967). See 59-62 re 'Constitutional Enactments'.

23. See also: *Imperial Acts Application Act 1984* (Qld); *Imperial Acts Application Act 1986* (ACT); *Imperial Acts Application Act 1980* (Vic).

by virtue of being an Imperial statute applying to Britain's dominions.²⁴ The Canadian Department of External Affairs also developed a list in the 1940s of British Acts that applied as part of Canadian law. It includes the *Bill of Rights* 1688, the *Act of Settlement* 1700, the *Royal Marriages Act* 1772, various enactments concerning the demise of the Crown and *His Majesty's Declaration of Abdication Act* 1936.²⁵ The Canadian provinces have also recognised such Imperial Acts as forming part of their laws. For example, the *Revised Statutes of Ontario* of 1897 include the *Act of Settlement* as one of the constitutional statutes of the United Kingdom that apply to Ontario.²⁶ Some have regarded these Imperial statutes as forming part of the Canadian constitution.²⁷ Hogg has recognised that the *Act of Settlement*, which applied to British colonies, became part of the law of Canada upon confederation.²⁸

THE STATUTE OF WESTMINSTER 1931 (IMP)

The Imperial Conference of 1926 declared, in what became known as the Balfour Declaration, that the United Kingdom and the Dominions were 'autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations'.²⁹

Effect was given to this declaration in two ways. First, the Sovereign began to act upon the advice of the responsible Ministers of the Dominion concerned when acting in relation to that Dominion. This had the effect of making the Crown divisible, with the Sovereign

24. *O'Donohue v Canada*, (2003) 109 CRR (2d) 1 at para 3, 2003 CanLII 41404 (ONSC) [O'Donohue].

25. Maurice Ollivier, *Problems of Canadian Sovereignty: From the British North America Act 1867 to the Statute of Westminster 1931* (Canadian Law Book Co, 1945), Appendix B, 465-469.

26. *O'Donohue*, *supra* note 24 at para, 35.

27. W P M Kennedy, *The Constitution of Canada 1534-1937* (London; Toronto: Oxford University Press, 1938) at 378; Norman Ward, *Dawson's The Government of Canada* (University of Toronto Press, 5th ed, 1970) at 62; Josh Hunter, "A More Modern Crown: Changing the Rules of Succession in the Commonwealth Realms" (2012) 38:3 Commonwealth L Bull 423 at 445-446. See also *O'Donohue v Canada* (2003) *supra* note 24 at para 28.

28. Peter Hogg, "Succession to the Throne" (2014) 33 NJCL 87.

29. "The Report of the Imperial Conference of 1926 upon Inter-Imperial Relations", Cmd 2768 (1926).

acting in different capacities, according to the advice of his different sets of responsible advisers. Hence it was the King of Australia who appointed the Governor-General of Australia on the advice of his Australian Ministers and it was the King of Canada who acted in relation to Canadian affairs on the advice of Canadian Ministers. The complete independence of a Dominion was not required to make this transformation – just the change in the source of responsible advice to the Sovereign.³⁰

The second method of giving effect to the Balfour Declaration was legislative. The Conference on the Operation of Dominion Legislation met in 1929 to develop a legislative response.³¹ It decided that the ‘appropriate method of reconciling the existence of [the legal power in the Parliament of the United Kingdom to legislate for the Dominions] was to place on the record a convention that no law of the United Kingdom Parliament would in future ‘extend to any Dominion otherwise than at the request and with the consent of the Dominion’.³² It concluded that this convention should be included in the preamble to the proposed statute and that due to ‘practical considerations affecting both the drafting of Bills and the interpretation of Statutes’ a provision should also be included in the substantive part of the Act,³³ which became s 4 of the *Statute of Westminster* 1931.

The Conference’s proposal to remove the application of the *Colonial Laws Validity Act* 1865 and the doctrine of repugnancy with respect to Dominion laws meant that a Dominion would have the power to repeal the application of the *Act of Settlement* and other relevant statutes with respect to the Dominion and enact a new law regarding succession to the throne.³⁴ King George V wanted a limitation to be placed upon the removal of the application of the *Colonial Laws Validity Act*, ‘to ensure no tampering with the Settlement Act’.³⁵ Initially, the British Government argued that the *Colonial Laws Validity Act* should continue to apply to certain foundational

30. *R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte Indian Association of Alberta* [1982] 1 QB 892, 917 (Lord Denning MR); 927 (Kerr LJ); and 928 (May LJ).

31. “Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation”, Cmd 3479 (1929) [Report Cmd 3479].

32. *Ibid* at 54.

33. *Ibid* at 55.

34. The grant of full power to make laws having extra-territorial operation by s 3 of the *Statute of Westminster*, would also have removed any legislative constraint based upon extra-territoriality.

35. Letter by His Majesty to the Prime Minister, 30 November 1929, quoted in: H Nicolson, *King George the Fifth* (London: Constable & Co Ltd, 1952) at 485.

laws that touched the essential structure of the Empire. However, the Irish Free State, Canada and South Africa objected on the basis that co-equal States could not be bound by the will of one of them.³⁶ The Irish argued instead that uniformity should be achieved by mutual consent and reciprocal legislation enacted on a voluntary basis.³⁷ This was finally accepted by the Imperial Conference. It saw the subject of succession to the throne as falling within 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'.³⁸ The retention of exclusive British legislative power over succession to the throne was regarded as inconsistent with the principle of equality laid down in the Balfour Declaration.³⁹

The Conference concluded that as the Dominions and Great Britain were now equal in status but bound by a common allegiance to the Crown, 'it is clear that the laws relating to the succession to the Throne and the Royal Style and Titles are matters of equal concern to all'.⁴⁰ It therefore decided not to exclude the succession laws from the application of s 2, but rather to establish a convention to deal with succession to the throne, which would be recorded in the preamble to the proposed statute.⁴¹

The leading Australian delegate, Sir William Harrison Moore, noted with respect to the succession that the Conference had considered 'that even this fundamental matter must be dealt with in conformity with the principle of equality and not by leaving it as an exclusive or paramount power in the British Parliament'.⁴² He explained that a convention was chosen because it was a familiar method that would be readily understood and that 'avoiding rigidity, it would impose the least restraint upon the flexibility which has been a distinctive feature of the British constitutional system'.⁴³ Another reason that a convention was chosen, rather than a law, was

36. Thomas Mohr, "The Colonial Laws Validity Act and the Irish Free State" (2008) 43 *Ir Jur* 21 at 37 [Mohr].

37. *Ibid* at 37-38.

38. Report Cmd 3479, *supra* note 31 at 57.

39. Austl, Commonwealth, *Report of Sir William Harrison Moore on the Conference on the Operation of Dominion Legislation*, Parl Paper No (1930) at 1367 [Report of Sir William Harrison Moore]. See also: Report Cmd 3479, *supra* note 31 at 60.

40. Report Cmd 3479, *supra* note 31 at 59.

41. K H Bailey, "The Abdication Legislation in the United Kingdom and in the Dominions" (1938) 3 *Politica* 1 at 12.

42. Report of Sir William Harrison Moore, *supra* note 39.

43. *Ibid*.

due to concern that the United Kingdom Parliament could not bind itself in this manner by law.⁴⁴ An attempt was made during debate on the *Statute of Westminster* to insert an equivalent provision in the text of the *Statute*, but after debate, the proposed amendment was withdrawn.⁴⁵

The convention was not intended to be set in stone. Coghill has observed that the convention concerning the succession is ‘in a form more of expectation and hope than of command’ and that it is ‘not of imperative force’.⁴⁶

The relevant parts of the preamble to the *Statute of Westminster* 1931 state:

And WHEREAS it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the 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. [paragraph 2]

AND WHEREAS it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion. [paragraph 3]

As noted above, the United Kingdom Parliament previously had full power to legislate in a manner that bound the Dominions by laws of paramount force. While s 2(2) of the *Statute of Westminster* took away the ‘paramount force’ of such laws by permitting their local amendment or repeal, s 4 of the *Statute* limited the future extension of British laws to the Dominions to circumstances where the Dominion had requested and consented to such an enactment. Section 4 provided:

No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Domin-

44. *Ibid.*

45. UK, HC, *Parliamentary Debates*, House of Commons, vol 260, col 355-62 (24 November 1931).

46. E H Coghill, “The King – Marriage and Abdication” (1937) 10 *Austl L J* 393 at 398.

ion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

These recitals and s 4 have been extensively examined by Wheare.⁴⁷ As he pointed out, they declare three conventions and a legal requirement. These are as follows:

1. Dominion legislation that alters the law touching succession to the throne or the royal style and titles requires the assent of the Parliaments of the United Kingdom and other Dominions (preamble, paragraph 2);
2. United Kingdom legislation that alters the law touching succession to the throne or the royal style and titles, whether or not it is intended to extend as part of the law of the Dominions, requires the assent of the Parliaments of the other Dominions (preamble, paragraph 2);
3. United Kingdom legislation that alters the law touching succession to the throne or the royal style and titles and which is intended to extend to any Dominion, as part of its law, requires the request and consent of that Dominion (preamble paragraph 3); and
4. United Kingdom legislation that alters the law touching succession to the throne or the royal style and titles shall not extend, or be deemed to extend, to a Dominion as part of its law, unless it is expressly declared in that Act that the Dominion has requested, and consented to, its enactment (section 4).⁴⁸

Underlying these conventional and legal requirements there are two critical understandings. The first is that the laws touching succession form part of the law of the Dominions and may therefore be amended or repealed and replaced by new laws enacted by a Dominion with respect to the Crown of that Dominion. To the extent that there would otherwise have been an argument that a Dominion had no power to legislate to amend or repeal foundational Imperial laws, such as those dealing with succession, this was wiped away by the insertion, at the insistence of Canada, of s 2(2) in the *Statute of Westminster*.⁴⁹ Wheare has

47. K C Wheare, *The Statute of Westminster and Dominion Status*, 5th ed (London: Oxford University Press, 1953) 150-157, 277-299 [Wheare].

48. This is a summary of those rules described by Wheare: *Ibid* at 278-280.

49. Canada apparently threatened the collapse of the Imperial Conference if the British did not agree to the inclusion of this provision: Mohr, *supra* note 36 at 40 (referring to Canadian archival records).

observed that the convention on the succession set out in the preamble was directly related to the powers conferred on the Dominion Parliaments by s 2(2) of the *Statute of Westminster*⁵⁰ to repeal or amend the laws of succession ‘in so far as the same is part of the law of the Dominion’. If the laws of succession to the throne did not form part of the laws of the Dominions, then s 2(2) of the *Statute of Westminster* would not permit their amendment or repeal by a Dominion with the consequence that there would be no need for convention 1 above. Paragraph 2 of the preamble would have been worded differently if this were the case. The drafting of the *Statute of Westminster* is clearly predicated upon the assumption that the laws of succession do form part of the laws of the Dominions and may be altered by them as a consequence of the application of s 2(2). Hence the need for the convention.

Secondly, it was assumed that the United Kingdom Parliament could legislate to change the rules of succession in such a way that the law either did or did not extend as part of the law of the Dominions. If the United Kingdom Parliament was changing its own law concerning the Crown of the United Kingdom but not applying that law as part of the law of the Dominion, then only ‘assent’ by Dominion Parliaments was required, whereas ‘request and consent’ were required in addition and in advance, if the change being made by the United Kingdom Parliament was also to extend as part of the law of the Dominion with respect to its Crown.

Four other distinctions ought to be addressed in relation to how these conventions and this statutory requirement operate. First, in terms of timing, conventions 1 and 2 require ‘assent’, which might take place before or after the United Kingdom’s legislation is enacted (although it would obviously be prudent for the United Kingdom to seek an informal indication of assent in advance).⁵¹ Convention 3 and legal requirement 4 instead require both a request and consent. The request must take place before the enactment of the legislation implementing it, particularly if legal requirement 4 applies, as it needs to be recorded in the implementing Act itself. The use of ‘assent’ in conventions 1 and 2, cannot therefore be taken as a substitute for ‘request and consent’ in convention 3 and s 4.

50. Wheare, *supra* note 47 at 175.

51. *Ibid* at 283; R T E Latham, *The Law and the Commonwealth* (London: Oxford University Press, 1949) at 619.

Secondly, regarding the source of agreement, conventions 1 and 2 require the assent of ‘Parliaments’⁵² whereas convention 3 and legal requirement 4 require the request and consent of ‘the Dominion’, incorporating a degree of ambiguity as to how this is to be given and by which institution.⁵³

Thirdly, in terms of application, the *Statute of Westminster* applied from its commencement in December 1931 to the Dominions of Canada, Australia, New Zealand, South Africa, the Irish Free State and Newfoundland.⁵⁴ However, the substantive provisions in sections 2-6 did not extend to Australia, New Zealand or Newfoundland as part of their law until adopted by the relevant Dominion Parliament.⁵⁵ Hence, while s 4 did not initially apply to these Dominions,⁵⁶ the preamble did. One reason for the preamble, therefore, was to apply these conventions in the meantime before s 4 of the *Statute of Westminster* was adopted.

Fourthly, the convention in paragraph 2 of the preamble treats the Parliaments of the United Kingdom and the Dominions equally. It requires the ‘assent’ of all of them – it does not specify that the United Kingdom Parliament makes the change to the law of succession while the Dominion Parliaments assent to its application as part of their laws. As a consequence of the application of the Balfour Declaration on equality, paragraph 2 of the preamble permits the enactment of identical or ‘reciprocal’ legislation by each of the Parliaments of the United Kingdom and the Dominions⁵⁷ or, in the alternative, the application of a United Kingdom law to the Dominion as part of its law, but only when a request and consent has been made.⁵⁸

52. Bailey has argued that the use of ‘Parliament’ in this context was ‘natural, since the convention was accepted, as a matter of record, in order to control the exercise by the Parliaments of the Commonwealth of their several and independent legislative powers, recognized or conferred by the Statute of Westminster itself’: K H Bailey, ‘The Abdication Legislation in the United Kingdom and in the Dominions’ (1938) 3 *Politica* 147 at 155 [Bailey, ‘Abdication Legislation’].

53. Wheare, *supra* note 47 at 283 (note that this ambiguity was clarified with respect to Australia (at its request) by s 9(3) of the *Statute of Westminster*).

54. 1931 (UK), 22 & 23 Geo V, c 4 s 2 [*Statute of Westminster*].

55. *Ibid* at s 10.

56. The *Statute of Westminster* was adopted by Australia in 1942, with retrospective application back to 3 September 1939. It was adopted by New Zealand in 1947. It was never adopted by Newfoundland, which later came under direct rule of the United Kingdom Government in 1934 and became a Province of Canada in 1949.

57. See further: K H Bailey, *The Statute of Westminster 1931* (Melbourne: Government Printer, 1935) at 8.

58. The request and consent was to be made pursuant to s 4 of the *Statute* where it applied or the convention in the 3rd paragraph of the preamble for those Dominions to which the substantive provisions of the *Statute* did not yet apply.

Two Canadian commentators at the time of the 1936 abdication queried the application of the ‘request and consent’ by the Canadian Government. This was in part driven by the fact that only Canada ‘requested and consented’, so it was seen to be the odd one out. W P M Kennedy argued that it ‘would seem that the intention of the Statute of Westminster is that laws relating to the succession to the throne and to the royal style and title should be excepted out of the general obligation of s 4 of the Statute’.⁵⁹ He based this view on the fact that the succession is mentioned only in the preamble, not in the text of the *Statute*, and that this was a deliberate decision of the Conference on the Operation of Dominion Legislation. He assumed, therefore, that s 4 of the *Statute of Westminster* did not extend to laws concerning succession to the throne.⁶⁰

It would seem clear, however, that the convention concerning the succession in paragraph 2 of the preamble adds to, rather than substitutes for, the requirement that request and consent be provided before legislation can apply as part of a law of the Dominion. It accommodates three possibilities – (1) that a Dominion will change its own law concerning the succession (being a United Kingdom law that had previously applied by paramount force as part of the Dominion’s law, but could now, under s 2(2) of the *Statute of Westminster*, be amended or repealed⁶¹); (2) that the United Kingdom will change its law of succession to the throne, but not so as to apply as part of the law of a Dominion (so that the Dominion would have to legislate to change its own law if the personal union of Crowns were to be maintained, as South Africa and the Irish Free State did in relation to the 1936 abdication); or (3) that the United Kingdom will amend its law and apply it as part of the law of one or more Dominions (in which case, request and consent would also be required, if s 4 of the *Statute of Westminster* applied to the Dominion, or the 3rd paragraph of the preamble would apply if s 4 did not). As the Conference noted, it would have been inconsistent with the ‘equality’ of the Dominions, if the United Kingdom’s laws were to apply as part of the law of the Dominion, without their prior request

59. W P M Kennedy, “Canada and the Abdication” (1937) 2 UTLJ 117 at 117.

60. Note, in contrast, the argument by Bailey that s 4 is unlimited in its terms and therefore applies to laws concerning succession, including *His Majesty’s Declaration of Abdication Act 1936*: Bailey, “Abdication Legislation”, *supra* note 52 at 13-14.

61. Note Bailey’s observation that s 2 of the *Statute of Westminster* ‘appears indisputably to bring the laws touching the succession to the throne in general, and the Act of Settlement in particular, within the ambit of Dominion legislative powers’: Bailey, “Abdication Legislation”, *supra* note 52 at 11.

and consent.⁶² Moreover, s 4 of the *Statute* is quite explicit that ‘No Act’ of the Parliament of the United Kingdom shall be deemed to extend to the Dominion without the record of request and consent. Such an absolute provision could not be read down by a recital in a preamble.⁶³ Kennedy’s argument has been rejected by a number of eminent scholars, including Wheare, the foremost expert on the *Statute of Westminster*, and Bailey.⁶⁴

Cronkite took a completely different approach. He relied on the application of s 2 of the *British North America Act 1867* to contend that the Canadian Sovereign is as a matter of law the same person who is Sovereign of Great Britain and Ireland.⁶⁵ He seemed to be unaware of the fact that s 2 had been repealed because it was a mere interpretative provision rather than a substantive requirement. Nor did he take into account the subsequent establishment of a separate Canadian Crown. Indeed, he also noted that South Africa only assented to the United Kingdom legislation, rather than requesting and consenting to it,⁶⁶ without apparently realising that this was because South Africa decided that it would enact its own legislation to make the change, rather than have the British law apply as part of its own law. South Africa’s ‘assent’ did not result in a change in the rules of succession with respect to South Africa – only its own legislation achieved this. The same can be said for Canada’s 2013 assent.

It is quite clear from both the drafting history of the *Statute of Westminster* and the way in which the preamble, s 2 and s 4 interact, that it was not the case that the laws of succession were intended to be subject only to change by the Westminster Parliament. The laws of succession were regarded as being part of the law of each Dominion which could from then on be changed by: (1) the legislature of the Dominion (with a convention that the assent of the Westminster Parliament and other Dominion Parliaments be given to such a change), or (2) by the United Kingdom, but only at the request and consent of the Dominion, if the amended law was to apply as part of the law of that Dominion. The Westminster Parliament could also change the

62. Report Cmd 3479, *supra* note 31 at 54.

63. Bailey, “Abdication Legislation”, *supra* note 52 at 15.

64. Wheare, *supra* note 47 at 285; Bailey, “Abdication Legislation”, *supra* note 52 at 14-16 (Sir Kenneth Bailey was Dean and Professor of Public Law at the University of Melbourne and later Solicitor-General of the Commonwealth of Australia and High Commissioner to Canada).

65. F C Cronkite, “Canada and the Abdication” (1938) 4:2 CJEPS 177 at 185 [Cronkite].

66. *Ibid* at 186.

law of succession so that it applied only with respect to the law of the United Kingdom and did *not* apply to as part of a law of a Dominion. If so, by convention, only the ‘assent’ of the Dominion was needed. It is this ‘assent’ that Canada has given under the *Succession to the Throne Act 2013* (Canada). Its effect, therefore, is to agree to the United Kingdom’s change to its own law of succession, but it does not affect the law of succession in relation to the Canadian Crown.

THE 1936 ABDICATION

While there is debate over whether the abdication of a Sovereign requires legislation, it was needed in the case of Edward VIII to ensure that if he had children they would not inherit the throne. Hence an amendment to the *Act of Settlement* was required.⁶⁷ The *Royal Marriages Act* also needed amendment so that the new King did not have to be asked for his consent to the marriage of Edward, Duke of Windsor, to Mrs Simpson. Despite having to enact its own legislation, the British Government sought to avoid the need to enact Dominion legislation, both because of the need for swift action and because it regarded the less debate upon the embarrassing subject, the better.

The British Government therefore tentatively suggested that the Dominions might rely on the change of the Sovereign in the United Kingdom as having the same effect in the Dominions, without any need for action on their part.⁶⁸ This suggestion was expressly rejected by the Prime Minister of Canada who replied that this argument ‘does not appear acceptable in view of the recognised position of the Dominions in regard to the Crown’. He concluded that it would be necessary to secure the expression of assent by the Parliament of Canada and that the Government of Canada would ‘formally convey to the Government of the UK consent to the Bill proposed to be introduced in the Parliament at Westminster’⁶⁹ in accordance with s 4 of the *Statute of Westminster*.

The British Government’s own legal advice was to the same effect. In the lead up to the 1936 abdication, the British Parliamentary

67. Telegram by the UK Prime Minister to the Dominion Prime Ministers (4 December 1936); See also: UK, HC, *Parliamentary Debates*, 5th ser, vol 318, col 2203 (11 December 1936).

68. Telegram from UK Prime Minister to Dominion Prime Ministers (4 December 1936).

69. Telegram from Canadian Prime Minister to UK Prime Minister (6 December 1936); see further clarification in telegram of 8 December.

Counsel, Sir Maurice Gwyer, who was best known for his critical role in the drafting and enactment of the *Statute of Westminster*, advised the British Government that the *Act of Settlement* applied as part of the law of each of the Dominions, and that request and consent under s 4 of the *Statute of Westminster* was necessary for any British law amending the *Act of Settlement* to have effect in Dominions such as Canada. He contended that if the declaration of abdication was made by His Majesty himself, without ministerial advice, then it could be effective throughout the Dominions without the need for separate advice from Ministers of each Dominion. However, when it came to amending the *Act of Settlement*, consent and request was required:

Assuming then that the instrument of abdication were framed in appropriate terms His present Majesty would by its execution cease to be King in the Dominions as well as in the United Kingdom but a very difficult position would nevertheless arise for section four of the Statute of Westminster makes it clear that an Act which, for example, amends the Act of Settlement (which latter Act is at the present time part of the law of all the Dominions) would not extend to any Dominion unless it was expressly declared in the amending Act that the Dominion had requested, and consented to, its enactment. I am of opinion that it will, therefore, be necessary, not merely as a matter of courtesy and constitutional propriety but as a matter of law, to secure the assent of the Dominions to the proposed Bill and that if consent is not obtained from any Dominion the amendments of the Act of Settlement for which the Bill makes provision will be of no effect in that Dominion, and, accordingly, in that Dominion the new King will not become King nor will the new succession become the law of the Dominion.⁷⁰

Coffey has summarised the situation in 1936 as follows:

So, if the British Act amended the Act of Settlement but Canada did not request and consent to it, then the Act of Settlement would remain unamended in Canada.⁷¹

The initial draft Bill of 4 December listed all the Dominions as requesting and consenting to the enactment of the Bill. South Africa objected, stating that under its *Status of Union Act 1934*, British law

70. Memorandum by Sir Maurice Gwyer, Parliamentary Counsel, to the UK Attorney-General (23 November 1936): PRO: PREM 1/449. Crown law advice to the UK Government was to the same effect: 'The Act of Settlement is at the present moment part of the law of each Dominion as well as of the United Kingdom, and the abdication will, therefore, be of no effect in a Dominion unless the action taken alters the law in the Dominion as well as in the United Kingdom': PRO: DO 121/39.

71. Donal K Coffey, "British, Commonwealth and Irish Responses to the Abdication of King Edward VIII" (2009) 44 Ir Jur 95 at 105.

could not apply to it directly. Hence a request and consent was inappropriate. The only course was for South Africa to enact its own law. It would, however, express its assent to the UK legislation, but it would not apply as part of South African law.⁷² It therefore applied convention 2 (above) but excluded the application of convention 3 and s 4. The Irish Free State also objected and would give neither its assent nor its request or consent, saying only that it would have to enact its own legislation.⁷³

Canada, New Zealand and Australia agreed to have the British law extend to them as part of their own laws. The *Statute of Westminster* applied in full to Canada, so conventions 2 and 3 and legal requirement 4 applied in its case. The consent and request of Canada to the enactment of *His Majesty's Declaration of Abdication Act 1936* was given by way of executive order in council⁷⁴ and recorded in the preamble to that Act. As Wheare has clearly stated:

The Act therefore applied to Canada *as part of the law of Canada*, and would be so construed by a Court.⁷⁵

In order to meet the parliamentary assent requirement of convention 2, the Canadian Parliament later enacted the *Succession to the Throne Act 1937* (Canada).

Section 4 of the *Statute of Westminster* had not yet been adopted by Australia or New Zealand, so it was not necessary to gain and record their request and consent for the law to extend to them. It extended to Australia and New Zealand of its own force without any further legal steps. The request and consent of Australia and New Zealand was therefore removed from the draft bill so that they could join South Africa in merely giving 'assent' to it. There was no legal requirement to record 'assent' in the preamble to *His Majesty's Declaration of Abdication Act 1936* (UK), but it was included as a 'matter of courtesy'.⁷⁶ Australia's Parliament was the only Dominion Parliament to indicate its assent prior to the enactment of *His Majesty's Declaration of Abdication Act*.⁷⁷

72. Telegram from South African Prime Minister to UK Prime Minister (7 December 1936).

73. Telegram from President of Executive Council of the Irish Free State to the UK Prime Minister (6 December 1936).

74. Minute of the Privy Council of Canada (10 December 1936) PC 3144.

75. Wheare, *supra* note 47 at 285 [emphasis added].

76. R T E Latham, *The Law and the Commonwealth* (London: Oxford University Press, 1949) at 629.

77. *Ibid* at 626.

New Zealand indicated its assent in advance by way of executive act, but later passed a parliamentary resolution in each House which ‘ratified and confirmed’ that assent for the purposes of convention 2.⁷⁸ It appears that neither Australia nor New Zealand formally requested and consented to the enactment of the British Act, in accordance with convention 3. Wade has noted that Australia and New Zealand simply behaved as they would have done before the enactment of the *Statute of Westminster*.⁷⁹

As *His Majesty’s Declaration of Abdication Act 1936* (UK) extended as part of the law of Canada, Australia and New Zealand as well as the United Kingdom, the effective date of the abdication in those four countries was the date of commencement of that Act, 11 December 1936, rather than 10 December, which was the day on which Edward VIII signed his declaration of abdication.⁸⁰ South Africa’s *His Majesty Edward VIII’s Declaration of Abdication Act 1937* dated the changes to the succession of the Crown of South Africa back to 10 December, being the day on which Edward VIII signed the instrument of abdication. The abdication was implemented in the Irish Free State by the *Executive Authority (External Relations) Act 1936*, which took effect from 12 December 1936.

A number of lessons can be learnt from this exercise in changing the laws of succession. First, it is possible for the laws of succession to diverge and apply differently in Commonwealth Realms. There were different Kings in different Dominions during the period 10-12 December 1936 marking the divisibility of the Crown in the personal, as well as the political, sense. As Wheare described it, the Commonwealth was ‘partly dismembered’ during this period.⁸¹ Bailey also observed that this incident demonstrated that ‘since the Statute of Westminster the unity of the Commonwealth rests rather in the King’s person than in his office; that the office of King can under the existing law be discharged by different persons for different parts of the Com-

78. NZ, *Hansard*, Parliamentary Debates (Vol 248) 9 September 1937, Legislative Council, 5; House of Representatives, 7. See further: K C Wheare, *The Constitutional Structure of the Commonwealth* (Oxford: Clarendon Press, 1960) at 162 on why a resolution was chosen over legislation.

79. E C S Wade, “Declaration of Abdication Act, 1936”, (1937) 1 Mod L Rev 64 at 66.

80. To avoid difficulties over assent to the Act, the declaration of abdication had been drafted so that the throne only passed from Edward VIII to George VI once Edward VIII had given royal assent to it: Telegram by UK Prime Minister to Dominion Prime Ministers (4 December 1936).

81. Wheare, *supra* note 47 at 290; see also: A B Keith, *The Dominions as Sovereign States*, (London: Macmillan & Co, 1938) at 107.

monwealth; and that the unity of the Commonwealth, through the person of the King, is now maintained, not by chance indeed, but by deliberate agreement.⁸²

Secondly, there was no acceptance amongst the Dominions in 1936 that a change to the succession of the throne of the United Kingdom would automatically change the succession in relation to the throne of each or any of the Dominions. All took the view that such a change needed to be made as *part of their own domestic law*. Australia and New Zealand only needed to ‘assent’ to the United Kingdom law because they had not yet adopted the substantive provisions of the *Statute of Westminster* and British laws could therefore still apply to them as part of their own domestic laws by express application or necessary intendment without any indication of request or consent. Canada, in accordance with s 4 of the *Statute of Westminster*, requested and consented to the application of the British law as part of Canadian law. Ireland and South Africa enacted their own laws. Only in Newfoundland was there no need to take action, because it had ceased to be a Dominion and no longer had a separate Crown. In 1936 none of the Dominions rested on the assumption that the change in succession in the United Kingdom would automatically effect the same change in the Dominion. All accepted that a change needed to be made to their domestic laws, either by a United Kingdom law or by the enactment of their own law.

THE TERMINATION OF THE ABILITY OF THE UNITED KINGDOM TO LEGISLATE FOR THE DOMINIONS

The capacity of the United Kingdom to legislate for the Dominions, enacting laws that form part of the law of the Dominions, has ceased to exist. South Africa and the Irish Free State became republics. Newfoundland eventually became a part of Canada. The capacity for the United Kingdom to enact laws for Canada ended in 1982⁸³ and for New Zealand⁸⁴ and Australia in 1986.⁸⁵

The consequence is that today, unlike in 1936, any law enacted by the United Kingdom Parliament that touches upon or alters the laws of succession to the throne will not extend as part of the law of

82. Bailey, “Abdication Legislation”, *supra* note 52 at 149.

83. *Constitution Act* 1982 (Canada), s 53 and Schedule, item 17. See also *Canada Act* 1982 (UK), 1982, c 11.

84. *Constitution Act* 1986 (NZ), ss 15(2) and 26.

85. *Australia Act* 1986 (Cth) and *Australia Act* 1986 (UK), ss 1 and 12.

any of the Commonwealth Realms. Hence convention 3 and s 4 of the *Statute of Westminster*, which required the request and consent of the relevant Dominions, no longer have any application at all.

To the extent that conventions 1 and 2 still apply, if at all, it is simply a matter of comity between the Realms. The ‘assent’ given under these conventions has no legal effect. It no longer performs the role of recognising the application to a Dominion of the United Kingdom law in cases where the Dominion has not yet adopted the substantive provisions of the *Statute*, as was the case in relation to Australia and New Zealand in 1936. The role of the convention is therefore purely diplomatic.

IS THERE A CONSTITUTIONAL REQUIREMENT THAT THE SOVEREIGN OF A REALM BE THE SAME PERSON WHO IS THE SOVEREIGN OF THE UNITED KINGDOM?

The Constitutions of the older Realms were all written at a time when the Crown was regarded as indivisible. Three of them included provisions that connected the references to the Sovereign in the Constitution, to the Sovereign of the United Kingdom. The critical question was whether these provisions were just ‘interpretation clauses’ intended to indicate that the person of the Sovereign changed from time to time so that references to Queen Victoria were not frozen in their application to her alone, or whether they were intended to create a substantive link between two separate Crowns by requiring them to be held by the same person. The relevant sections provided:

Australia – ‘The provisions of this Act referring to the Queen shall extend to Her Majesty’s heirs and successors in the sovereignty of the United Kingdom’.⁸⁶

Canada – ‘The Provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland’.⁸⁷

South Africa – ‘The provisions of this Act referring to the King shall extend to His Majesty’s heirs and successors in the sovereignty of the United Kingdom of Great Britain and Ireland’.⁸⁸

86. *Commonwealth of Australia Constitution Act 1900* (Imp), s 2.

87. *British North America Act 1867* (Imp), s 2.

88. *South Africa Act 1909* (Imp), s 3. See also: s 5 of the *Status of Union Act 1934* (Sth Africa) which defined ‘heirs and successors’ as meaning ‘His Majesty’s heirs and successors in the sovereignty of the United Kingdom of Great Britain and Ireland’.

The Canadian provision was repealed in 1893⁸⁹ on the ground that it was redundant because the *Interpretation Act* 1889 (UK) provided that references to the Sovereign at the time an Act was made should ‘unless the contrary intention appears be construed as referring to the Sovereign for the time being’. It was therefore regarded in 1893 as being no more than a statutory interpretation provision that ensured that references to the monarch at the time of the enactment of the Constitution were not frozen in their application to that monarch alone. As Bailey observed, all that ‘such a section should properly be regarded as doing is to ensure that whenever in future a person comes to the throne by a succession law operative in the Dominion, the provisions in the Dominion Constitution referring to His Majesty will extend to such a person’.⁹⁰ Bailey also pointed to the history of the negotiations of the *Statute of Westminster*, concluding:

It will be recalled that in none of the discussions that led up to and accompanied the enactment of the Statute of Westminster was it suggested that so far as concerned Canada and Australia at any rate there was no need of the proposed convention, because the Constitution Acts of those Dominions contained sections, beyond the power of the Dominions to alter, which made any succession to the throne in the United Kingdom automatically operative in the Dominion.⁹¹

As noted above, the Canadian Government took the view in 1936 that it was necessary to request and consent to the application of the United Kingdom law as part of Canadian law. It rejected the proposition that the change in the monarch of the United Kingdom had the effect of automatically changing the monarch of Canada.

In 1936, the South African Government insisted that its Parliament had to enact its own legislation to change the rules of succession

as determined by the laws relating to the succession to the Crown of the United Kingdom of Great Britain and Ireland.’

89. *Statute Law Revision Act* 1893 (UK), 52 & 53 Vict c 63, s 30 (note, however, the mistaken assumption that s 2 was still in force at the time of the abdication crisis in 1936 and the analysis of its effect): *House of Commons Debates*, 18th Parl, 2nd Sess, Vol 20 (19 January 1937) at 76 (Mr Lapointe, Minister for Justice); A B Keith, “Notes on Imperial Constitutional Law” (1937) 19 J Comp Leg (3d) 105 at 106; Bailey, “Abdication Legislation”, *supra* note 52 at 20-21[Keith]; Cronkite, *supra* note 65 at 177; and Sir I Jennings, *Constitutional Laws of the Commonwealth* (Oxford: Clarendon Press, 1952) at 384.
90. Bailey, “Abdication Legislation”, *supra* note 52 at 17 (see also his commentary on arguments made in the Canadian Parliament at 21).
91. *Ibid* at 18.

to its Crown.⁹² The South African Government did not accept that the UK change had the automatic effect of changing the monarch of South Africa. Bailey described the South African position as follows:

The Act of Settlement was and is, by common consent, part of the law of South Africa; it needed no s 3 of the South Africa Act, no s 5 of the Status of the Union Act, to bring it into and maintain it in operation there. Any subsequent amendment of that Act, however, would operate in South Africa as part of the law thereof only if enacted by the Union Parliament in pursuance of s 2 of the Statute of Westminster, or if enacted by the Parliament of the United Kingdom, with a declaration of the request and consent of the Union, pursuant to s 4 of that Statute.⁹³

South African constitutional references to the King and his heirs and successors were repealed when South Africa became a republic in 1961.

The only one of these three provisions that remains in existence is the one concerning Australia – known as covering clause 2. There are three possible views as to how it operates. The first is that it mandates that whoever is the sovereign of the United Kingdom is also, by virtue of this external fact, sovereign of Australia.⁹⁴ According to this view, a change in the United Kingdom law of succession would have no legal application as part of Australian law, but if it had the effect of changing the sovereign (eg as a result of abdication) then the new sovereign of the United Kingdom would automatically become the new sovereign of Australia because of the operation of covering clause 2. This view is now regarded as old-fashioned and most unlikely to be accepted by the Australian courts for the reasons noted below. Professor Zines criticised it as follows:

The view that s 2 of the [*Commonwealth of Australia Constitution Act*] requires Australia to have the same monarch as the United Kingdom is anachronistic. To suggest that its object was to ensure that the Queen of Australia was the Queen of the United Kingdom would not have been understandable by anyone in 1900. The Crown was Imperial and the Commonwealth had no power to alter Imperial law. It is also difficult to understand why the British Parliament would see the need to pro-

92. This was so, despite UK pressure for South Africa to ‘request and consent’ in the same manner as Canada: Telegram by UK Prime Minister to South African Prime Minister (10 December 1936).

93. Bailey, “Abdication Legislation”, *supra* note 52 at 26.

94. Keith, *supra* note 95 at 106 (see also the statement by Winterton that the Queen of Australia ‘is constitutionally required to be the British monarch’: G Winterton, “The Evolution of a Separate Australian Crown” (1993) 19 *Monash UL Rev* 1 at 2).

vide Australia with a rule of succession separate from that operating throughout the Empire. The Crown was one and indivisible.⁹⁵

Zines also referred to the potential consequences of such a view. If Britain became a republic, there would be no Queen ‘to which s 2 could refer and all Australian governmental institutions would either immediately or eventually cease to exist’.⁹⁶

The second view is that covering clause 2 is merely an interpretative provision which assumes, but does not enact, the existence of a succession law that is operative in Australia.⁹⁷ According to this view, covering clause 2 operates to ensure that references to the Sovereign are not taken to be confined to the Sovereign at the time of the enactment, but extend to whoever happens to be the Sovereign from time to time in accordance with the applicable law. This was to be determined by the succession law that formed part of the law of Australia. Zines has observed that ‘before the *Statute of Westminster*, the Imperial law of succession operated as paramount law in Australia, not by virtue of [covering clause 2], but in its own right, as it did in, for example, New Zealand or Newfoundland, where no provision similar to [covering clause 2] existed’.⁹⁸ As the United Kingdom can no longer legislate for Australia, the applicable law would be the pre-existing law of succession as altered by Australian law. This approach is consistent with that taken in relation to other British laws that applied by paramount force prior to the *Statute of Westminster* coming into force. Their repeal or amendment in the United Kingdom had no effect upon their operation in Australia,⁹⁹ even when the laws were ludicrously outdated, such as the *Merchant Shipping Act 1894* (Imp).

The third view, which falls between the two extremes, is that covering clause 2 incorporated by reference into the *Commonwealth of Australia Constitution Act* the British laws of succession to the

95. L Zines, *The High Court and the Constitution*, 5th ed (New South Wales: Federation Press, 2008) at 436 [Zines].

96. *Ibid* at 437.

97. Bailey, “Abdication Legislation”, *supra* note 52 at 17; *Final Report of the Constitutional Commission* (AGPS: Canberra, 1988) Vol 1 at 81; Zines, *supra* note 95 at 436-437.

98. Zines, *supra* note 95 at 436.

99. *Copyright Owner’s Reproduction Society Ltd v EMI (Australia)* (1958) 100 CLR 597, 604 (Dixon CJ); *Bisticic v Rokov* (1976) 135 CLR 552; *Ukley v Ukley* [1977] VR 121. See also: R D Lumb, “Fundamental Law and the Processes of Constitutional Change in Australia” (1978) 9 FL Rev 148 at 174-175, and for a New Zealand example: *Re Ashman* [1985] 2 NZLR 224.

throne.¹⁰⁰ Under s 4 of the *Statute of Westminster*, those laws could be amended or repealed by United Kingdom legislation to which Australia had given its request and consent. That is no longer the case since s 1 of the *Australia Acts* came into force. In *Sue v Hill*, three Justices of the High Court of Australia noted that covering clause 2 identifies the Queen ‘as the person occupying the hereditary office of Sovereign of the United Kingdom under rules of succession established in the United Kingdom’. Their Honours went on to state:

The law of the United Kingdom in that respect might be changed by statute. But without Australian legislation, the effect of s 1 of the *Australia Act* would be to deny the extension of the United Kingdom law to the Commonwealth, the States and the Territories.¹⁰¹

The argument here is that the rules of succession have been effectively patriated with the Australian Crown and while they continue to exist in their current British form, they may only be amended or repealed by Australian action. On this basis any change of the rules of succession enacted by the Westminster Parliament would have no effect in relation to the Crown of Australia unless Australia chose to take action to change the laws of succession that are part of Australian law to ensure that they remained consistent with those of the United Kingdom.

Given the High Court of Australia’s indication of the approach that it would find acceptable and given the current orthodoxy of this approach within Australian legal and constitutional scholarship¹⁰², the Australian Government accepted from the start that Australian legislation would be required to implement such a change as part of Australian law. While there were certainly debates about whether federal legislation alone would be sufficient or whether all of the States would have to pass legislation requesting the federal law, there was

100. See eg R Miller, “Constitutional Law” in R Baxt (ed), *An Annual Survey of Law 1980* (Sydney: Law Book Co, 1981) at 492, 512; K Booker and G Winterton, “The Act of Settlement and the Employment of Aliens” (1981) 12 FL Rev 212 at 215; *Sue v Hill* (1999) 199 CLR 462 at para 93 (Gleeson CJ, Gummow and Hayne JJ) [*Hill*].

101. *Hill*, *supra* note 100 at para 93; see also: *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at para 228 (Gummow and Hayne JJ).

102. See, eg, Professor Campbell’s view that if the Queen were to abdicate, separate abdication legislation would have to be enacted in Australia: Enid Campbell, “Changing the Rules of Succession to the Throne” (1999) 1:4 Constitutional Law and Policy Review 67 at 70. See also: Zines, *supra* note 95 at 436-437. Banks has taken the same view in relation to Canada: Margaret Banks, “If the Queen were to Abdicate: Procedure Under Canada’s Constitution” (1990) Alta L Rev 535 at 537[Banks].

no debate that Australian law had to make the substantive change to succession to the Australian Crown if it was desired to maintain the personal union of Crowns with the United Kingdom.

**IS THERE AN ‘AUTOMATIC RECOGNITION RULE’
DERIVED FROM THE PREAMBLE TO THE CANADIAN
CONSTITUTION THAT REQUIRES THE SAME PERSON
TO BE MONARCH OF THE UNITED KINGDOM
AND CANADA?**

It has been claimed that there is an automatic recognition rule, which finds its source in the preamble to the *British North America Act 1867* (now known as the *Constitution Act 1867*).¹⁰³ This preamble provides:

Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom;

The Constitution of the United Kingdom, however, does not have an ‘automatic recognition rule’ for determining the monarch. It has a monarch determined by the application of the law of the land (both common law and statute). If Canada has a Constitution ‘*similar in principle to that of the United Kingdom*’, then its monarch too is determined by the law of the land, being the common law as altered by the *Bill of Rights 1688*, the *Act of Settlement 1700* and other relevant statutes, which form part of Canadian law. This is also the case in Australia and the other former ‘Dominions’ (as they were known).

Similarly, the reference to the ‘Crown of the United Kingdom of Great Britain and Ireland’ cannot be regarded as the source of such a rule.¹⁰⁴ First, in 1867 this was an indivisible Crown, so there could not have been any rule at that time recognising that the Queen of Canada must be the same person who holds the office of Queen of the

103. See eg: Rob Nicholson, “Changing the Line of Succession to the Crown” (Summer 2013) 36:2 *Canadian Parliamentary Review* 8; Peter Hogg, ‘Succession to the Throne’ (2014) 33 *NJCL* 83 at 90 [Hogg, “Succession to the Crown”]; and Ian Holloway, “The Law of Succession and the Canadian Crown” in D Michael Jackson and Philippe Lagassé, eds, *Canada and the Crown – Essays on Constitutional Monarchy* (Montreal and Kingston: McGill-Queen’s University Press, 2013) 107, 113.

104. Cf *O’Donohue*, *supra* note 24 at para 21.

United Kingdom given that no such separate offices existed. Such a rule of recognition could therefore not possibly be inferred from the preamble as originally drafted and applied. Those who assert that the preamble contains a rule of automatic recognition or a 'rule of Crown identification'¹⁰⁵ are mixing up means and ends. Certainly, in 1867 it would have been true to say that the 'Queen' referred to in the *British North America Act* was the same person who was the Queen of the United Kingdom, as is the case today. However, the means of achieving that end was the law of succession to the throne which formed part of British law and which applied by paramount force as part of Canadian law. It was the paramountcy of this law that ensured the unity of the Crown across the Dominions – hence the concern expressed by George V at the termination of its paramountcy when the *Statute of Westminster* came into effect.

As a rule of Crown identification could have had no logical existence prior to the Crown becoming divisible, if such a rule exists at all today, the preamble to the *British North America Act* must have been given new meaning to provide the basis for such a rule once the Crown became divisible. None of the commentators who proclaim the existence of such a rule, however, explain how a preamble which does not on its face refer to any such rule and which clearly could not have contained such a rule at the time it was first enacted, transformed to include such a rule after the Crown became divisible.

Secondly, it could not realistically be argued that the Crown governing Canada today is still the 'Crown of the United Kingdom of Great Britain and Ireland'. This is because such a Crown no longer exists (given the departure of the Republic of Ireland). Moreover, if Canada was governed by the Crown of the United Kingdom, then the Queen would have to act upon the advice of her British Ministers exercising constitutional powers in relation to Canadian matters. As Her Majesty in fact acts upon the advice of Canadian Ministers, when exercising her powers in relation to Canada, she does so under the Crown of Canada, not the Crown of the United Kingdom. Hence, the reference to the Crown in the preamble, if it is to have any ongoing status beyond an historic statement, must be reinterpreted as referring to the Crown of Canada.

It has also been argued by the Canadian Government that references in the *Constitution Act* to 'the Queen' must be interpreted as

105. See Mark Walters' contribution to this volume.

meaning the ‘Queen of the United Kingdom’.¹⁰⁶ Again, if this were the case, then the Queen of the United Kingdom could only take advice from her United Kingdom Ministers, regarding Canadian matters. To an Australian constitutional lawyer it would seem inconceivable that a Canadian court would interpret references to the Queen in such a manner. Certainly, in Australia, the High Court has reinterpreted all such references to the Queen in the Australian Constitution as meaning the ‘Queen of Australia’.¹⁰⁷

The High Court of Australia explained its interpretative approach as follows:

The constitutional term “subject of the Queen” must be understood in the light of the development and evolution of the relationship between Australia and the United Kingdom and the United Kingdom and those other countries which recognise the monarch of the United Kingdom as their monarch. In particular, the expression “subject of the Queen” can be given meaning and operation only when it is recognised that the reference to “the Queen” is not to the person but to the office. That recognition necessarily entails recognition of the reality of the independence of Australia from the United Kingdom.¹⁰⁸

As Justice Kirby has noted, the Constitution has adapted to ‘the practical and statutory change in the position of the Queen as Queen of Australia’ and that this has been recognised in many cases.¹⁰⁹

Canada, too, has become independent from the United Kingdom, and there is a separate office of the Queen of Canada which is governed by Canadian law. As Hunter has argued, to the extent that references to the Queen would otherwise be interpreted as mean-

106. Note that the Leader of the Government in the Canadian Senate went further to state that ‘The Constitution provides that the Queen of the United Kingdom is also the Queen of Canada’: *Debates of the Senate*, 41st Parl, 1st Sess, No 148 (26 February 2013) at 3307.

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

108. *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 ¶ 14 (Gleeson CJ, Gummow and Hayne JJ).

109. *Singh v Commonwealth* (2004) 222 CLR 322 ¶263 (Kirby J).

ing the Sovereign of the United Kingdom, the ‘express disavowal of future [British] legislative authority over Canada would almost certainly... constitute a “contrary intention”... and thus displace’ any such presumption.¹¹⁰

It has also been suggested that there is a constitutional requirement of ‘symmetry’ across the Realms that the Sovereign of each Realm must be the person who is the Sovereign of the United Kingdom under the one British succession law.¹¹¹ If there ever was such a symmetry requirement, it was destroyed in 1936 when different persons were King in the different Dominions from 10-12 December 1936. Of all the Dominions that were made subject to the *Statute of Westminster* 1931, the only one that considers that such a requirement of symmetry exists is Canada. South Africa and the Irish Free State never did, as they deliberately recognised as their King a person who was not King of the United Kingdom in the period 10-12 December. Moreover, Australia and New Zealand have both long recognised their own separate Crowns and that the laws of succession to that Crown have been incorporated in their own domestic laws. They have voluntarily agreed to change their own succession laws to accord with British changes.¹¹² Neither has accepted a constitutional requirement of symmetry or an automatic rule of recognition.

Ultimately, there is no textual support in the preamble or the text of the Canadian Constitution for the assertion of an automatic rule of recognition and nor is there any historic support for such a proposition. It appears, from an outsider’s point of view, that this newly created doctrine of automatic recognition is the child of political convenience arising from an unwillingness to engage in inter-

110. Josh Hunter, “A More Modern Crown: Changing the Rules of Succession in the Commonwealth Realms” (2012) 38:3 Commonwealth L Bull 423 at 446 [Hunter].

111. The original source of the symmetry argument appears to be a confused discussion in *O’Donohue supra* note 24 at para 33-34 where Rouleau J on the one hand seemed to regard the rule of symmetry as requiring each Realm to maintain its own laws of succession in a manner consistent with the British laws of succession (implicitly recognising that there is no rule of automatic recognition) but on the other hand seemed to regard any Canadian change to its laws of succession as purporting to change those of all the Realms. These propositions are inconsistent. Canadian legislation amending the *Act of Settlement* as part of the law of Canada would not purport to alter the *Act of Settlement* as part of the law of the United Kingdom or any other Realm, just as Canadian legislation to repeal s 4 of the *Statute of Westminster* did not alter the *Statute of Westminster* in any other Realm.

112. See: *Royal Succession Act* 2013 (NZ) (royal assent 17 December 2013). In Australia, as noted above, the process continues underway, with five of the six States so far passing the relevant request legislation.

governmental negotiations and to confront the possibility of a need to undertake constitutional change through s 41 of the *Constitution Act* 1982 (Can).¹¹³

IS THE CANADIAN GOVERNMENT'S DECISION TO 'ASSENT' TO BRITISH CHANGES TO THE RULES OF SUCCESSION SUPPORTED BY PRECEDENT?

One of the explanations given by the Canadian Government for 'assenting' to British changes to the rules of successions was that it was acting in accordance with precedent. The Minister for Justice and Attorney-General stated in evidence to the Senate Standing Committee on Legal and Constitutional Affairs that the Canadian *Succession to the Throne Bill* 2013, in simply assenting to the enactment of British legislation, followed the precedent in relation to the abdication of Edward VIII and the precedents of 1947 and 1953 in relation to the royal style and titles.¹¹⁴ In this, it would appear, that he was poorly advised because on none of those occasions did Canada simply assent to the enactment of British legislation.

When it came to the abdication, the Canadian Government requested and consented to the application of *His Majesty's Declara-*

113. Note that this chapter does not seek to deal with the further constitutional issue of whether s 41 of the Constitution is engaged by changes to the law of succession to the Canadian Crown. For discussion on this issue see: Margaret Banks, "If the Queen were to Abdicate: Procedure Under Canada's Constitution" (1990) *Alta L Rev* 535 at 537-539; Hunter, *supra* note 110 at, 445-448; Andrew Smith & Jatinder Mann, "A Tale of Two Ex-Dominions: Why the Procedures for Changing the rules of Succession are So different in Canada and Australia" Institute of Intergovernmental Relations Working Paper, Queen's University, 2013: <http://www.queensu.ca/iigr/WorkingPapers/NewWorkingPapersSeries/workingpaper052013smithandmann.pdf>; Hogg, "Succession to the Crown", *supra* note 103 at 92-94; Philippe Lagassé and James 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* 17 at 22-3; Robert Hawkins, "The Monarch is Dead; Long Live the Monarch": Canada's Assent to Amending the Rules of Succession" (2013) 7:3 *Journal of Parliamentary and Political Law* 593-610. Note, however, the Canadian Supreme Court has twice recently rejected the Harper Government's view that the s 41 amending procedure does not apply to particular laws: *Reference re Supreme Court Act, ss 5 and 6* [2014] SCC 21; and *Reference re Senate Reform* [2014] SCC 32.

114. Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence* (21 March 2013) online: <http://www.parl.gc.ca/Content/SEN/Committee/411/lcjc/32ev-50040-e.htm?Language=E&Parl=41&Ses=1&comm_id=11>. See also: Rob Nicholson, "Changing the Line of Succession to the Crown" (Summer 2013) 36:2 *Canadian Parliamentary Review* 8.

tion of Abdication Act 1936 (UK) as part of Canadian law. It did not accept that whoever was the Sovereign of the United Kingdom was automatically the Sovereign of Canada. There was no acceptance of any 'automatic recognition rule'. The Canadian Prime Minister, Mackenzie King, insisted on 10 December 1936 that the draft preamble to the Act be altered to make it clear that Canada was giving its request and consent pursuant to s 4, not general assent.¹¹⁵ He stated in a telegram to the British Government:

Under the terms of section 4 United Kingdom Parliament cannot legislate for Canada unless it is expressly declared in Act that Canada has requested and consented to the enactment thereof or in other words Canada must, as regards necessary legislative procedure have taken initiative by formally requesting such action and expressed its consent to terms of draft Act.¹¹⁶

He therefore insisted upon the inclusion in the preamble of reference to Canada's request and consent under s 4. The Canadian Prime Minister clearly saw the British Act as legislating for Canada and becoming part of Canadian law. Request and consent under s 4 was only necessary and applicable if the UK law were to 'extend to a Dominion as part of the law of that Dominion' – not if there was a rule of recognition that required the King of Canada to be the same person who was King of the United Kingdom.

Canada's subsequent parliamentary assent in the *Succession to the Throne Act 1937 (Can)* refers in its preamble to the request and consent of Canada pursuant to s 4 of the *Statute of Westminster*. This shows both that assent under convention 2 was regarded as something additional to, rather than in substitution for, the request and consent required by s 4. It also shows that Canada had a law regarding succession and that this law was altered in 1936 by a further statute on the succession which was applied as part of the law of Canada and remains part of the law of Canada.

The precedent, therefore, from 1936 is that the Canadian law of succession to the throne required change, either through the enactment of independent Canadian legislation or, as occurred, a request and consent to the application of the British Act as part of Canadian

115. Telegram from UK High Commissioner in Canada (10 December 1936): PRO: DO 121/33.

116. Telegram from UK High Commissioner in Canada to the Secretary of State for Dominion Affairs (9 December 1936), conveying the message of the Canadian Prime Minister: PRO: DO 121/33.

law. As Banks has noted, the ‘procedure followed in 1936-37 would not be correct today’ since the passage of the *Canada Act 1982*.¹¹⁷ The only option that this leaves is the enactment of substantive Canadian legislation implementing the relevant changes as part of Canadian law.

Nor is it the case that the changes to the royal style and titles, made pursuant to the same convention in the preamble to the *Statute of Westminster*, simply assented to the application of a United Kingdom law.¹¹⁸ In 1947 the Canadian *Royal Style and Titles Act (Canada) 1947* assented to the alteration of the King’s royal style and titles to exclude his title as Emperor of India. It did not assent to the enactment of legislation in the United Kingdom. Instead, it was ‘agreed that the omission should be made effective *as regards Canada* by means of an Order in Council’.¹¹⁹ The source of power for the Canadian Order in Council was expressed to be the *Royal Style and Titles Act (Canada) 1947*,¹²⁰ not any British Act of Parliament.

The *Royal Style and Titles Act 1953 (Canada)* assented to the Queen, as Queen of Canada, under the Great Seal of Canada, adopting a royal style and title with respect to Canada. It did not assent to the enactment of United Kingdom legislation. The actual proclamation of that royal style and title was made by the Queen on the advice of her Canadian Privy Council, under the Great Seal of Canada.¹²¹

It is clear in relation to every precedent concerning succession to the throne and changes to the royal style and titles from 1931 to 2012, that Canada did not simply assent to the enactment of British laws. In 1936, it gave request and consent to the application of the British law as part of Canadian law. In 1947 it enacted Canadian legislation which authorised a Canadian order-in-council. In 1953 it enacted Canadian legislation authorising the Queen of Canada, acting on the advice of the Canadian Privy Council, to make a proclamation under the Great Seal of Canada. It was not until 2013, that the Canadian Government decided that it no longer had a role in relation to succession or royal style and titles, apparently abdicating these matters to the United Kingdom.

117. Banks, *supra* note 102 at 537.

118. See also: Garry Toffoli & Paul Benoit, “More is Needed to Change the Rules of Succession for Canada” (2013) 36:2 Canadian Parliamentary Review 10 at 10-11.

119. Canada, Order in Council, PC 2828, 1948 [emphasis added].

120. Canada, Order in Council, PC 2828, 1948; and *The Canada Gazette*, Vol LXXII, No 5, 22 June 1948.

121. *Canadian Gazette*, Vol LXXXVII, No 6, 29 May 1953.

CONCLUSION

This chapter has argued that there is no automatic rule of recognition and that Australia and Canada must each make substantive changes to the laws of succession as they apply as part of their respective laws. The Canadian Parliament, by declining to amend the *Act of Settlement* and other laws governing the succession to the Canadian Crown that apply as part of the law of Canada, has undermined the personal union of Crowns by retaining a law of succession that will be out of step with the law applying to the Crowns of the United Kingdom and the other Realms.

It is sometimes claimed that Canada has taken the more 'conservative' and pro-monarchist approach and that Australia was driven in its actions by underlying republicanism. The potential outcomes show otherwise. If there is any doubt about which is the legally correct course, Australia has taken the more conservative and rational approach. The Australian Commonwealth Government has respected the States and the constitutional role of the Sovereign in each of the States. It has done this by negotiating with them and reaching an agreement with them that involves legislation in each State Parliament. By doing so, it has avoided federal disharmony and litigation. If it is ever held by a court in the future that the Commonwealth was wrong and that there *is* a constitutional rule of automatic recognition in Australia, then the Commonwealth and State legislation would be invalid, but the outcome in terms of the succession to the Australian Crown would be the same, because the same rules would apply in the United Kingdom in determining who is Sovereign.

Canada, however, by taking the opposite approach has excluded the provinces from involvement in a matter of fundamental constitutional importance, causing federal disharmony and resulting in litigation. If the Canadian Government is wrong and there is no constitutional rule of automatic recognition, then the outcome will be that different rules of succession apply to Canada than apply in all the other Realms with the consequence that Canada could potentially end up with a different monarch from the United Kingdom, terminating the personal unity of the Crown.

The Australian approach has been conservative, respectful of the role of the monarchy in the States and concerned to maintain the personal unity of the Crown. The Canadian approach has put at risk the personal unity of the Crown, potentially undermining the monarchy and has undermined the federal system by denying the provinces

their rightful constitutional role in relation to changes concerning the Crown. From an Australian perspective, it seems a potentially very high price to pay for the short-term advantage of avoiding the bother of intergovernmental negotiations.

CHAPITRE 13

L'ABDICTION DU ROI ÉDOUARD VIII EN 1936: «AUTOPSIE» D'UNE MODIFICATION DE LA CONSTITUTION CANADIENNE

Julien Fournier*, **Patrick Taillon****,
Geneviève Motard† et **André Binette‡**

L'adoption par le Parlement fédéral, sans le consentement des provinces, de la *Loi de 2013 sur la succession au trône*¹ représente, à l'instar des projets de réformes du Sénat² et d'amendement à la *Loi sur la Cour suprême du Canada* (affaire Nadon)³, une tentative de modification unilatérale d'une caractéristique essentielle de la Constitution canadienne, soit les règles de désignation du chef de l'État, dites règles de succession. Cette loi du Parlement cherche à donner suite, en droit canadien, à l'accord politique conclu lors du Sommet de Perth en 2011 qui, principalement, manifeste l'intention de chacun des 16 royaumes du Commonwealth de coordonner une modification de leurs règles de succession royale respectives. D'un point de vue politique, cette vaste réforme poursuit l'objectif de mettre fin à la discrimination sexuelle découlant de la primogéniture masculine, de supprimer l'incapacité à régner d'un prétendant au trône résultant du mariage avec un catholique romain et de limiter aux cinq premiers

* Étudiant en droit, Université Laval.

** Professeur agrégé, Université Laval.

† Professeure, Université Laval.

‡ Avocat, DS Welsh Bussière.

Les auteurs tiennent à remercier Amélie Binette et Mathilde Asselin Van Coppenolle pour leur collaboration à la préparation de ce texte, de même que le Fonds de recherche du Québec – Société et culture pour l'aide financière accordée à la réalisation de cet article dans le cadre du programme Établissement de nouveaux professeurs-chercheurs.

1. *Loi de 2013 sur la succession au trône*, LC 2013, c 6 [*Loi de 2013*].

2. *Renvoi relatif à la réforme du Sénat*, 2014 CSC 32, [2014] 1 RCS 704.

3. *Renvoi relatif à la Loi sur la Cour suprême*, art 5 et 6, 2014 CSC 21, [2014] 1 RCS 433.

successibles l'exigence d'obtenir le consentement royal s'appliquant aux mariages des héritiers au trône⁴.

Sans contester l'opportunité politique de ces importants changements proposés aux règles de succession royale, la *Loi de 2013* pose problème : il s'agit d'une tentative de modifier la Constitution du Canada sans respecter les exigences constitutionnelles établies par la Partie V de la *Loi constitutionnelle de 1982*⁵. Parce qu'elle se limite à exprimer « l'assentiment⁶ » du Canada à un projet de loi britannique⁷, la loi canadienne emprunte – partiellement et maladroïtement – la méthode retenue en 1936 pour modifier la Constitution du Canada à la suite de l'abdication du roi Édouard VIII. Elle représente à cet égard un retour à l'époque où le Canada ne disposait pas de la capacité juridique à modifier les aspects essentiels de sa Constitution.

De toute évidence, cette forme de renonciation à la souveraineté canadienne, teintée d'une nostalgie impériale, compromet l'un des acquis majeurs du rapatriement de la Constitution de 1982 : l'extinction de la capacité du Parlement britannique à légiférer pour le Canada⁸. En ce sens, la *Loi de 2013* contrevient à la lettre et à l'esprit de l'article 2 de la *Loi de 1982 sur le Canada*⁹, lequel a pour-

4. Sur la genèse de la modification faite en 2013 à la succession royale dans le Commonwealth et sur les procédures contemporaines de modification dans les différents royaumes, voir : Anne Twomey, « Changing the Rules of Succession to the Throne » (2011) 11 : 71 Sydney Law School Research Paper.
5. Annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11, reproduit dans LRC 1985, ann II, n° 44 [LC de 1982].
6. *Loi de 2013*, *supra* note 1, art 2.
7. Bill 110, *A Bill to Make succession to the Crown not depend on gender; to make provision about Royal Marriages; and for connected purposes*, sess 2012-2013, 2012 (sanction royale, 25 avril 2013). Ce projet de loi britannique fut adopté après la sanction royale de la loi canadienne : *Succession to the Crown Act 2013* (R-U), c 20.
8. Anne Twomey, « The Royal Succession and the De-Patriation of the Canadian Constitution » (4 février 2013), en ligne : Constitutional Critique <http://blogs.usyd.edu.au/cru/2013/02/the_royal_succession_and_the_d.html>; James W.J. Bowden, « Canada Cannot Assent to British Law », *Ottawa Citizen* (5 février 2013) A11; Philippe Lagassé, « The Queen of Canada Is Dead; Long Live the British Queen. Why the Conservatives Must Rethink Their Approach to Succession », *Maclean's* [de Toronto] (3 février 2013); « Op-Ed: Canada's Independence Is at Stake », *Ottawa Citizen* (5 juillet 2013). *Contra* : Benoît Pelletier, « Loi sur la succession au trône – Le fédéral n'a pas agi inconstitutionnellement », *Le Devoir* [de Montréal] (12 juillet 2013) [postérieur à la *Loi de 2013*]; Andrew Heard, « Dilemmas from Changes to the Royal Succession: Is There a Canadian Monarchy? », British Columbia Political Studies Association Annual Conference, présentée à l'Université de Colombie-Britannique, 2 mai 2013 [non-publiée] p 6. en ligne : <<http://www.bcpsa.ca/previous-agms/323-2>> [postérieur à la *Loi de 2013*].
9. (R-U), 1982, c 11, art 2.

tant mis fin au pouvoir du Parlement britannique d'adopter des lois applicables pour le Canada.

Il faut dire que la technique rédactionnelle employée par le Parlement fédéral dans la *Loi de 2013* a pour objectif – ou à tout le moins pour effet – de court-circuiter la procédure de modification de la Constitution qui devrait s'employer dans ce cas, plus particulièrement l'alinéa 41a) de la *LC de 1982*, lequel protège la charge de la Reine et de ses représentants¹⁰. Pour ce faire, le législateur fédéral s'inspire, à tort selon nous, des formes et techniques rédactionnelles utilisées en 1936-37, lors du seul précédent pertinent en cette matière, soit la modification des règles de succession rendue nécessaire à la suite de l'abdication du roi Édouard VIII.

10. L'argumentaire du gouvernement fédéral et des principaux experts mobilisés depuis 2013 au soutien de son projet de loi tente à tout prix d'éviter l'application de l'alinéa 41a) de la *LC de 1982*, *supra* note 5. Entre ceux qui, comme Benoît Pelletier, plaident pour le recours au pouvoir résiduaire de légiférer pour la « paix, l'ordre et le bon gouvernement » et ceux qui, comme Peter Hogg, misent sur l'existence d'une règle non écrite de reconnaissance automatique du souverain britannique par le Canada, il n'existe en définitive qu'un seul point commun : le souci d'écartier l'application de l'alinéa 41a) de la *LC de 1982* (*ibid*). Ainsi, le ministre Nicholson affirme sans détour « que le projet de loi C-53 ne modifie pas la Constitution du Canada relativement à la Charge de la reine ». Rob Nicholson, « Modifications apportées à la loi concernant la succession au trône » (2013) 36 *Revue parlementaire canadienne* 8 aux pp 8-9. Transparent quant aux enjeux de ce débat, Peter Hogg admet explicitement que si la solution de la reconnaissance automatique n'est pas retenue par les tribunaux, « the result is highly inconvenient », puisque la procédure de modification applicable alors « would undoubtedly be the “unanimity” procedure of s. 41 ». Peter W. Hogg, « Succession to the Throne » (2014) 33 : 1 *NJCL* 83 [postérieur à la *Loi de 2013*], [Hogg, « Succession »]. Benoît Pelletier, quant à lui, commence sa comparution devant le comité sénatorial chargé de l'étude de ce projet de loi par une charge à l'endroit de ceux qui, comme nous, prétendent que les provinces ont leur mot à dire en cette matière, et ce, depuis l'adoption de la *LC de 1982*, *supra* note 5. Il déclare : « Il n'est pas nécessaire d'appliquer la procédure de modification de la Constitution canadienne prévue à la partie V de la *Loi constitutionnelle de 1982*. [...] Le Parlement canadien peut adopter une loi sur l'ordre de succession au trône en exerçant son pouvoir résiduel. » Faisant fi des changements intervenus en 1982, il ajoute : « Ni le Parlement canadien ni le gouvernement ne sont tenus de consulter les provinces ou, *a fortiori*, d'obtenir leur consentement. Les précédents de 1937, de 1947 et de 1952 montrent que les provinces n'ont aucun rôle à jouer dans les modifications relatives à la succession au trône ou aux titres royaux. Les provinces n'ont pas réagi non plus. Aucune règle constitutionnelle, y compris les conventions constitutionnelles, n'exige la participation des provinces. Au Canada, il y a un souverain en vertu d'un ensemble de règles, qui relève exclusivement du gouvernement fédéral, sauf lorsque le paragraphe 41a) de la *Loi constitutionnelle de 1982* s'applique. » Sénat, Comité sénatorial permanent des affaires juridiques et constitutionnelles, *Témoignages*, 41^e lég, 1^{re} sess, no 32 (20 mars 2013) (Benoît Pelletier), [postérieur à la *Loi de 2013*] [Pelletier, *Témoignages*].

Mis à part le caractère anachronique de cette solution, cette façon de s'inspirer du précédent de 1936 retenu par le Parlement fédéral reste bien sélective. À supposer un instant que ce précédent s'impose en droit, encore aujourd'hui, celui-ci n'a été que très partiellement respecté lors de l'adoption de la *Loi de 2013*. De toute évidence, le législateur fédéral ne semble retenir de l'expérience de 1936 que les aspects de la procédure qui servent ses intérêts, soit le respect de certaines conventions constitutionnelles, faisant fi de l'essentiel des exigences juridiques requises par le droit formel. C'est dans cette optique que la présente étude vise à dresser un bilan de l'expérience de 1936 en analysant le rôle respectif des autorités fédérales canadiennes et du Parlement britannique au moment de cette modification de la Constitution canadienne survenue à la suite de l'abdication du roi Édouard VIII.

Conséquence de la volonté du roi de se marier dans des conditions jugées inacceptables par les gouvernements du Royaume-Uni et des dominions, l'abdication du roi Édouard VIII a nécessité d'importants changements aux règles de désignation du chef de l'État, et ce, afin d'exclure ses descendants directs à la fois de la liste des prétendants au trône et des exigences de consentement royal au mariage. Plus qu'une simple abdication, il s'est alors produit une transformation significative des règles de désignation du chef de l'État canadien, et ce, quelques années à peine après l'entrée en vigueur, au Canada, du *Statut de Westminster de 1931*¹¹ et de la divisibilité effective de la Couronne qui résulte des conférences impériales des années 1920. De manière à souligner les écarts entre les procédures employées, en 1936, et celles préconisées par les autorités fédérales canadiennes, en 2013, nous analyserons d'abord le droit canadien de la succession royale, de sa réception à sa première modification [*Titre 1*], pour ensuite examiner en détail les changements opérés en 1936 et les exigences juridiques cumulatives qui se sont imposées à l'époque [*Titre 2*].

1. LE DROIT CANADIEN DE LA SUCCESSION ROYALE: DE LA RÉCEPTION À SA PREMIÈRE MODIFICATION

À l'origine du choix de procédure employée en 1936-37 par les autorités fédérales canadiennes et par le Parlement de Londres, un constat fort simple: il existe au Canada un droit portant sur la succession royale qui ne peut être modifié que dans le respect du droit

11. *Statut de Westminster de 1931* (R-U), 22 Geo V, c 4. [*Statut de Westminster*].

constitutionnel canadien. Ce droit était, à l'origine, celui de l'Empire britannique, applicable à une Couronne impériale indivisible. Il a été reçu dans les anciennes colonies et possessions formant aujourd'hui le Canada à partir de l'affirmation de la souveraineté de la Couronne sur ces régions, mais il est longtemps resté uniquement modifiable par le Parlement britannique. Dans ce contexte colonial fort complexe où, jusqu'en 1982, le Canada n'avait pas le pouvoir de modifier – sans le concours du Parlement britannique – les caractéristiques essentielles de sa Constitution¹², les règles relatives à la désignation du chef de l'État ont évolué à mesure que les rapports entre le Canada et les autorités britanniques se sont transformés. C'est pourquoi la *réception* des règles de succession doit être clairement distinguée des règles relatives à leur *modification* [Titre a], et ce, avant même d'examiner le cadre juridique mis en place par le *Statut de Westminster de 1931* et appliqué lors de l'abdication du roi Édouard VIII [Titre b].

a. Les distinctions qu'impose l'évolution coloniale

Pour les règles de succession royale, comme pour bien d'autres matières, l'évolution – sans rupture – des rapports coloniaux entre le Canada et les autorités britanniques entraîne toute une série de fines distinctions quant aux sources de l'ordonnement juridique canadien. Ici, quatre précisions s'imposent.

i. La réception en droit canadien des règles de succession

L'évolution coloniale soulève, dans un premier temps, la question incontournable de la *réception* des règles de succession. Au Canada, cette dernière s'est opérée bien avant la création de l'Union fédérale de 1867, mais à des moments qui varient d'une région à l'autre. Génér-

12. Si le Parlement britannique détenait formellement la capacité à agir à titre de pouvoir constituant pour le Canada, il a tout de même établi un certain nombre d'exceptions à ce principe en autorisant le Parlement fédéral ou la législature des provinces à modifier des normes constitutionnelles souples telles que la constitution interne de la province sous l'article 92(1) de la *Loi constitutionnelle de 1867* ([R-U], 30 & 31 Vict, c 3, reproduite dans LRC 1985, ann II, n° 5 [LC de 1867]), la création d'une cour générale d'appel et de tribunaux fédéraux par l'article 101 de la *LC de 1867*, la création de nouvelles provinces par l'article 146 de cette loi (pouvoir confirmé en 1871 par la *Loi constitutionnelle de 1871* [R-U], 34 & 35 Vict, c 28, reproduite dans LRC 1985, ann II, n° 11) ou encore, après 1949, les caractéristiques non essentielles des institutions fédérales sous le paragraphe 91(1) de cette loi (*Acte de l'Amérique du Nord britannique* [N° 2] [R-U], 1949, 13 Geo VI, c 81, reproduit dans LRC 1985, ann II, n° 33).

ralement, les règles du droit privé étaient reçues dans le droit de la colonie ou de la possession suivant la manière dont cette colonie ou cette possession avait été acquise par la Couronne britannique¹³. En présence d'une colonie de conquête ou de cession et jusqu'à ce qu'il promette la création d'une assemblée élue, le monarque disposait – par prérogative – du pouvoir de légiférer pour la colonie et pouvait, dès lors, décider du droit qui y était applicable, tandis que, dans une colonie dite de peuplement, la règle prévoyait plutôt que les colons importaient leur ordre juridique, mais seulement dans la mesure où les règles ainsi introduites étaient applicables («*suitable*») à la situation coloniale¹⁴.

À la différence de ces techniques de réception des règles du droit privé, le droit constitutionnel impérial, incluant le droit colonial britannique, a été introduit *ex proprio vigore*, c'est-à-dire de sa propre autorité, dès l'affirmation de la souveraineté de la Couronne sur ces territoires, et ce, indépendamment de la manière dont ceux-ci avaient été acquis¹⁵. Le moment de cette réception résulte donc de circonstances historiques. Parce que les colonies de l'Amérique du Nord britannique ont été conquises ou peuplées à des dates différentes les unes des autres, la réception du droit constitutionnel impérial s'est opérée à des moments distincts.

Mais encore, en fonction des intérêts de la métropole, l'application de certaines règles du droit impérial a pu être différée dans le temps. En effet, certains aspects du droit impérial s'avèreraient parfois non pertinents ou inapplicables au contexte particulier d'une colonie¹⁶.

13. Voir notamment *Campbell v Hall*, (1774) 1 Cowp 204, 98 ER 1045 (KB) [*Campbell*]; *Conseil scolaire francophone de la Colombie-Britannique c Colombie-Britannique*, [2013] 2 RCS 774, 2013 CSC 42 aux para 15, 17. Voir aussi Michel Morin, « Les changements de régimes juridiques consécutifs à la Conquête de 1760 » (1997) 57 R du B 689, lequel précise que la distinction entre les règles de réception du droit privé et du droit public n'est apparue qu'au XIX^e s.; J. E. Côté, « The Reception of English Law » (1977) 15 Alta LR 29; Peter W. Hogg, *Constitutional Law of Canada*, Student ed, Toronto, Carswell, 2011 [antérieur à la *Loi de 2013*] aux pp 2-1 et s [Hogg, *Constitutional Law*]; Russel Lawrence Barsh, « Indigenous Rights and the Lex Loci in British Imperial Law » dans Kerry Wilkins, dir, *Advancing Aboriginal Claims: Visions, Strategies, Directions*, Saskatoon, Purich, 2004, 91.

14. Voir notamment *Campbell*, *supra* note 13.

15. *Campbell*, *supra* note 13; voir également : *Calder et al c Attorney-General of British Columbia*, [1973] RCS 313 à la p 395 (j Hall); *R c Côté*, [1996] 3 RCS 139 au para 39-40; *PG du Qué et Keable c PG du Can et autres*, [1979] 1 RCS 218 à la p 244; *Chaput v Romain*, [1955] SCR 834 à la p 853; *Quebec North Shore Paper c C.P. Ltée*, [1977] 2 RCS 1054 à la p 1063; Pelletier, *Témoignages*, *supra* note 10.

16. Selon Anne Twomey, bien que ces règles aient été reçues, elles pouvaient demeurer en « dormance » dans le droit interne d'une colonie. Anne Twomey, *The laws*

Par exemple, des parties du *Bill of Rights* ou de l'*Act of Settlement*, notamment les dispositions relatives aux privilèges parlementaires, à l'indépendance judiciaire ou à l'*habeas corpus*, ont pu voir leur application différée d'une colonie à l'autre. Ainsi, s'agissant de la *Province of Quebec*, les protections prévues par la *common law* en matière de privilèges parlementaires n'auraient pu être appliquées dès 1763, compte tenu qu'aucune assemblée législative n'était en place.

Cela dit, de telles exceptions, bien qu'envisageables en ce qui concerne certains aspects précis du droit des colonies, n'auraient eu, à l'époque, aucun sens à l'égard des règles constitutives de l'autorité de la Couronne. Dans le cas précis de la désignation du titulaire de la Couronne, il s'agissait, dès l'origine du régime britannique, de la source et du fondement même de l'autorité royale sur les colonies et possessions canadiennes. Ce corpus comprenait notamment des règles de *common law* et certaines dispositions du *Bill of Rights* de 1689¹⁷, de l'*Act of Settlement* de 1701¹⁸ et du *Royal Marriages Act* de 1772¹⁹, ces dernières ayant par la suite été modifiées lors de la réforme de 1936²⁰.

Il faut dire que les termes mêmes du *Bill of Rights* et de l'*Act of Settlement* prévoyaient – expressément – que ces textes s'appliquaient aux possessions et colonies de l'Empire britannique²¹. Corollaires du

of succession to the throne – Australia and Canada, Rapport d'un témoin expert, disponible dans le dossier n° 200-17-018455-139, *Motard et Taillon c Procureur général du Canada*, Cour supérieure, Québec [*Motard et Taillon*] au para 3.7 [Twomey, *Laws of succession*].

17. *Bill of Rights, 1689* (R-U), 1 Will & Mary Sess 2, c 2.

18. *Act of Settlement, 1701* (R-U), 12 & 13 Will 3, c 2.

19. *Royal Marriages Act, 1772* (R-U), 12 Geo III, c 11.

20. Le droit de la succession royale a été modifié, en 1936, par *His Majesty's Declaration of Abdication Act, 1936* ((R-U), 1 Edw VIII and 1 Geo VI, c 3 [*Declaration of Abdication Act*]) qui a amendé l'*Act of Settlement*, *supra* note 18 et le *Royal Marriages Act*, *ibid*. Quant à la réforme de 2013, celle-ci cherche maintenant à modifier les trois lois impériales qui composent le droit de la succession royale. *Succession to the Crown Act 2013*, *supra* note 7.

21. *Bill of Rights*, *supra* note 17: «[...] the said Lords Spirituall and Temporall and Commons doe further pray that *it may be enacted* That all and every person and persons that is are or shall be reconciled to or shall hold Communion with the See or Church of Rome or shall professe the Popish Religion or shall marry a Papist shall be excluded and be for ever uncapable to inherit possesse or enjoy the Crowne and Government of this Realme and Ireland and *the Dominions* thereunto belonging or *any part of the same* or to have use or exercise *any Regall Power Authoritie or Jurisdiction within the same* » [nos italiques]; *Act of Settlement*, *supra* note 18. Cette loi rappelle l'interdiction inscrite dans le *Bill of Rights* pour celui qui aura la Couronne et le gouvernement de tout un chacun des dominions anglais de marier un catholique: « [...] or marry a Papist should be excluded and are by that Act made for ever incapable to inherit possess or enjoy the Crown and Government of this Realm and Ireland and *the Dominions thereunto belonging* [...] ».

principe de suprématie parlementaire, ces lois, qui composaient le droit fondamental de l'Empire, consacraient l'autorité suprême du Parlement britannique d'établir un ordre de succession au trône et de l'imposer dans l'ensemble de l'Empire. Étant nécessairement «*suitable*» à la situation de chaque colonie, elles se voyaient intégrées dans le droit interne de chaque domaine («*dominion*») de la Couronne²².

Le droit de la succession royale avait donc été reçu depuis longtemps dans le droit interne des colonies d'Amérique du Nord britannique qui ont décidé, en 1867, de constituer une union fédérale. Au terme de l'article 129 de la *LC de 1867*, ce droit continuait d'en faire partie²³. Celui-ci a effectivement maintenu les lois impériales déjà en vigueur dans le droit des colonies appelées à former la fédération

De plus, cette loi établit le point de départ de la succession royale pour tous les dominions: «[...] it enacted and declared by the Kings most Excellent Majesty by and with the Advice and Consent of the Lords Spirituall and Temporall and Comons in this present Parliament assembled and by the Authority of the same *That the most Excellent Princess Sophia Electress* [...] be and is hereby declared to be the next in Succession in the Protestant Line to the Imperial Crown and Dignity of the said Realms of England France and Ireland *with the Dominions and Territories thereunto belonging* [...]» [nos italiques].

22. Pour les colonies dites de conquête, voir *Campbell*, *supra* note 13. Du point de vue des peuples colonisés, l'intégration des territoires n'est ni consentie ni légitime. Cette théorie de droit colonial cherche à supplanter l'ordre constitutionnel en place et se trouve à être, du même coup, en porte à faux avec les engagements pris, par exemple, dans les traités et alliances avec les peuples autochtones.
23. L'article 129 de la *LC de 1867*, *supra* note 12, se lit: «Except as otherwise provided by this Act, *all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union*, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, *shall continue* in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, *as if the Union had not been made*; subject nevertheless (*except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland*), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.» Dans sa version non officielle française: «Sauf toute disposition contraire prescrite par la présente loi, – *toutes les lois en force en Canada, dans la Nouvelle-Écosse ou le Nouveau-Brunswick, lors de l'union*, – tous les tribunaux de juridiction civile et criminelle – toutes les commissions, pouvoirs et autorités ayant force légale, – et tous les officiers judiciaires, administratifs et ministériels, en existence dans ces provinces à l'époque de l'union, *continueront d'exister* dans les provinces d'Ontario, de Québec, de la Nouvelle-Écosse et du Nouveau-Brunswick respectivement, *comme si l'union n'avait pas eu lieu*; mais ils pourront, néanmoins (*sauf les cas prévus par des lois du Parlement de la Grande-Bretagne ou du Parlement du Royaume-Uni de la Grande-Bretagne et d'Irlande*), être révoqués, abolis ou modifiés par le Parlement du Canada, ou par la législature de la province respective, conformément à l'autorité du Parlement ou de cette législature en vertu de la présente loi.» [nos italiques].

tout en conservant la règle suivant laquelle ces lois relevaient exclusivement de la compétence du Parlement britannique, une exigence qui, à l'époque, visait l'ensemble des normes constitutionnelles de rang supralégislatif, dont, au premier chef, les dispositions rigides de la *LC de 1867*.

Le préambule de la *LC de 1867*²⁴ a également confirmé la réception, en droit canadien, des règles de succession. En faisant référence au fait que le Canada a « une constitution reposant sur les mêmes principes que celle du Royaume-Uni »²⁵, ce préambule témoigne, d'une part, de la réception des principes constitutionnels britanniques à l'échelle de la fédération²⁶ et, d'autre part, de la constitutionnalisation de ceux-ci²⁷. Or, d'hier à aujourd'hui, un des principes fondamentaux de la Constitution britannique demeure que le chef de l'État doit être désigné ni par ses prédécesseurs ni par jugement de Dieu²⁸ ni selon le droit d'un autre État²⁹, mais bien en fonction de la loi du Parlement titulaire de la souveraineté dans l'État.

Enfin, cette réception des lois impériales fondamentales a été confirmée par plusieurs³⁰, notamment par le juge en chef Laskin qui,

24. Le préambule de la *LC de 1867* est, selon le juge en chef Lamer, le « portail de l'édifice constitutionnel » canadien. *Renvoi relatif à la rémunération des juges de la Cour provinciale de I.P.E.*, [1997] 3 RCS 3 au para 109, juge en chef Lamer [*Renvoi rémunération des juges*].

25. *LC de 1867*, *supra* note 12, préambule.

26. Henri Brun, Guy Tremblay et Eugénie Brouillet, *Droit constitutionnel*, 5^e éd, Cowansville, Yvon Blais, 2008 [antérieur à la *Loi de 2013*]. Voir *R (Canada) c R (Île-du-Prince-Édouard)*, [1978] 1 CF 533 à la p 549.

27. Tel qu'il a été établi dans les arrêts de la Cour suprême du Canada dont nous traiterons ci-dessous, notamment : *Renvoi rémunération des juges*, *supra* note 24 ; *New Brunswick Broadcasting Co c Nouvelle-Écosse (Président de l'Assemblée législative)*, [1993] 1 RCS 319 [*New Brunswick Broadcasting Co*].

28. André Émond, *Constitution du Royaume-Uni : Des origines à nos jours*, Montréal, Wilson & Lafleur, 2009 aux pp 385-386.

29. *Infra* note 100.

30. C'est du moins ce que Peter Hogg confirme dans cet extrait : « Among the many important statutes of a constitutional character that are not included in the schedule to the Constitution Act, 1982 is the *Act of Settlement, 1701* which is an imperial statute enacted by the Parliament of the United Kingdom *but also to its dominion including Canada* » [nos italiques]. Hogg, *Constitutional Law*, *supra* note 13 aux pp 10-11, s 1.4. Plus près des autorités fédérales canadiennes, Maurice Ollivier, pour le compte du département des Affaires étrangères canadiennes a établi, en 1945, une liste des lois britanniques toujours en vigueur au Canada, où toutes ces lois sont systématiquement mentionnées. Maurice Ollivier, *Problems of Canadian Sovereignty: From the British North America Act 1867 to the Statute of Westminster 1931*, Canadian Law Book Co, 1945, Appendix B aux pp 465-469. Cette énumération contient également *Declaration of Abdication Act*, *supra* note 20 ; voir aussi : Henri Brun, Guy Tremblay et Eugénie Brouillet, *Droit*

dans le *Renvoi : Résolution pour modifier la Constitution*, a affirmé que le *Bill of Rights* de 1689 « fait indubitablement partie du droit du Canada »³¹, une formule reprise ensuite en 2003 par le juge Major, au nom de la Cour, dans l'arrêt *Authorson*³². De même, le juge Rouleau, de la Cour supérieure de l'Ontario, dans l'arrêt *O'Donohue v Canada*, a conclu à la réception des lois impériales dans un litige concernant, précisément, les dispositions relatives aux règles de succession. Dans une décision confirmée par la Cour d'appel de l'Ontario, il écrit :

The *Act of Settlement* is an imperial statute adopted by the United Kingdom in 1701. By its terms it provides that it is an act « established and declared » in the « Kingdoms of England, France and Ireland, and the dominions thereunto belonging ». As a result it became and remains part of the laws of Canada [nos italiques]³³.

Cette reconnaissance des tribunaux canadiens confirme, à notre avis, la réception des lois impériales relatives à la succession royale.

ii. L'application directe des lois impériales fondamentales

Bien qu'intégré en droit canadien au moment de l'affirmation de la souveraineté britannique, le contenu des lois impériales fondamentales ne s'applique que dans la mesure où celui-ci n'a pas été altéré par des normes constitutionnelles adoptées subséquemment. Après tout, le droit impérial n'a rien d'immuable : il peut être adapté

constitutionnel, 6^e éd, Cowansville, Yvon Blais, 2014 [postérieur à la *Loi de 2013*], au para I.35, à la p 17 ; André Tremblay, *Droit constitutionnel*, 2^e éd, Montréal, Thémis, 2000, à la p 9.

31. *Renvoi : Résolution pour modifier la Constitution*, [1981] 1 RCS 753 au para 59, juge en chef Laskin pour la majorité de la Cour.
32. *Authorson c Canada (Procureur général)*, 2003 CSC 39, [2003] 2 RCS 40. De plus, dans le *Renvoi relatif à la sécession du Québec*, la Cour affirme à propos d'une autre loi impériale fondamentale : « L'évolution de notre tradition démocratique remonte à la *Magna Carta* (1215) et même avant [sic], à travers le long combat pour la suprématie parlementaire dont le point culminant a été le *Bill of Rights* anglais de 1689 » : *Renvoi relatif à la sécession du Québec*, [1998] 2 RCS 217 au para 63 [*Renvoi sécession*].
33. *O'Donohue v Canada*, 2003 ONSC 41404 au para 3 [*O'Donohue*], juge Rouleau. Le litige portait dans cette affaire sur la conformité des règles de succession royale avec le droit à l'égalité et la protection contre la discrimination garanti par la *Charte canadienne des droits et libertés*, art 15, partie I de la *LC de 1982*, supra note 5. Au paragraphe 35, le juge ajoute : « The fact that the *Act of Settlement* was indexed among the constitutional acts is a further indication that, despite the fact that it was not listed in the *Schedule to the Constitution Act, 1982*, the *Act of Settlement* was intended to be a component of our constitutional enactments (see *Revised Statutes of Ontario, 1897*, vol III, appendix Part 1). »

et modifié au gré des circonstances. Il y a donc lieu, dans un deuxième temps, de faire une autre distinction entre la question de la *réception* des lois impériales et celle de leur *application* actuelle ou contemporaine en droit canadien³⁴.

Des textes plus spécifiques ou plus récents ont pu « faire écran » à l'application directe de certaines parties des lois impériales fondamentales. L'évolution constitutionnelle des colonies a en effet amené ces dernières à adopter, la plupart du temps par l'entremise des autorités britanniques, des dispositions plus précises que celles prévues dans les lois impériales, ces nouvelles normes aménageant certains aspects de ce droit au contexte particulier de chaque colonie. Certaines règles impériales ont donc été modulées ou adaptées suivant la situation coloniale.

Ce serait le cas, par exemple, de l'adoption des articles 96 à 100 de la *LC de 1867* et de l'alinéa 11d) de la *LC de 1982* (deux lois impériales propres à la situation des colonies – ou anciennes colonies – de l'Amérique du Nord britannique) qui ont modifié les règles relatives à l'indépendance judiciaire³⁵. Du coup, ces dispositions spécifiques font aujourd'hui écran à l'application directe de certains articles de l'*Act of Settlement* qui deviennent, dans ces circonstances, une source supplétive³⁶ pouvant, tout au plus, guider l'interprétation des lois plus précises de 1867 et de 1982³⁷.

34. *Conseil scolaire francophone de la Colombie-Britannique c Colombie-Britannique*, *supra* note 13 au par 17.

35. Sous la Constitution de l'Acte d'Union, l'*Acte concernant l'indépendance des juges de la Cour du Banc de la Reine et de la Cour supérieure ainsi que de leur récusation en certains cas*, 1843 (R-U), 7 Vict, c 15 avait aussi contribué à cet aménagement local du principe d'indépendance judiciaire. Voir Jean Leclair et Yves-Marie Morissette, « L'indépendance judiciaire et la Cour suprême: Reconstruction historique douteuse et théorie constitutionnelle de complaisance », (1998) 36: 3 Osgoode Hall LJ 485.

36. Ainsi, au paragraphe 87 du *Renvoi rémunération des juges*, *supra* note 24, le juge en chef Lamer semble confirmer la valeur supplétive de l'*Act of Settlement*, *supra* note 18, dans la mesure où il constate que les dispositions de la *LC de 1982*, *supra* note 5, et de la *LC de 1867*, *supra* note 12, codifient partiellement la sécurité financière protégée par l'*Act of Settlement* (*ibid*). *Renvoi rémunération des juges*, *supra* note 24 au para 87. Le juge Laforest, dissident, considère, quant à lui, que les articles 99 et 100 de la *LC de 1867* (*ibid*) avaient « effectivement constitutionnalisés les éléments fondamentaux de l'indépendance judiciaire énoncés dans l'*Act of Settlement* (*ibid*), de manière à permettre aux tribunaux de prendre des mesures contre les atteintes à ce principe » (au para 311 du même renvoi). Voir aussi les motifs du juge Gonthier pour la majorité de la Cour dans *Therrien (Re)*, 2001 CSC 35, [2001] 2 RCS qui, au paragraphe 67, utilise l'*Act of Settlement* (*ibid*) comme source « d'inspiration » guidant son interprétation.

37. En ce sens, le juge en chef Lamer, dans le *Renvoi rémunération des juges*, *supra* note 24 au para 106, écrit: « Les origines historiques de la protection de l'indé-

Il en va de même en matière de privilèges parlementaires, où l'article 18 de la *LC de 1867* de même que les dispositions des lois fédérales et provinciales font, en quelque sorte, écran à l'application directe de l'article 9 du *Bill of Rights*. Comme le mentionne le juge en chef Lamer, dans l'arrêt *New Brunswick Broadcasting Co*, « avec l'assentiment de la Couronne, une bonne partie du droit relatif au privilège a été codifiée »³⁸. C'est pourquoi le juge Lamer, comme la juge McLachlin, refuse, dans cette affaire, de renvoyer à « un article précis » du *Bill of Rights* : « Cela ne veut pas dire que les principes qui sous-tendent l'art 9 du *Bill of Rights* anglais de 1689 ne font pas partie de notre droit », écrit la juge McLachlin. Toutefois, cela indique qu'il y a désormais des dispositions spécifiques qui font écran à l'application directe de cet aspect du *Bill of Rights*. Ce dernier est alors réduit, en certaines matières, à n'être qu'une source de droit ayant valeur supplétive³⁹ ou guidant l'interprétation du droit constitutionnel canadien contemporain⁴⁰.

Or, contrairement à ce que l'on observe en matière de privilèges et immunités parlementaires, d'indépendance judiciaire ou encore d'*habeas corpus*, il n'y a, concernant la succession royale, aucun texte – si ce n'est la modification intervenue en 1936 – susceptible de faire écran à l'application directe et contemporaine du droit impérial reçu dans l'ordre juridique canadien. Loin de chercher à empêcher l'appli-

pendance de la magistrature au Royaume-Uni et, partant, dans la Constitution du Canada, remontent à l'*Act of Settlement* de 1701. Comme nous l'avons dit dans *Valente*, précité, à la p 693, c'est de cette loi que « s'inspirent historiquement » les dispositions relatives à la magistrature de la *Loi constitutionnelle de 1867* ».

38. *New Brunswick Broadcasting Co*, *supra* note 27 à la p 345 (motifs du juge en chef Lamer). Dans la même optique, le juge McIntyre, dans l'arrêt *Smith*, tient des propos semblables en ce qui concerne l'article 10 du *Bill of Rights*, *supra* note 17, dont le contenu a été « repris dans la *Charte canadienne des droits et libertés* », ce qui, selon lui, « indique que cet article du *Bill of Rights* n'est pas désuet » : *R. c Smith*, [1987] 1 RCS 1045 au para 82, juge McIntyre, dissident.
39. André Tremblay évoque le rôle supplétif de ces textes qui subsistent toujours lorsqu'il écrit : « D'autres lois impériales, qui traitent des relations entre le pouvoir royal et le parlement, présentent, aussi à titre supplétif, un intérêt certain pour l'étude du droit constitutionnel : la pétition des droits de 1629, le *Bill of Rights* de 1689, l'*Acte d'établissement* de 1701 et le *Parliament Act* de 1911. » Tremblay, *supra* note 30 à la p 9.
40. *Canada (Chambre des communes) c Vaid*, 2005 CSC 30, [2005] 1 RCS 667 au para 21 (juge Binnie à propos des privilèges parlementaires); *Renvoi sécession*, *supra* note 32 au para 63 (à propos de la *Magna Carta*); *Renvoi rémunération des juges*, *supra* note 24 au para 87 (juge Lamer à propos de l'indépendance judiciaire); *Therrien (Re)*, *supra* note 36 au para 67 (juge Gonthier à propos de l'indépendance judiciaire); *620 Connaught Ltd c Canada (Procureur général)*, 2008 CSC 7, [2008] 1 RCS 131 au para 4 (juge Rothstein à propos du lien entre taxation et représentation).

cation de l'*Act of Settlement* et du *Bill of Rights*, la modification intervenue en 1936 est plutôt venue confirmer explicitement la réception, l'application et certaines évolutions des règles de succession en droit constitutionnel canadien. Il n'existe donc aucun obstacle, aucun aménagement local spécifique permettant d'écarter l'application directe et actuelle, en droit canadien, des règles de succession reçues à la suite de l'affirmation de la souveraineté de la Couronne britannique.

iii. La « canadianisation » des règles de succession

Les règles de succession ont pendant longtemps désigné les prétendants à une Couronne unique et indivisible ayant autorité sur un empire dont le Canada n'était, jusqu'à son accession à l'indépendance, que l'une des composantes. Il faut donc distinguer, dans un troisième temps, le processus de « canadianisation » des règles de succession royale qui s'opère avec la *divisibilité* de la Couronne, de la question de la *réception* et de celle de l'*application directe* de ces règles en droit canadien. En effet, préalablement à la reconnaissance de l'indépendance politique des dominions lors des conférences impériales des années 1920 et de l'adoption du *Statut de Westminster de 1931*, le droit canadien de la succession royale demeurait celui d'une composante de l'Empire. Il n'y avait qu'une seule charge royale pour tout l'Empire⁴¹. Dans ces circonstances, la Constitution de 1867 n'a évidemment pas pu établir de règles spécifiques à la désignation du chef de l'État canadien, puisque cet État – tout comme la charge de Reine du Canada – n'existait tout simplement pas. Le droit de la succession royale était celui de l'Empire britannique, reçu dans chacune des colonies comme une composante essentielle de l'autorité impériale et, évidemment, modifiable uniquement par le Parlement de Westminster.

Cette unité du droit de la succession à l'échelle de l'Empire britannique a été acquise au début du XVIII^e siècle lorsque l'union personnelle des Couronnes d'Écosse et d'Angleterre s'est transformée

41. *Canada v Bank of Nova Scotia*, (1885) 11 SCR 1: «That, for the purpose of entitling itself to the benefit of its prerogative rights, *the Crown is to be considered as one and indivisible throughout the Empire*, and is not to be considered as a quasi-corporate head of several distinct bodies politic (thus distinguishing the rights and privileges of the Crown as the head of the government of the United Kingdom from those of the Crown as head of the government of the dominion, and, again, distinguishing it in its relations to the Dominion and to the several provinces of the dominion) is a point so settled by authority as to be beyond controversy» [nos italiques].

en une charge royale unifiée et indivisible. En effet, l'indivisibilité de la Couronne impériale a été grandement consolidée par les *Acts of Union*⁴² de 1707 qui ont uni les royaumes d'Angleterre et d'Écosse. À l'origine, l'Écosse avait pourtant une charge royale distincte, et le droit écossais de la succession royale en régissait la transmission. L'Angleterre avait également sa charge et son droit de la succession royale. En 1603, les aléas familiaux ont fait en sorte que les droits anglais et écossais ont attribué leur couronne respective à la même personne physique, Jacques VI d'Écosse et 1^{er} d'Angleterre⁴³. Par la suite, ce souverain a régné en union personnelle sur les deux royaumes, en vertu de deux droits de la succession royale indépendants. Puis, par l'adoption des *Acts of Union*, le droit public a été unifié dans l'ensemble de la Grande-Bretagne⁴⁴, dès lors constituée. Un droit de la succession royale uniforme régissant la transmission d'une couronne une et indivisible s'est alors formé⁴⁵.

La Couronne du Canada est apparue, quant à elle, avec l'accession des dominions à l'indépendance politique. Le processus inverse de l'union de l'Angleterre et de l'Écosse s'est alors produit. D'une Couronne indivisible, le Commonwealth a évolué vers une union personnelle de charges fondées sur des règles distinctes, mais harmonisées. Cette divisibilité s'est cristallisée lors des conférences impériales des années 1920 ayant mené à la Déclaration Balfour de 1926. Le *Statut de Westminster de 1931* a ensuite formalisé juridiquement cette indépendance⁴⁶. D'une seule Couronne pour tout l'Empire, on scinda celle-ci en une multitude de charges distinctes de celle du Royaume-Uni⁴⁷. La

42. *Union with Scotland Act, 1706* (Angleterre), 6 Anne c 11; *Union with England Act, 1707* (Écosse), Anne c 7.

43. En 1603, il était déjà roi d'Écosse alors que la Couronne anglaise lui échet. Rosalind Mitchison, *A History of Scotland*, 3^e éd, London-New York, Routledge, 2002 à la p 121.

44. J.D. Ford, «The legal provisions in the Acts of Union», (2007) 66 Cambridge LJ 106 à la p 108.

45. *Union with Scotland Act, 1706* (Angleterre), *supra* note 42, art 2; *Union with England Act, 1707* (Écosse), *supra* note 42, art 2. L'article 2 de chacune de ces deux lois est presque identique et reprend les dispositions relatives à la succession royale contenues dans le *Bill of Rights* et l'*Act of Settlement* (voir *supra*, note 21), tout en ajoutant la notion d'« Imperial Crown of Great Britain and the Dominions ». La loi anglaise d'union avec l'Écosse de 1706 fait partie du droit du Canada selon Maurice Ollivier. Elle est présente dans sa liste des lois britanniques faisant partie du droit canadien préparée pour le compte du département des Affaires étrangères canadiennes, *supra* note 30.

46. L'indépendance canadienne a été reconnue par la Cour suprême dans : *Re Offshore Mineral Rights of B.C.*, [1967] RCS 792 à la p 816 [*Offshore Mineral Rights*].

47. Henri Brun et Guy Tremblay, *Droit constitutionnel*, 4^e éd, Cowansville, Yvon Blais, 2002 [antérieur à la *Loi de 2013*] à la p 77: « [L]a divisibilité de la couronne apparaissait évidente puisqu'elle agissait distinctement en fonction des

réception et l'application directe des règles de succession issues du droit impérial ont néanmoins permis de maintenir une apparente uniformité, car bien que juridiquement distinctes⁴⁸, toutes ces charges royales sont attribuées à une même personne physique (union personnelle) tant et aussi longtemps que les royaumes du Commonwealth conservent des règles de succession identiques⁴⁹. Il n'empêche que, sur le plan juridique formel, la divisibilité de la Couronne reste entière, ce qui a d'ailleurs été explicitement reconnu dans l'arrêt *The Queen v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*, rendu par la division civile de la Cour d'appel d'Angleterre et du Pays de Galles⁵⁰.

La divisibilité de la Couronne et l'accession du Canada à l'indépendance politique ont donc entraîné la « canadienisation » des règles de succession royale. En plus d'être reçues et directement applicables, ces dernières se conçoivent désormais comme des règles autonomes de

avis reçus des différentes parties de l'empire. Le « Roi du Canada » n'était plus le même organe que le roi des autres membres de l'empire. Cela fut formalisé par la *Loi sur la désignation et les titres royaux*, S.C. 1952-53, c 9 [...]. Aujourd'hui, l'indivisibilité formelle de la couronne, en raison des expédients qu'on a trouvés pour en contourner les effets, n'est qu'une règle constituée principalement d'exceptions ».

48. Nicole Duplé, *Droit constitutionnel. Principes fondamentaux*, 5^e éd, Montréal, Wilson & Lafleur, 2011 [antérieur à la *Loi de 2013*] à la p 224 : « Il est certain que l'Empire était divisible sur le plan fonctionnel puisque les colonies disposaient de pouvoirs autonomes et de trésors distincts. Pendant la période coloniale, la Couronne a donc été le symbole de l'unité de l'Empire. En accédant à la souveraineté, les anciennes colonies britanniques sont devenues des entités juridiques non seulement distinctes les unes des autres, mais distinctes, également, de l'entité juridique qu'est le Royaume-Uni. Le Canada détient son propre chef d'État, et le fait que la Reine du Canada soit aussi le chef d'État de plusieurs autres États souverains est sans conséquence dans l'ordre juridique canadien. Dans ce dernier contexte, la Reine est le symbole incarné de la souveraineté canadienne et, comme il ne peut y avoir d'État dans l'État, la souveraineté est indivisible dans son principe » [nos italiques].
49. Ci-dessus à la p 16; Twomey, *Laws of succession*, *supra* note 16 au para 4.4.
50. [1982] 2 All ER 118 (CA), lord Denning : « Hitherto I have said that in constitutional law the Crown was single and indivisible. *But that law was changed in the first half of this century* – not by statute – but by constitutional usage and practice. The Crown became separate and divisible – according to the particular territory in which it was sovereign. This was recognised by the Imperial Conference of 1926 » [nos italiques]; David Keeshan, « Crown », dans *Halsbury's laws of Canada*, à jour au 1^{er} octobre 2012, n° HCW-7 (LN/QL); Jacques-Yvan Morin et José Woehrling, *Les constitutions du Canada et du Québec : Du régime français à nos jours*, t 1, « Études », Montréal, Thémis, 1994 aux pp 383-384; Hogg, *Constitutional Law*, *supra* note 13 aux pages 302-303. Voir aussi *Offshore Mineral Rights*, *supra* note 46 à la p 816. Dans cet arrêt, la Cour suprême du Canada reconnaît la souveraineté du Canada.

celles qui organisent les autres royaumes du Commonwealth⁵¹. Leur avenir, c'est-à-dire leur éventuelle modification ou abrogation, peut dès lors être envisagé de manière distincte de celui du Royaume-Uni, du moins en droit formel⁵².

iv. La modification des règles constitutionnelles relatives à la succession

La complexité des rapports entre le Canada et les autorités britanniques implique, dans un quatrième temps, la prise en compte d'une autre distinction fondamentale entre, d'un côté, les questions de *réception*, d'*application* et de *divisibilité* des règles de succession et, de l'autre, le problème de leur *modification*. En effet, les règles de succession, bien que reçues dans le droit de la colonie, avaient longtemps échappé à la compétence des autorités canadiennes. Avant l'avènement de la divisibilité de la Couronne, le droit canadien de la succession royale était, en fait, celui de l'Empire britannique, modifiable unilatéralement par le Parlement impérial. Tant et aussi longtemps qu'aucune loi impériale n'eut expressément attribué ce pouvoir aux autorités coloniales, la *common law*, codifiée par le *Colonial Laws Validity Act* en 1865⁵³, écartait la compétence des législatures coloniales en matière de succession royale. Cet état du droit a été ensuite maintenu par l'adoption de l'article 129 de la *LC de 1867*, qui a permis de conserver l'application des lois impériales en droit canadien, tout en réservant au Parlement britannique le pouvoir exclusif de les modifier. Cette compétence exclusive britannique n'était pas le propre des règles de succession : elle visait, en définitive, toutes les normes rigides de la Constitution canadienne⁵⁴, dont, au premier chef, l'essentiel de la *LC de 1867* elle-même.

Le ministère fédéral de la Justice, à l'époque de l'abdication de 1936, reconnaissait cet état du droit qui caractérisait la période

51. Kenneth Clinton Wheare, *The Statute of Westminster and Dominion Status*, London, Oxford University Press, 1953 aux pp 198 et 285 ; Brun, Tremblay et Brouillet, *supra* note 30 aux pp 229-230 ; Nicole Duplé, *Droit constitutionnel Principes fondamentaux*, 6^e éd, Montréal, Wilson & Lafleur, 2014 [postérieur à la *Loi de 2013*] aux pp 689-690.

52. Des traditions, voire des conventions constitutionnelles, militent néanmoins en faveur d'une concertation politique et d'une harmonisation des règles de succession des différents royaumes du Commonwealth, voir les développements à ce sujet aux pp 378 et s ci-dessous.

53. *Colonial Laws Validity Act, 1865* (R-U), 28 & 29 Vict, c 63, art 2 et 5.

54. Par exception, certaines modifications des normes constitutionnelles souples étaient néanmoins possibles, *supra* note 12.

antérieure à l'adoption du *Statut de Westminster*. Les avis juridiques de ce ministère, aujourd'hui disponibles aux archives, énonçaient :

Accordingly, there can be no doubt that from the strictly legal point of view, prior to the enactment of the *Statute of Westminster*, it would have been beyond the powers of the Parliament of Canada to enact a law changing the succession. [...] A change of this sort would have been a fundamental constitutional change which could only be made legally effective by enactment by the Parliament of the United Kingdom [nos italiques]⁵⁵.

Ainsi, antérieurement au *Statut de Westminster*, une modification à la succession royale représentait – du point de vue du ministère fédéral de la Justice – un changement constitutionnel fondamental qui ne pouvait être réalisé que par le Parlement britannique agissant comme législateur pour l'ensemble de l'Empire britannique, dont le Canada était alors l'une des parties.

En outre, même après la divisibilité de la Couronne et l'accession à l'indépendance politique, la souveraineté canadienne souffrait encore d'une importante exception. Le Canada était certes doté de sa propre charge royale et de ses propres règles de succession, mais il ne disposait pas, durant la période 1931-1982, de la capacité à modifier les caractéristiques essentielles de sa Constitution sans le concours du Parlement britannique⁵⁶. Bien que « canadienisées », les règles de succession demeuraient uniquement modifiables par le Parlement britannique à la demande et avec le consentement des autorités canadiennes. Cet état de fait explique, en partie, les rôles respectifs des Parlements canadien et britannique, alors encadrés par le *Statut de Westminster*, lors de la modification de 1936, par opposition à la modification de 2013 qui intervient dans un ordre juridique où l'exercice du pouvoir constituant a été profondément transformé par l'entrée en vigueur de la *Loi constitutionnelle de 1982*.

Il faut donc conserver à l'esprit les distinctions terminologiques et conceptuelles qui s'imposent entre la *réception* et l'*application* de ces règles par l'effet de la colonisation, la « canadienisation » de celles-ci à la suite de la *divisibilité* de la Couronne et, enfin, la participation progressive des autorités canadiennes à la *modification* des règles de succession au gré de l'évolution des procédures de révision de la Constitution canadienne. En somme, pour être exhaustive, l'analyse des changements

55. Bibliothèque et Archives nationales Canada, Fonds Ernest Lapointe, « Edward VIII – Canada's constitutional position concerning the abdication », MG27-IIIB10, vol 49, n° 30, R8207-2-3-F aux pp 13-14 [Bibliothèque et Archives nationales, « Edward VIII »].

56. *Statut de Westminster*, *supra*, note 11, art 4 et 7.

issus de l'adoption du *Statut de Westminster* de même que la modification des règles de succession intervenue en 1936 doivent tenir compte de ces variations entre *réception, application, canadianisation et modification* des règles constitutionnelles relatives à la désignation du chef de l'État.

b. Le cadre juridique mis en place par le *Statut de Westminster*

Le *Statut de Westminster* a tiré les conséquences juridiques de l'indépendance politique des dominions et de la divisibilité de la Couronne en limitant, pour la première fois, la compétence du Parlement britannique relativement au droit constitutionnel canadien, en général, et aux règles de succession, en particulier. Bien qu'il ne s'agissait que d'exigences de forme, ces limites étaient bien réelles. Encore aujourd'hui, ce Statut, adopté à l'époque avec le consentement unanime des provinces canadiennes⁵⁷, fait partie de la Constitution du Canada⁵⁸, à l'exception de l'article 4 et du paragraphe 7(1) qui ont été abrogés par l'article 53 de la *LC de 1982*⁵⁹, puis remplacés à la fois par l'article 2 de la *Loi de 1982 sur le Canada* et par les procédures de modification de la Partie V de la *LC de 1982*. Il n'empêche qu'au moment de l'abdication du roi Édouard VIII, c'est bien l'ensemble du *Statut de Westminster* qui s'appliquait au Canada. D'ailleurs, à l'époque, la fédération canadienne se démarquait de plusieurs autres dominions, tels que l'Australie, la Nouvelle-Zélande et Terre-Neuve⁶⁰, où le Statut est entré en vigueur bien plus tardivement⁶¹.

i. La fin de la suprématie législative: une forme de reconnaissance de l'indépendance politique des dominions

Le *Statut de Westminster* mit fin, sauf exception, à la suprématie des lois britanniques. Acte de reconnaissance juridique de l'indé-

57. Ce consentement a été exprimé lors d'une conférence fédérale-provinciale sur le *Statut de Westminster* qui a eu lieu à Ottawa les 7 et 8 avril 1931. Le rapport de cette conférence est disponible auprès de la Bibliothèque du Parlement fédéral: *Report of Dominion-provincial Conference, 1931*, M JL 69 A2 1976 no 17.

58. *LC de 1982*, *supra* note 5, art 52 et annexe au para 17.

59. *Ibid.*

60. Sur cette question, voir les développements aux pp 389 et s ci-dessous.

61. *Infra* note 102. De plus, en Afrique du Sud, l'application de l'article 4 était expressément écartée, étant donné que la Constitution excluait toute compétence au Parlement de Westminster. *Status of the Union Act 1934* ([S Afr], n° 69 de 1934).

pendance politique des dominions, le Statut, à son article 2⁶², écarta l'application du *Colonial Laws Validity Act* de 1865⁶³. D'un point de vue formel, et sous réserve des autres dispositions, cet article a permis aux dominions d'accéder à la pleine souveraineté législative et de modifier leur droit, suivant les modalités propres à chaque ordre juridique. Or, en mettant fin à la primauté du droit britannique dans les dominions, l'article 2 n'a en rien modifié la réception et l'application du droit impérial. Au contraire, il a confirmé son application en précisant que celui-ci n'avait toutefois plus automatiquement priorité sur le droit des dominions. Autrement dit, les lois britanniques ayant fait l'objet d'une réception en droit interne pouvaient dorénavant évoluer et être modifiées en fonction du destin propre à chaque dominion.

Dans le cas précis du Canada, la souveraineté législative canadienne dont il est question à l'article 2 a cependant été restreinte par l'article 7 du Statut⁶⁴. Exception nécessaire afin de préserver le rang supralégislatif de la Constitution en attendant que les provinces et le fédéral conviennent d'une procédure spéciale de modification, l'article 7 permet de protéger, jusqu'à l'entrée en vigueur de la *LC de 1982*, le fédéralisme et les caractéristiques essentielles de la Constitution canadienne de l'intervention unilatérale du fédéral ou des provinces⁶⁵.

ii. «L'assentiment» des dominions: une exigence conventionnelle pour conserver la commune allégeance à la Couronne

Le préambule du *Statut de Westminster* fit en sorte qu'aucun des royaumes du Commonwealth, tant qu'ils demeurent tous unis par une commune allégeance à une même personne physique, ne puisse modifier ses règles de succession sans avoir au préalable reçu l'assen-

62. L'article 2 vise spécifiquement les «lois adoptées par le parlement d'un dominion», mais le paragraphe 7(2) du Statut ajoute que l'article 2 est au même effet en ce qui concerne les lois et les compétences des législatures des provinces canadiennes. *Statut de Westminster*, supra note 11, art 2 et 7(2).

63. *Colonial Laws Validity Act*, supra note 53.

64. *Statut de Westminster*, supra note 11, art 7. L'article 7 énonce : « [TRADUCTION NON OFFICIELLE] (1) La présente loi ne s'applique pas à l'abrogation ni à la modification des *Lois de 1867 à 1930 sur l'Amérique du Nord britannique* ou de leurs textes d'application. (2) L'article 2 s'applique aux lois des provinces du Canada et aux pouvoirs de leurs législatures. (3) Les pouvoirs conférés par la présente loi au Parlement du Canada et aux législatures des provinces se limitent à l'édition de lois dont l'objet relève de leurs compétences respectives ».

65. Duplé, supra note 48 aux pp 623-625.

timent des Parlements de tous les royaumes du Commonwealth. Ce paragraphe énonce :

[TRADUCTION NON OFFICIELLE] qu'il convient, puisque la Couronne est le symbole de la *libre* association de tous les membres du Commonwealth britannique et qu'ils sont unis par une commune allégeance à celle-ci, de déclarer en préambule que serait *conforme à leur situation constitutionnelle* l'obligation d'assujettir *désormais* toute modification des règles de *succession au trône* et de présentation des titres royaux à *l'assentiment des parlements des dominions comme à celui du Parlement du Royaume-Uni* [nos italiques]⁶⁶.

[VERSION OFFICIELLE] And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the 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* [nos italiques].

Par ce second paragraphe du préambule, les autorités britanniques se sont engagées à obtenir « l'assentiment » des Parlements des dominions préalablement à toute modification des règles de succession dès lors qu'ils conservent leur allégeance à la personne du souverain. Cette manière de coordonner l'action des différents royaumes visait à préserver l'harmonisation des règles de succession héritée de l'évolution coloniale.

Cette nécessaire harmonisation ou coordination des règles de succession est la conséquence logique de l'indépendance politique des dominions et de la divisibilité de la Couronne. Or, contrairement à l'article 2 du Statut qui mit fin à la suprématie des lois britanniques sur celles des dominions, le paragraphe 2 du préambule énonce une norme, qui, bien que pertinente politiquement, n'en est pas une de droit strict⁶⁷. Ce préambule ne demeure que l'expression du sentiment

66. *Statut de Westminster*, supra note 11, préambule.

67. Une telle règle aurait porté atteinte à la souveraineté du Parlement britannique, principe fondamental de l'ordre juridique anglais. Donal Coffey, « British, Commonwealth and Irish Responses to the Abdication of King Edward VIII » (2009) 44 *Ir Jur* 95 aux pp 103 et 105; Benoît Pelletier, « The Constitutional Requirements for the Royal Morganatic Marriage » (2005) 50: 2 *McGill LJ* 265 [antérieur à la *Loi de 2013*] au para 51 [Pelletier, « Morganatic Marriage »]; E. H. Coghill, « The

des acteurs politiques concernés d'être liés par une convention qui limite la souveraineté du Parlement britannique en la conditionnant à l'assentiment des dominions. Cette convention n'est pas une règle de droit positif⁶⁸. Selon Coghill, il s'agissait davantage d'un souhait ou d'un objectif politique, c'est-à-dire d'un engagement à coordonner les réformes futures afin de préserver l'harmonisation des règles de succession, que d'une prescription. Il écrit : « It will be noticed that the Preamble already quoted is not followed by any enacting words, and is, itself, expressed in a form more of expectation and hope than of command »⁶⁹. Il y a donc lieu de rigoureusement distinguer les exigences conventionnelles, relatives à la modification des règles de succession royale, des règles proprement juridiques.

Conformément « à leur situation constitutionnelle »⁷⁰, chaque royaume a, seul, la compétence pour modifier son propre droit, d'où la nécessité de limiter conventionnellement cette prérogative par une forme de coopération permettant d'assurer leur « assentiment » à des règles de succession harmonisées. Cette coordination politique s'incarne dans une convention, soit une pratique liant les acteurs politiques et reposant sur un idéal d'unité au sein du Commonwealth. En définitive, le préambule cherche à concilier les deux impératifs suivants : respecter le statut international d'États indépendants acquis par les dominions tout en conservant, par des règles de succession harmonisées, une allégeance partagée à un même titulaire des charges royales (union personnelle).

King – Marriage and Abdication » (1937) 10 Austl L J 393 à la p 398 ; Sir Maurice Gwyer, *Memorandum by Sir Maurice Gwyer, Parliamentary Counsel to the UK Attorney-General, 23 November 1936*, National Archives of Australia PRO : PREM 1/449 au para 11.

68. Les conventions constitutionnelles sont des règles non écrites reconnues, mais non sanctionnées par les tribunaux, et ce, parce que leur contenu entre généralement en contradiction avec le droit constitutionnel formel. Ces conventions, dont le but est de réconcilier le droit positif avec les valeurs et les pratiques politiques contemporaines, restreignent l'étendue du pouvoir discrétionnaire dont dispose un organe constitué. La jurisprudence canadienne a cerné trois conditions essentielles pour reconnaître la présence d'une convention constitutionnelle dans le *Renvoi : Résolution pour modifier la Constitution*, *supra* note 31 aux pp 888-909. D'abord, la Cour exige des précédents (*ibid* aux pp 888-898), dont la présence est une condition nécessaire sans constituer une condition suffisante. Ensuite, les acteurs politiques concernés par les précédents doivent se sentir liés par cette règle qui, sans posséder un caractère strictement obligatoire, a fini par être reconnue et acceptée dans la pratique (*ibid* aux pp 898-905). Finalement, le troisième critère vise à cerner la raison d'être du comportement adopté, raison qui doit différer du simple usage ou de la coutume (*ibid* aux pp 905-909).

69. Coghill, *supra* note 67 à la p 398.

70. *Statut de Westminster*, *supra* note 11, préambule.

Par conséquent, les exigences conventionnelles exprimées par le deuxième paragraphe du préambule ne se substituent pas aux procédures formelles de modification du droit canadien. Elles s'ajoutent, au chapitre des objectifs politiques communs, à un processus formel qui, lui, obéit aux règles propres à chaque État. Après tout, c'est bien parce que le *Statut de Westminster* a mis fin à la suprématie législative du Parlement britannique que la convention constitutionnelle qui découle du préambule s'est imposée. Prenant acte de l'indépendance politique des dominions, cette dernière cherche à préserver l'harmonisation des règles de succession par une forme de coordination, marquée par l'autolimitation et l'assentiment mutuel.

***iii. La « demande et le consentement » du Canada :
une procédure formelle de modification des règles
de succession***

Outre les exigences conventionnelles au processus de modification des règles de succession, le *Statut de Westminster* apporta des évolutions significatives à l'exercice du pouvoir constituant pour le Canada. En plus du processus de coordination prévu par le préambule, le Statut établit une nouvelle procédure formelle de modification du droit constitutionnel interne au Canada. Si la Constitution de 1867 et ses nombreux compléments demeuraient modifiables par le Parlement britannique en raison de l'exception de l'article 7 du *Statut de Westminster*, cette modification était désormais strictement encadrée par l'article 4. Cet article, en vertu duquel se sont opérées toutes les modifications apportées aux caractéristiques essentielles de la Constitution du Canada de 1931 à 1982⁷¹ (incluant l'adoption de la *Loi de 1982 sur le Canada*)⁷², était formulé de la façon suivante :

[TRADUCTION NON OFFICIELLE]
Les lois adoptées par le Parlement du Royaume-Uni après l'entrée en vigueur de la présente loi ne font partie du droit d'un dominion que s'il est expressément déclaré dans ces lois que le dominion a demandé leur édicition et y a consenti [nos italiques].

[VERSION OFFICIELLE] No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

71. *Infra* note 158 et s.

72. *Infra* à la p 398.

73. *Statut de Westminster*, *supra* note 11, art 4.

Interprété à la lumière de l'exception nécessaire de l'article 7 du Statut, il a été, jusqu'à l'entrée en vigueur de la *LC de 1982*, la procédure générale de modification de la Constitution canadienne. Cette formule avait pour conséquence d'encadrer plus strictement, durant la période 1931-1982, le rôle du Parlement britannique et des autorités politiques canadiennes dans le processus de modification de la Constitution.

Bien qu'ils perpétuaient le pouvoir du Parlement britannique de légiférer « pour le Canada », les articles 4 et 7 formalisaient deux exigences fondamentales pour la suite des choses : désormais, une modification du droit interne au Canada ne pouvait être adoptée qu'*expressément* et qu'à la *demande* et avec le *consentement* du Canada⁷⁴. Une telle déclaration devait donc être explicite quant à l'intention du Parlement britannique et quant à la demande et consentement des autorités canadiennes⁷⁵.

La procédure des articles 4 et 7 permettait au Parlement britannique de pallier l'incapacité juridique des autorités canadiennes à modifier les caractéristiques essentielles de leur Constitution par une procédure qui respectait à la fois l'indépendance politique du Canada et l'étanchéité des ordres juridiques. D'une part, le caractère explicite de l'intention du Parlement britannique, exigé par l'article 4, visait à mieux différencier les lois adoptées par le Parlement britannique « pour le Canada », de celles qui ne lui étaient plus opposables. D'autre part, la demande et le consentement des autorités canadiennes avaient pour fonction d'assurer la légitimité des changements opérés par un Parlement désormais « étranger », mais condamné à agir, encore pour un temps, comme pouvoir constituant « pour le Canada ». Se comportant à l'instar d'un « simple fiduciaire »⁷⁶, le Parlement britannique pouvait ainsi respecter pleinement l'indépendance politique du Canada en ne légiférant qu'à la demande et avec le consentement de ce dernier.

Ces exigences n'étaient pas sans conséquence. D'un côté, une loi du Parlement britannique, comme celle modifiant, en 1936, les règles de succession royale⁷⁷, ne pouvait plus produire d'effets en

74. Brun, Tremblay et Brouillet, *supra* note 26.

75. Soucieux de respecter l'indépendance politique des dominions, le 5^e paragraphe du préambule de *Statut de Westminster*, énonce que le Statut lui-même a été adopté à la demande et avec le consentement du Canada et des autres dominions. *Statut de Westminster (ibid)*, préambule, para 5.

76. Renvoi : *Résolution pour modifier la Constitution*, *supra* note 31 à la p 770.

77. *Declaration of Abdication Act*, *supra* note 20.

droit canadien sans la déclaration expresse, dans cette même loi, que le dominion avait demandé et consenti à cette loi. Il s'agissait de la formule «*request and consent*», pour reprendre les termes exacts de la version officielle anglaise du Statut que l'on retrouve dans toutes les modifications constitutionnelles adoptées par le Parlement britannique de 1931 à 1982⁷⁸. D'un autre côté, l'inverse étant aussi vrai, dès lors qu'une loi britannique portait la déclaration expresse qu'elle avait été adoptée à la demande et avec le consentement du Canada, elle modifiait effectivement le droit canadien directement applicable⁷⁹.

Cela dit, contrairement aux exigences conventionnelles du deuxième paragraphe du préambule, qui précisait que «l'assentiment» des dominions devait émaner des «parlements» de ceux-ci, l'article 4 demeurait bien silencieux sur l'identité des organes chargés de «demander» et de «consentir» à une intervention du Parlement britannique. Était-ce le Parlement ou le gouvernement? Du fédéral ou des provinces? Le *Statut de Westminster* laisse, en définitive, à chaque dominion le soin d'établir ses propres règles ou ses usages. À terme, cette question ne fut tranchée, au Canada, que lors des renvois de 1981 et de 1982 relatifs au rapatriement de la Constitution⁸⁰.

78. *Infra* à la p 398.

79. Du reste, la procédure de l'article 4 s'inscrivait, pour l'essentiel, en continuité avec le troisième paragraphe du préambule qui établissait que «les lois désormais adoptées par le Parlement du Royaume-Uni ne pouvaient faire partie du droit d'un dominion qu'à la demande et avec le consentement de celui-ci.» Cette exigence, substantiellement identique à celle de l'article 4, comportait néanmoins une différence importante sur le plan de la forme. Alors que le troisième paragraphe du préambule exigeait la demande et le consentement du dominion préalablement à l'adoption d'une loi britannique applicable à un dominion, l'article 4 requérait en plus que le Parlement britannique indique expressément dans sa loi avoir reçu cette demande et ce consentement du dominion. Il s'agissait de deux exigences de forme. *Statut de Westminster, supra* note 11, préambule.

80. En 1981, le raisonnement de la Cour suprême dans les renvois de 1981 et de 1982 témoigne, de nouveau, d'un sérieux décalage entre les exigences juridiques et celles qui relèvent des conventions constitutionnelles. Selon la majorité, dans le renvoi de 1981, les chambres fédérales peuvent légalement procéder à une demande au Parlement impérial: *Renvoi: Résolution pour modifier la Constitution, supra* note 31 à la p 808, juge en chef Laskin pour la majorité de la Cour. Toutefois, afin de respecter les conventions constitutionnelles, les autorités fédérales doivent avoir reçu l'appui d'un nombre suffisant de provinces (*ibid* à la p 909), motifs majoritaires des juges Martland, Ritchie, Dickson, Beetz, Chouinard et Lamer; *Renvoi sur l'opposition du Québec à une résolution pour modifier la Constitution, [1982] 2 RCS 793* à la p 817.

2. LES CHANGEMENTS OPÉRÉS EN 1936 : DES EXIGENCES FORMELLES AUX EXIGENCES CONVENTIONNELLES

Si la modification du droit canadien de la succession royale a pendant longtemps échappé à la compétence de son Parlement, c'est en grande partie parce que la Couronne demeurait indivisible dans tout l'Empire et qu'aucune loi britannique, de 1867 à 1931, n'attribuait aux autorités canadiennes la compétence de modifier les règles de désignation du chef de l'État. Le droit de la succession royale était, à cette époque, celui de l'Empire britannique, modifiable unilatéralement par le Parlement impérial. Or, après l'entrée en vigueur du *Statut de Westminster*, la compétence du Parlement britannique fut doublement limitée.

Premièrement, sur le plan conventionnel, le deuxième paragraphe du préambule du *Statut de Westminster*, imposa désormais un processus de coopération, caractérisé par l'assentiment mutuel comme moyen d'assurer l'harmonisation des règles de succession. À cet égard, le préambule a favorisé la commune allégeance à la personne de Sa Majesté, titulaire des charges royales des différents royaumes du Commonwealth.

Deuxièmement, sur le plan juridique formel, l'article 4 a contraint le Parlement britannique à ne légiférer « pour le Canada » qu'en des termes explicites et qu'à « la demande et avec le consentement » des autorités canadiennes, sans préciser l'origine législative ou gouvernementale, fédérale ou provinciale de ce consentement. Les autorités canadiennes ont donc acquis, à la suite de la divisibilité de la Couronne et de la mise en œuvre du *Statut de Westminster*, le droit de concourir au processus de modification des règles de désignation du chef de l'État, et ce, de deux manières distinctes et cumulatives : par la formulation de la demande et du consentement requis par l'article 4, et par « l'assentiment » du « Parlement » canadien, prévu par convention, dont le deuxième paragraphe du préambule se veut l'expression.

L'abdication du roi Édouard VIII fut l'occasion d'expérimenter, pour une première fois, ce cadre juridique. Pour opérer les changements rendus nécessaires, le Canada et le Royaume-Uni ont adopté plusieurs actes [*Titre a*], et ce, afin de respecter le cumul des exigences formelles et des conventions constitutionnelles [*Titre b*] applicables aux règles relatives à la succession royale.

a. Les actes ayant rendu possible la modification des règles de succession

L'abdication du roi Édouard VIII et la radiation de ses descendants directs de l'ordre de succession furent des changements constitutionnels importants nécessitant, en droit britannique, l'intervention du Parlement et, au Canada, celle du pouvoir constituant, c'est-à-dire du Parlement britannique légiférant « pour le Canada » à la demande et avec le consentement des autorités canadiennes.

Outre cette modification formelle du droit, d'autres actes ont été adoptés afin de respecter les pratiques, les usages et les conventions qui encadrent les relations entre le Royaume-Uni et les dominions nouvellement indépendants d'une part, et entre le roi et les gouvernements qui « l'assistent » dans l'exercice du pouvoir d'autre part. Après tout, mener à terme une modification des règles de désignation du chef de l'État dans la plus vieille monarchie constitutionnelle d'Europe et, aussi, dans et pour chacun des anciens dominions devenus des États politiquement indépendants, représente, aujourd'hui comme hier, une opération diplomatique très délicate. Sur le plan conventionnel, plusieurs actes étaient requis pour témoigner de la volonté du roi d'abdiquer⁸¹ et de celle des dominions de fournir leur assentiment⁸² aux modifications des règles de succession que cette abdication entraînait. Bien que tous ces actes n'aient pas été juridiquement exécutoires, ils ont permis d'exprimer des volontés politiquement nécessaires afin de coordonner et de préserver l'harmonie entre les règles de succession. Ils constituent des faits essentiels dans l'analyse de ce précédent que constitue la modification de 1936.

i. La déclaration d'abdication et les pressions des gouvernements du Royaume-Uni et des dominions

À l'origine de ces changements, un conflit entre le roi Édouard VIII et le gouvernement britannique au sujet de la femme que le roi se proposait d'épouser. À peine quelques mois après son accession au

81. L'instrument d'abdication a été annexé aux deux lois suivantes: *Declaration of Abdication Act*, *supra* note 20; *Loi sur la modification de la loi concernant la succession au trône, 1937*, 1 Geo VI, c 16, ann 1 [*Loi canadienne de 1937*].

82. Pour le Canada, par législation fédérale: *Loi canadienne de 1937*, *ibid*; pour l'Australie, par résolution des deux chambres fédérales: Austl, Commonwealth, House of Representatives, *Parliamentary Debates* (11 décembre 1936) aux pp 2898-2926 et Senate, aux pp 2892-2896; pour la Nouvelle-Zélande, par résolution des deux chambres: N-Z, Legislative Council, *Parliamentary Debates*, col. 248 (9 septembre 1937) 5, House of Representatives, *Parliamentary Debates*, col. 248 (9 septembre 1937) 7. Voir Twomey, *Laws of succession*, *supra* note 16 aux para 6.8 et 6.9.

trône, celui-ci caressait l'idée de se marier avec une roturière américaine, Wallis Simpson, qui s'apprêtait à divorcer pour une seconde fois. L'embarras que suscitait ce projet de mariage au sein du cabinet britannique et dans les dominions⁸³, entraîna un certain nombre de tractations⁸⁴. Le premier ministre britannique Stanley Baldwin tenta d'abord de décourager le roi d'épouser Wallis Simpson⁸⁵. Il l'avisa aussi de la nécessité de consulter les dominions dans cette affaire. Le souverain et le premier ministre Baldwin s'entendirent alors sur trois options⁸⁶ à soumettre informellement à l'appréciation des gouvernements des dominions : (1) un mariage royal ; (2) un mariagemorganatique ; (3) une abdication volontaire du roi.

L'option du mariage royal, célébré à la suite du second divorce, fut rapidement écartée par les gouvernements du Royaume-Uni et des dominions⁸⁷. Il en fut de même de celle du mariagemorganatique, c'est-à-dire un mariage privé accompagné d'une modification aux règles de succession⁸⁸.

En effet, à la suite de la consultation informelle des chefs de gouvernement des dominions et des membres du gouvernement

-
83. Par exemple, pour l'Australie, voir National archives of Australia, « Royalty – Abdication of King Edward VIII – General » (1936-1937), NAA A461 V396/1/1. L'embarras venait non seulement du fait que le mariage aurait lieu avec une roturière américaine mariée à deux reprises, mais également du fait que M^{me} Simpson n'était pas encore pleinement divorcée lors de la crise d'abdication, un délai de six mois étant encore nécessaire. Pendant ce délai, une enquête sur M^{me} Simpson aurait normalement dû avoir lieu. Or, comme le souligne Coffey, le second divorce de celle-ci aurait pu avorter si les résultats de l'enquête avaient révélé un adultère réciproque. Il écrit : « In 1936, a divorce could not be granted if both sides had committed adultery and there was a real danger that an investigation could interfere with the King's marriage plans ». Coffey, *supra* note 67 à la p 97.
84. Concernant les avis donnés par le premier ministre Baldwin au roi relativement à M^{me} Simpson et à la possibilité d'un mariagemorganatique, voir Coghill, *supra* note 67.
85. Coffey, *supra* note 67 à la p 97 ; Coghill, *ibid*.
86. Coffey, *supra* note 67 aux pp 98-99.
87. Selon Coffey, le cabinet Baldwin avait « no intention of agreeing to a morganatic marriage and the discussion thereafter was as to the necessary legislation in order for the King to voluntarily abdicate ». Coffey, *ibid* aux pp 98-99 ; Coghill, *supra* note 67.
88. Plus précisément, un mariagemorganatique est une institution de droit germanique dans laquelle un noble se marie avec une roturière ; ce mariage ne créant, en somme, d'effets qu'entre les parties, ce qui exclut toute transmission de titre à la conjointe ou aux enfants issus d'un tel mariage. Le patrimoine, s'il est lié au titre, ne passe pas aux enfants issus de ce mariage. Lors de la crise de l'abdication de 1936, un mariagemorganatique aurait eu pour effet d'empêcher les enfants éventuels du roi et de M^{me} Simpson de succéder au trône et aurait donc nécessité, pour cette raison, une modification des règles de succession. À propos du mariagemorganatique, voir : Pelletier, « Morganatic Marriage », *supra* note 67.

Baldwin, le premier ministre avisa le roi, le 2 décembre 1936, que l'option du mariage morganatique avait été fermement rejetée par le gouvernement britannique et par les dominions⁸⁹. Comme le rapporte Donal Coffey: «Baldwin [...] advised him he could either finish his relationship with Simpson, marry Mrs Simpson (which would lead to the resignation of his Ministers), or abdicate»⁹⁰.

Édouard VIII céda en définitive à la pression des gouvernements du Royaume-Uni et des dominions et signa, le 10 décembre 1936, en présence de ses frères, une déclaration d'abdication qui fut, par la suite, annexée à la loi britannique de 1936⁹¹ qui y donne effet. Si cet instrument témoignait de la volonté irrévocable du roi de renoncer au trône, il ne s'agissait que d'une demande formulée à l'endroit des organes compétents à formaliser l'abdication. En vérité, sur le plan juridique, l'acte d'abdication du 10 décembre n'était pas directement exécutoire: il devait être transposé en droit par le Parlement du Royaume-Uni, avec la participation des dominions⁹². Ainsi, même après la signature de la déclaration d'abdication, Édouard VIII demeurait roi. Pour preuve, le lendemain 11 décembre, ce fut encore lui qui procéda à la sanction royale de la loi, *His Majesty's Declaration of Abdication Act*, laquelle donnait effet à la déclaration d'abdication.

ii. L'intervention du Parlement britannique: une formalité impérative et exécutoire

En droit britannique, l'intervention du Parlement était requise afin de modifier les règles de succession à la suite d'une abdication⁹³. L'objectif de cette démarche était de permettre au Duc d'York (devenu George VI), frère du souverain précédent, et à ses descendants, dont l'aînée, Sa Majesté actuelle, la reine Élisabeth II, d'accéder au trône plutôt que les descendants éventuels d'Édouard VIII. Il fallait donc modifier la législation britannique pour exclure ces derniers de la

89. Hector Bolitho, *King Edward VIII. An intimate biography*, Philadelphia, J.B. Lippincott, 1937 à la p 290.

90. Coffey, *supra* note 67 à la p 98; Lord Beaverbrook, *The Abdication of King Edward VIII*, Londres, Hamish Hamilton, 1966 à la p 57.

91. *Declaration of Abdication Act*, *supra* note 20.

92. Andrew Heard, «Canadian Independence», Colombie-Britannique, Université Simon Fraser, 1990, en ligne: Simon Fraser University <<http://www.sfu.ca/~aheard/324/Independence.html#ednref75>>. Sur l'absence d'effets juridiques de la déclaration d'abdication, voir Émond, *supra* note 28 à la p 450.

93. A. B. Keith, «Notes on Imperial Constitutional Law» (1937) 19 *Journal of Comparative Legislation and International Law* 105.

ligne de succession et soustraire l'éventuel mariage de l'ancien roi à l'exigence du consentement royal sous le *Royal Marriages Act 1772*⁹⁴.

Un débat concernant la nécessité d'une loi lors d'une abdication qui n'affecterait pas les descendants a néanmoins persisté dans la doctrine⁹⁵. Pourtant, c'est bien la loi du Parlement qui confère la charge royale à une personne (Édouard Windsor, en l'occurrence) et à ses descendants. L'héritier au trône ne pouvait résister à l'attribution de la charge royale qui est effectuée par l'*Act of Settlement*⁹⁶, comme un héritier à la pairie ne pouvait davantage renoncer à son titre de noblesse avant l'entrée en vigueur du *Peerage Act 1963*⁹⁷. Ainsi, l'*Act of Settlement*⁹⁸ a fixé le point de départ de la succession royale, soit la Princesse Sophia⁹⁹. En vertu du principe de suprématie législative qui caractérise le droit britannique, cet ordre de succession ne peut être modifié que par loi du Parlement, titulaire du pouvoir suprême de modifier les règles de désignation du chef de l'État¹⁰⁰.

-
94. *Royal Marriages Act*, *supra* note 19. Cette loi britannique rend invalides, autant au Royaume-Uni que dans les dominions, les mariages des successibles au trône n'ayant pas reçu le consentement du monarque. Keith, *supra* note 93 à la p 106.
95. Voir à ce sujet : F. C. Cronkite, «Canada and the Abdication» (1938) 4 *Canadian Journal of Economics and Political Science* 177 à la p 178 et s (loi non nécessaire); Émond, *supra* note 28 aux pp 448-449 (loi nécessaire).
96. Émond, *ibid* à la p 449.
97. *Peerage Act, 1963* (R-U), 1963, c 48.
98. *Supra* note 18.
99. Le Parlement britannique, par l'*Act of Settlement*, *ibid*, importe une dynastie du Hanovre pour régner sur le Royaume-Uni. Cependant, les descendants de Sophia accèdent au trône britannique, nonobstant leur règne sur le Hanovre. Le monarque britannique règne en fonction du droit de la succession royale britannique. Coffey écrit : «An historical parallel was drawn between the Commonwealth position and the fact that King George III, King George IV, and King William had been Kings of Hanover and, at the same time, Kings of Great Britain and Ireland. *The same person was King in both jurisdictions but the person did not hold the title of King of Hanover by virtue of the title of King of Great Britain and Ireland.* Hanover was governed by agnatic succession. This meant that a female could not succeed to the Crown. When Victoria became Queen of the United Kingdom, her uncle became King Ernest Augustus I of Hanover. This historical parallel therefore indicated the possibility of having separate monarchs in Great Britain and the Dominions» [nos italiques]. Coffey, *supra* note 67 à la p 102.
100. Conscient que la *common law* ou un acte de l'exécutif ne peuvent aller à l'encontre de la volonté du Parlement, Sir William Blackstone, dans ses *Commentaries*, écrit : «The grand fundamental maxim upon which the *jus coronae*, or right of succession to the throne of these kingdoms, depends, I take to be this: "that the crown is, by common law and constitutional custom, hereditary"; and this in a manner peculiar to itself: but that the right of inheritance *may from time to time be changed or limited by act of parliament*; under which limitations the crown still continues hereditary.» Sir William Blackstone, *Commentaries on the Laws of England: In Four Books*, Philadelphia, J.B. Lippincott Editions,

Si l'intervention du Parlement britannique, pouvoir suprême dans l'ordre juridique du Royaume-Uni, apparaissait indispensable au dénouement de la crise provoquée par l'abdication du roi Édouard VIII, celle des dominions représentait une innovation rendue nécessaire par la divisibilité de la Couronne et l'accession des anciennes colonies à l'indépendance politique. L'opération s'annonçait d'autant plus complexe que l'indépendance des dominions était relativement récente. Le nouveau cadre juridique mis en place par le *Statut de Westminster* n'était pas encore entré en vigueur dans tous les dominions. Certains États, comme le Canada, l'Afrique du Sud et l'Irlande, devaient se conformer aux exigences du Statut alors que d'autres, comme l'Australie, la Nouvelle-Zélande et Terre-Neuve, n'y étaient que partiellement tenus¹⁰¹.

1876, Book 1, c 3; Keith, *supra* note 93. Coffey ajoute: «The line of succession to the English throne had been settled by the 1701 Act. The primary purpose of the Act was to prevent Roman Catholics from ascending to the throne. Section 1 provided that the line of succession was to be through William III and his issue, Anne and her issue, and then the Elector Sophia of Hanover "and the heirs of her body, being Protestants." This section fixed the line of succession. Any alteration in the line of succession would therefore require a statutory amendment. Section 2 provided that if a Roman Catholic held the throne, or if the Monarch married a Catholic, then a demise of the Crown would take place and the next in line to the throne who was a Protestant would ascend to the throne. Section 3 stated that, "whosoever shall hereafter come to the possession of this Crown, shall join in communion with the Church of England, as by law established» [nos italiques]. Coffey, *supra* note 67 à la p 97.

101. Le premier article du Statut définit son domaine d'application. Celui-ci comprend les dominions suivants: «Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland». L'article 10 du Statut contient toutefois un report de l'entrée en vigueur des articles 2 à 6 pour l'Australie, la Nouvelle-Zélande et Terre-Neuve jusqu'à ce que le Parlement du Dominion en question adopte ces articles. C'est donc dire que le Statut n'est effectif en totalité qu'au Canada, en Afrique du Sud et dans l'État libre d'Irlande lors de l'abdication. Ainsi, il est pleinement entré en vigueur, en Australie, qu'en 1942 (*Statute of Westminster Adoption Act 1942* (Cth), 1942/56) et, en Nouvelle-Zélande, en 1947 (*Statute of Westminster Adoption Act 1947* [N-Z], 1947/28). Les autorités britanniques étaient pleinement conscientes de cette application asymétrique de l'article 4 du *Statut de Westminster*, comme en témoigne la *Lettre du 6 décembre 1936 du haut-commissaire britannique à Ottawa au premier ministre King inter alia lui remettant un résumé de la position du premier ministre du gouvernement du Commonwealth d'Australie au télégramme du premier ministre britannique Baldwin du 4 décembre ainsi que la réponse de ce dernier au premier ministre du Commonwealth d'Australie* (Bibliothèque et Archives Canada, Prime Ministers' Fonds, «William Lyon Mackenzie King», MG26 J1, vol 216, microfiche C3688 [Bibliothèque et Archives Canada, «Mackenzie King»] aux pp 186734-186743 également disponible dans *Motard et Taillon*, *supra* note 16, pièce PGC-14) [*Lettre du 6 décembre 1936*], où le premier ministre Baldwin rappelle aux autorités australiennes qu'elles ne sont pas visées par les mêmes exigences que le Canada. Voir aussi Pelletier, «Morganatic Marriage», *supra* note 67 au para 27;

En revanche, l'ensemble des dominions étaient visés par les mêmes exigences conventionnelles qui devaient, par conséquent, être respectées de tous. La modification des règles de succession royale dans les dominions s'effectua donc suivant le droit et les conventions pertinentes de chacun. Cette situation requérait une pluralité de procédures, ne serait-ce que parce que certains États n'étaient pas encore soumis aux exigences de l'article 4 au moment de l'abdication.

C'est dans ce contexte que les autorités britanniques préparèrent, bien avant la déclaration d'abdication, les modifications requises aux règles de succession¹⁰². À cette fin, Maurice Gwyer, conseiller juridique du premier ministre Baldwin pendant la crise d'abdication de 1936, représentant britannique lors de plusieurs conférences du Commonwealth et futur juge en chef de l'Inde, avait produit un important mémorandum¹⁰³. De ce fait, le gouvernement Baldwin était pleinement conscient de la complexité des changements requis en cas d'abdication lorsqu'il s'opposa au projet de mariage du roi Édouard VIII. En effet, les avis juridiques étaient sans équivoque quant à la nécessité de modifier les règles de succession en droit britannique – et dans le droit interne de chacun des dominions. Cela a d'ailleurs été explicitement reconnu dans le mémorandum préparé par Gwyer :

*The Act of Settlement is at the present moment part of the law of each Dominion as well as of the United Kingdom, and the abdication will, therefore, be of no effect in a Dominion unless the action taken alters the law in the Dominion as well as in the United Kingdom [nos italiques]*¹⁰⁴.

Cette reconnaissance de la réception et de la pluralité des processus de modification était d'autant plus importante que Gwyer, à l'instar de plusieurs autres, demeurait, à l'époque, profondément influencé par la doctrine *inter se* qui avait tendance à concevoir les rapports d'égalité entre les pays visés par la Déclaration Balfour comme étant des rapports de droit constitutionnel au sein d'un même empire plutôt que de droit international, comme l'a ensuite confirmé la pratique institutionnelle¹⁰⁵.

E.C.S. Wade, « Statute: Declaration of Abdication Act, 1936 » (1937) 1 *Modern Law Review* 64 à la p 65; Coffey, *supra* note 67 à la p 103.

102. Coffey, *ibid* aux pp 98-99.

103. Gwyer, *supra* note 67 au para 13.

104. « Crown Law Advice to the UK Government », 1936, National Archives of Australia PRO: DO 121/39 au para 5.

105. Pour expliquer la persistance de la doctrine *inter se* et la résistance de certains à prendre acte de la divisibilité de la Couronne, Coffey écrit : « The indivisible Crown meant that the King was King of all of the Commonwealth countries at

Au-delà de cette nécessité de modifier le droit interne des dominions, les autorités britanniques, devant l'impératif d'agir promptement en cas d'abdication, tentèrent de simplifier et d'unifier le plus possible la procédure à suivre¹⁰⁶, mais en vain. Dans un télégramme du premier ministre Baldwin, daté du 4 décembre 1936, où il annonçait aux autorités canadiennes la préparation d'un projet de loi sur l'abdication, il proposa que la législation britannique opère une reconnaissance automatique dans le droit des dominions¹⁰⁷, suivant la théorie de l'*implied incorporation*¹⁰⁸.

Le gouvernement canadien de Mackenzie King, comme celui d'autres dominions, dut, dès lors, poser un certain nombre de gestes pour faire respecter leur indépendance dans le cadre du processus de modification des règles de succession. Par exemple, dans l'attente d'une indépendance complète, l'Irlande utilisa la crise de l'abdication

the same time, rather than King of each separately. This theoretical point had a number of practical applications. If the King was a single King then it axiomatically followed that treaties, which were concluded in the name of Heads of State, could not be concluded between Commonwealth members, as the Head of State in both instances was the same person performing the same function. Therefore, Commonwealth relations were, under the *inter se* doctrine, constitutional rather than international.» Coffey, *supra* note 67 à la p 101.

106. Baldwin était d'avis que moins de législation voulait dire moins de débats, et, ainsi, moins de place pour la critique. *Lettre du 4 décembre 1936 du haut-commissaire britannique («British high commissioner») à Ottawa au premier ministre King inter alia lui remettant un résumé du télégramme du premier ministre britannique Baldwin de la même date*, Bibliothèque et Archives Canada, «Mackenzie King», *supra* note 101 aux pp 186688-186695, également disponible dans *Motard et Taillon*, *supra* note 16, pièce PGC-8 [*Lettre du 4 décembre 1936*].
107. La Constitution de l'Afrique du Sud et celle de l'Australie contiennent alors des articles interprétatifs selon lesquels la mention du roi dans ces constitutions inclut les successeurs, rois et reines du Royaume-Uni. Baldwin était d'avis que ces dispositions, explicites pour l'Afrique du Sud et l'Australie, sont implicites dans les constitutions des autres dominions, opérant, selon lui, l'*implied incorporation* des changements à la succession réalisés en droit britannique dans tous les dominions. *Lettre du 4 décembre 1936, ibid.*
108. Cette théorie est défendue à l'époque notamment par Cronkite, *supra* note 95 à la p 186. C'est sur cette thèse que se sont appuyées les autorités fédérales à l'occasion de la réforme de 2013. Selon le ministre Nicholson, les références à la Reine dans la Constitution canadienne réfèrent invariablement au souverain alors régnant sur le Royaume-Uni. Ainsi, tout changement apporté par le Parlement de Westminster à la succession royale en droit britannique affecterait automatiquement le Canada. Nicholson, *supra* note 10: «Canada is a constitutional monarchy, and it is a fundamental rule of our constitutional law that the Queen of Canada is the Queen of the United Kingdom, or, to put it another way, whoever, at any given period is the Queen or King of the United Kingdom is, at the same time, the Queen or King of Canada». Voir aussi Peter C. Oliver, *The Commonwealth, Constitutional Independence and Succession to the Throne*, Rapport d'un témoin expert, disponible dans *Motard et Taillon*, *supra* note 16; Hogg, «Succession», *supra* note 10.

comme un pas de plus vers la forme républicaine de gouvernement. Par deux lois subséquentes, dont l'une résolvait la crise de l'abdication, l'État libre d'Irlande évacua toute référence à la monarchie dans les affaires internes, ne conservant le monarque que dans le domaine des affaires étrangères¹⁰⁹.

Plus subtilement, d'autres États arrivèrent à s'appuyer sur cette situation afin d'affirmer leur indépendance, et la divisibilité de la Couronne qui en découle, tout en préservant l'harmonisation des règles de succession et l'allégeance commune à un même titulaire des différentes charges royales. L'exemple de l'Afrique du Sud est, à cet égard, très éloquent. Parce que les autorités locales étaient fermement attachées à la divisibilité de la Couronne, elles ont utilisé le processus de modification pour montrer qu'il existait, en vérité, plusieurs charges royales indépendantes les unes des autres, mais confiées à une seule personne. Pour ce faire, il lui fallut symboliquement et temporairement rompre avec le principe de l'harmonie des règles de succession. C'est l'opération à laquelle se livra l'Afrique du Sud, dans les premiers mois de 1937, en donnant effet à l'abdication un jour plus tôt dans ce pays que dans le reste du Commonwealth¹¹⁰.

Cette manière d'affirmer la souveraineté et l'indépendance de la Couronne d'Afrique du Sud était d'autant plus volontariste que cet État – contrairement au Canada – était soumis à une disposition constitutionnelle explicite, en vigueur depuis seulement deux ans au moment de l'abdication, selon laquelle la succession royale pour l'Afrique du Sud devait être interprétée comme étant celle applicable à la Couronne britannique¹¹¹. Toutefois, la Constitution sud-africaine de 1934 contenait également une disposition limitant la capacité du Parlement britannique à légiférer pour l'Afrique du Sud¹¹². Ainsi,

109. *Executive Authority (External Relations) (Ireland) Act, 1936*, No. 58 of 1936; *Constitution (Amendment No. 27) (Ireland) Act, 1936*, No. 57 of 1936. Seule la première des deux lois portait directement sur la question de l'abdication. Voir aussi Coffey, *supra* note 67 aux pp 111 et s.

110. *His Majesty King Edward the Eighth's Abdication Act 1937* (S Afr), n° 2 de 1937.

111. Accréditant, pour cet État, la thèse de l'intégration automatique des changements aux règles de succession proposée par le Royaume-Uni (*implied incorporation*), l'article 5 du *Status of the Union Act 1934*, *supra* note 61, énonçait explicitement la règle suivante : « heirs and successors' shall be taken to mean His Majesty's heirs and successors in the sovereignty of the United Kingdom of Great Britain and Ireland as determined by the laws relating to the succession of the Crown of the United Kingdom of Great Britain and Ireland » [nos italiques].

112. L'article 2 de la Constitution énonçait ceci : « The Parliament of the Union shall be the sovereign legislative power in and over the Union, and notwithstanding anything in any other law contained, no Act of the Parliament of the United Kingdom and Northern Ireland passed after the eleventh day of December,

le législateur sud-africain n'eut d'autre choix que d'édicter une loi modifiant la succession royale pour l'Afrique du Sud¹¹³, et ce, afin d'intégrer, dans le droit de cet État, les modifications adoptées par le Parlement britannique. Or, cette loi sud-africaine a rétroactivement fixé les effets de l'abdication en droit sud-africain un jour plus tôt que dans le reste des pays du Commonwealth. Comme le souligne Coffey :

This Act was important from a theoretical point of view. Edward VIII abdicated one day earlier in South Africa compared to Britain. It was impossible, in light of this development, to maintain that the Crown was indivisible. This undermined the *inter se* doctrine which had hitherto been the British approach to Commonwealth relations¹¹⁴.

Symboliquement et temporairement, l'Afrique du Sud rompit sciemment avec l'exigence conventionnelle de maintenir des règles de succession harmonisées. En agissant ainsi, elle put affirmer sa souveraineté et l'indépendance de sa Couronne par rapport au reste du Commonwealth.

iii. La demande et le consentement: une exigence essentielle en droit canadien

Le Canada, quant à lui, fit très méticuleusement respecter les exigences du *Statut de Westminster*. Doté d'une constitution reposant sur les mêmes principes que celle du Royaume-Uni¹¹⁵, il dut, lui aussi, modifier son droit interne relatif aux règles de désignation de son chef d'État afin de donner suite à la volonté d'abdication du roi Édouard VIII.

L'étude des archives du gouvernement de Mackenzie King relatives à la crise de l'abdication confirme par ailleurs une maîtrise extrêmement fine de la procédure à suivre. Conscients des modifications requises aux normes constitutionnelles rigides qui, à l'époque, demeuraient du ressort exclusif du Parlement britannique agissant

1931, shall extend, or be deemed to extend, to the Union as part of the law of the Union, *unless extended thereto by an Act of the Parliament of the Union* » [nos italiques]. *Status of the Union Act 1934, ibid.*

113. *His Majesty King Edward the Eighth's Abdication Act 1937, supra* note 110.

114. Coffey, *supra* note 67 à la p 111. Voir aussi Twomey, *Laws of succession, supra* note 16 au para 6.12: « There were different Kings in different Dominions during the period 10-12 December 1936 marking the divisibility of the Crown in the personal, as well as the political, sense ».

115. *LC de 1867, supra* note 12, préambule.

à la demande et avec le consentement du Canada¹¹⁶, les auteurs des avis juridiques du gouvernement fédéral établirent un lien entre la procédure des articles 4 et 7 et la modification des règles de succession. Ils écrivirent :

It may thus be assumed that there remained in the Parliament of the United Kingdom the power to make laws extending to Canada, and that if the laws set forth on their face the *request and consent* of Canada, they would be effective. This is *particularly true in the case of a law relating to the constitution, such as His Majesty's Declaration of Abdication Act 1936*. There could be no doubt as to the validity of this law, which contained on its face a recital of the request and consent of Canada.¹¹⁷ [...]

It will thus be seen that since the Parliament of the United Kingdom could not, by the terms of the Statute of Westminster, pass an Abdication Act extending to Canada, *unless the Dominion had requested such legislation in advance and consented to its terms*, steps were taken to convey this request and consent and secure their expression in the United Kingdom Act, and steps are now being taken to secure the assent of the Parliament of Canada necessary for the alteration in the Succession [nos italiques]¹¹⁸.

Dans un discours qu'il livra à la Chambre des communes lors de l'adoption, après coup, de la *Loi canadienne de 1937*¹¹⁹, Mackenzie King insista, lui aussi, sur l'importance de la procédure prévue à l'article 4. Il déclara :

[...] jusqu'en 1931, ce pouvoir de modifier la succession appartenait uniquement au parlement britannique. Au cours de cette année-là, on a reconnu formellement le fait que la succession au trône constituait une affaire qui intéressait directement et profondément tous les membres du Commonwealth des nations britanniques. Cette reconnaissance est inscrite dans le texte du *Statut de Westminster*, dans l'article 4 que l'on a cité hier à maintes reprises, ainsi que dans le préambule. Permettez-moi de citer encore une fois l'article 4 du *Statut de Westminster*. [citation omise]

Le Parlement du Royaume-Uni ne pouvait donc pas, en vertu des dispositions du *Statut de Westminster*, adopter une loi relative à l'abdication s'étendant ou destinée à s'étendre au Canada à moins que le Dominion

116. Conformément aux articles 4 et 7 du *Statut de Westminster*, *supra* note 11.

117. Bibliothèque et Archives nationales Canada, « Edward VIII », *supra* note 55 à la p 18.

118. *Ibid* à la p 38.

119. *Loi canadienne de 1937*, *supra* note 81.

ne demande l'adoption d'une telle mesure à l'avance et n'accepte ses dispositions [nos italiques]¹²⁰.

Si Mackenzie King insistait tant sur l'article 4 comme condition nécessaire à toute modification des règles de succession pour le Canada, c'est essentiellement pour deux raisons. Premièrement, à l'époque, seul cet article permettait une modification du droit constitutionnel canadien relatif aux règles de désignation du chef de l'État. Deuxièmement, il représentait une avancée importante pour l'exercice du pouvoir constituant canadien : le Parlement britannique était désormais formellement tenu d'agir qu'à la demande et avec le consentement du Canada, un acquis que Mackenzie King voulait assurément consolider.

C'est donc une certaine idée de la souveraineté du Canada que Mackenzie King défendit auprès des autorités britanniques dans la correspondance qui précéda l'adoption du *His Majesty's Declaration of Abdication Act* par le Parlement britannique. Le premier ministre du Canada fit alors d'intenses représentations auprès des gouvernements du Royaume-Uni et des dominions afin que les changements opérés modifient effectivement le droit canadien de la succession royale d'une manière qui soit conforme avec le nouveau statut du Canada. Il fit rigoureusement respecter les exigences de la procédure prescrite à l'article 4 du *Statut de Westminster* qui, lors de l'abdication de Sa Majesté Édouard VIII, en décembre 1936, formait la procédure formelle de modification de la Constitution du Canada¹²¹.

Dès qu'il reçut le télégramme du 4 décembre du premier ministre Baldwin, dans lequel ce dernier proposait d'appliquer, à l'ensemble des dominions, la théorie de la reconnaissance automatique (*implied incorporation*), qui semblait explicitement prévue par les constitutions de l'Afrique du Sud et de l'Australie, Mackenzie King s'y opposa¹²². À l'idée que cette théorie serait implicitement disponible

120. *Débats de la Chambre des Communes*, 18^e parl, 2^e sess, vol 1, (19 janvier 1937) à la p 68 (William Lyon Mackenzie King).

121. Brun, Tremblay et Brouillet, *supra* note 30 au para I.31, à la p 16.

122. *Télégramme 6 (sic) décembre 1936 du haut-commissaire britannique à Ottawa transmettant la position du premier ministre King au premier ministre britannique Baldwin quant à la procédure proposée par ce dernier dans son télégramme du 4 décembre*, disponible dans *Motard et Taillon*, *supra* note 16, PGC-11 et P-52 [Télégramme King-Baldwin]. Voir aussi *Projet de réponse au télégramme du premier ministre britannique Baldwin du 4 décembre 1936*, Bibliothèque et Archives nationales Canada, «Mackenzie King», *supra* note 101 aux pp 186721-186723, également disponible dans *Motard et Taillon*, *supra* note 16, PGC-10 [Projet de réponse Baldwin]; Coffey, *supra* note 67 aux pp 105-108.

pour le Canada, il répondit que celle-ci « does not appear acceptable in view of the recognised position of the Dominions in regard to the Crown »¹²³. Cela aurait pourtant permis, à l'époque, de résoudre un problème bien canadien : celui de l'impossibilité de convoquer le Parlement en temps utile.

N'étant pas en mesure de réunir le Parlement canadien avant janvier 1937, Mackenzie King, qui cherchait une manière de respecter les exigences formelles et conventionnelles, suggéra de procéder en deux temps : une *demande et consentement* du gouvernement canadien dans les plus brefs délais, conformément à l'article 4 du *Statut de Westminster*, et l'expression d'un *assentiment* du Parlement fédéral, après coup, au début de l'année 1937¹²⁴. Or, même si la proposition de Mackenzie King fut acceptée par le premier ministre Baldwin dans son télégramme du 5 décembre¹²⁵, le premier ministre du Canada écrivit de nouveau à son homologue britannique afin d'exiger que la mention « à la requête et avec le consentement du Canada » figurât expressément dans le texte du projet de loi¹²⁶.

Puis, du 7 au 10 décembre, un débat s'amorça sur le choix des termes devant être employés dans le projet de loi. Pendant que le Canada tenait aux vocables « requête et consentement »¹²⁷, l'Afrique du Sud, où d'autres procédures devaient s'appliquer¹²⁸, ne pouvait se satisfaire que du terme « assentiment » prévu par le préambule du *Statut de Westminster*¹²⁹. Pour tenir compte des particularités de

123. *Télégramme King-Baldwin*, supra note 122.

124. *Ibid* ; *Lettre du 8 décembre 1936 du premier ministre King au haut-commissaire britannique à Ottawa pour être transmise au premier ministre britannique Baldwin quant aux modifications proposées au projet de loi britannique par ce dernier le 7 décembre*, Bibliothèque et Archives nationales Canada, « Mackenzie King », supra note 101 à la p 186781, également disponible dans *Motard et Taillon*, supra note 16, pièce PGC-18 [*Lettre du 8 décembre 1936*].

125. *Lettre du 5 décembre 1936 du haut-commissaire britannique à Ottawa au premier ministre King inter alia lui remettant un résumé du télégramme du premier ministre britannique Baldwin en réponse à celui de King*, Bibliothèque et Archives nationales Canada, « Mackenzie King », supra note 101 aux pp 186724-186731, également disponible dans *Motard et Taillon*, supra note 16, PGC-12.

126. *Lettre du 6 décembre 1936*, supra note 101. Voir aussi *Lettre du 8 décembre 1936*, supra note 124.

127. *Ibid*.

128. *Status of the Union Act 1934*, supra note 61. Voir supra à la p 29.

129. *Lettre du 6 décembre 1936*, supra note 101 ; *Lettre du 9 décembre 1936 (16 h) du haut-commissaire britannique à Ottawa au premier ministre King portant sur la position du premier ministre britannique Baldwin quant aux commentaires sur les modifications proposées au projet de loi britannique (Abdication Act) par le Canada et la Nouvelle-Zélande*, Bibliothèque et Archives nationales Canada, « Mackenzie King », supra note 101 aux pp 186798-186800,

chaque État, le premier ministre Baldwin proposa, dans son télégramme du 7 décembre 1936¹³⁰, que le projet de loi fasse référence à la « requête et au consentement du Canada, de la Nouvelle-Zélande et de l'Australie », d'une part, et à « l'assentiment de l'Afrique du Sud », d'autre part. En réaction à cette proposition, Mackenzie King, dans son télégramme du 8 décembre¹³¹, tout comme son homologue de la Nouvelle-Zélande¹³², se montra réticent à l'utilisation de deux formules différentes qui pouvaient laisser l'impression, d'un point de vue politique, que le Canada, l'Australie et la Nouvelle-Zélande avaient davantage insisté en faveur de la solution de l'abdication que l'Afrique du Sud.

Pour vaincre ces réticences, la Nouvelle-Zélande suggéra l'utilisation du terme « assentiment », prévu au préambule du *Statut de Westminster* pour tous les dominions. De nouveau, Mackenzie King s'opposa fortement à cette proposition. Dans son télégramme du 9 décembre, transmis aux autorités britanniques, il affirma :

The use of the word « assent » would have certain advantage, but we consider it open to the minor objection of confusion with the different significance given to the same word in the preamble of the Statute of Westminster, and to the serious objection that its use would weaken the procedure devised in Section 4 of the Statute of Westminster for ensuring the constitutional equality of the Dominion. Under the terms of Section 4, the United Kingdom Parliament cannot legislate for Canada unless it is expressly declared in the Act that Canada has *requested and consented* to the enactment thereof, or, in other words, *Canada must (hand written in margin: as regards the necessary procedure) have taken the initiative by formally requesting such action and expressed its consent* to the terms of the draft Act. *It does not appear desirable to set a precedent for a lower procedure or phraseology so far as Canada is concerned.* I have already pointed out that Section 4 of the Statute is not applicable to New Zealand [nos italiques]¹³³.

également disponible dans *Motard et Taillon, supra note 16, PGC-23 [Lettre du 9 décembre 1936]*.

130. *Lettre du 7 décembre 1936 (21 h) du haut-commissaire britannique à Ottawa au premier ministre King lui remettant les modifications proposées au projet de loi britannique (Abdication Act) par le premier ministre britannique Baldwin*, Bibliothèque et Archives nationales Canada, « Mackenzie King », *supra note 101* aux pp 186759-186760, également disponible dans *Motard et Taillon, supra note 16, PGC-17*.
131. *Lettre du 8 décembre 1936, supra note 124*.
132. *Lettre du 9 décembre 1936, supra note 129*.
133. *Ibid.* Voir aussi *Projet de lettre du premier ministre King au haut-commissaire britannique à Ottawa pour être transmise au premier ministre britannique Baldwin quant aux modifications proposées au projet de loi britannique par le premier ministre de Nouvelle-Zélande le 9 décembre*, Bibliothèque et Archives

Puis, le même jour, dans un second télégramme transmis au premier ministre Baldwin, Mackenzie King commenta le libellé d'un projet qui lui avait été soumis de la façon suivante :

I would anticipate some danger of the legal validity of the legislation as regards Canada being challenged and of greater criticism by constitutional authorities if it failed to comply with the express requirements of Section 4 of the Statute¹³⁴.

Ainsi, pour le gouvernement que dirigeait Mackenzie King, la procédure de l'article 4 représentait une exigence impérative à la modification du droit canadien de la succession royale. Il ne pouvait concevoir qu'une procédure plus souple que la modification constitutionnelle formelle soit utilisée en ce qui concerne le Canada. Son objectif était alors d'assurer la souveraineté canadienne en évitant la création d'un précédent en faveur d'une autre formule. Il voulut jalousement préserver la limitation de la compétence du Parlement impérial établie par l'article 4 du Statut.

Une fois ces conditions comprises et acceptées par le Royaume-Uni et les autres dominions, le Canada adopta, le 10 décembre 1936, un arrêté en conseil¹³⁵ afin de demander et de consentir à une modification aux règles de succession suivant la procédure prescrite par l'article 4 du *Statut de Westminster*. Après avoir rappelé et distingué les exigences du préambule de celles de l'article 4 du Statut, l'arrêté du gouverneur général en conseil précisait :

*That, in order to insure that the requirements of the fourth section of the Statute are satisfied, it is necessary to provide for the request and consent of Canada to the enactment of the proposed legislation; and, in order to insure compliance with the constitutional convention expressed in the second recital of the preamble, hereinbefore set forth, it is necessary to make provision for securing the assent of Parliament of Canada thereto;*¹³⁶

nationales Canada, «Mackenzie King», *supra* note 101 aux pp 186787-186792, également disponible dans *Motard et Taillon*, *supra* note 16, PGC-21.

134. *Lettre du 9 décembre 1936*, *supra* note 129. Mackenzie King propose alors le préambule suivant: «His Majesty's Government in Canada, pursuant to the provisions of Section 4 of the Statute of Westminster, 1931, have requested and assented to the enactment of this Act». La version finale de la loi retiendra ce préambule, mais remplacera «His Majesty's Government in Canada» par «Dominion of Canada»: *Declaration of Abdication Act*, *supra* note 20, préambule.
135. *Order in Council regarding Canadian Request and Consent for Enactment of United Kingdom altering succession*, CP 1936-3144, (1936) Gaz C II, 843 [*OC Canadian Request and Consent*].

136. *Ibid.*

Puis, dans sa partie opérante, l'arrêté édictait :

That the enactment of legislation by the Parliament at Westminster, following upon the voluntary abdication of His Majesty the King, providing for the validation thereof, the consequential demise of the Crown, succession of the heir presumptive and revision of the laws relating to the succession to the throne, and declaring that *Canada has requested and consented* to such enactment, by hereby approved;

That the proposed legislation, *in so far as it extends to Canada*, shall conform as nearly as may be to the annexed draft bill [nos italiques]¹³⁷.

Cette dernière mention, spécifiant que la loi britannique opère une modification du droit canadien, confirma, encore une fois, la *réception*, l'*application* et la « canadianisation » des règles de succession au Canada. Ainsi, concernant l'*His Majesty's Declaration of Abdication Act*¹³⁸, Wheare écrit : «The Act therefore applied to Canada as part of the law of Canada, and would be so construed by a Court»¹³⁹.

En pratique, le choix de recourir à un arrêté en conseil afin d'exprimer «la demande et le consentement» du Canada permit d'accentuer encore davantage les différences entre les exigences de l'article 4 et celle du deuxième paragraphe du préambule du *Statut de Westminster*. En effet, contrairement à «l'assentiment» du Parlement prévu au préambule, l'article 4 ne précise pas les organes habilités à demander et à consentir. Le terme «Dominion» se voulait une dénomination large englobant autant le gouvernement que le Parlement du Canada¹⁴⁰. Or, en décembre 1936, il était impossible de convoquer en temps utile le Parlement¹⁴¹. Le Canada dut conséquemment exprimer sa demande et son consentement à un moment et par un organe bien distinct du Parlement, dont l'assentiment demeurerait malgré tout souhaitable, à terme, afin de se conformer à la convention constitutionnelle du deuxième paragraphe du préambule du *Statut de Westminster*.

137. *Ibid.*

138. *Declaration of Abdication Act*, *supra* note 20.

139. Wheare, *supra* note 51 à la p 285.

140. Voir le développement à ce sujet à la p 378, ci-dessus.

141. *Télégramme King-Baldwin*, *supra* note 122; *Projet de réponse Baldwin*, *supra* note 122; *OC Canadian Request and Consent*, *supra* note 135 : «That it is impossible so to expedite the assembling of the Parliament of Canada as to enable appropriate parliamentary action to be taken prior to or contemporaneously with the enactment of the proposed legislation by the Parliament at Westminster.». Voir aussi Pelletier, «Morganatic Marriage», *supra* note 67 au para 50; Margaret A. Banks, «If the Queen Were to Abdicate: Procedure under Canada's Constitution» (1989) 28 *Ata L Re* 535 à la p 536.

Si l'arrêté en conseil du gouvernement du Canada fut adopté le même jour que la signature, par Édouard VIII, de sa déclaration d'abdication¹⁴², le Parlement britannique n'adopta une loi sur l'abdication que le lendemain, soit le 11 décembre 1936, modifiant à la fois le droit britannique et le droit constitutionnel canadien de la succession royale¹⁴³. Son préambule précise en effet qu'elle a été adoptée à la demande et avec le consentement du Canada, conformément à l'article 4 du *Statut de Westminster*:

And whereas, following upon the communication to His Dominions of His Majesty's said declaration and desire, *the Dominion of Canada pursuant to the provisions of section four of the Statute of Westminster 1931 has requested and consented to the enactment of this Act*, and the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa have assented thereto [nos italiques]¹⁴⁴.

Au terme des échanges diplomatiques entre les gouvernements du Royaume-Uni et ceux des dominions, seul le Canada fut mentionné dans le préambule de la loi britannique de 1936 comme ayant demandé et consenti sous l'article 4 du *Statut de Westminster*. Il devait en être ainsi, dans la mesure où cette disposition n'était pas en vigueur dans tous les dominions¹⁴⁵ et que l'Irlande et l'Afrique du Sud eurent leurs propres exigences¹⁴⁶. Cette singularité canadienne ne doit rien au hasard: elle confirme la modification des règles de désignation du chef de l'État canadien.

142. *Declaration of Abdication Act*, *supra* note 20.

143. Cette lecture est confirmée par plusieurs auteurs, dont notamment: Wade, *supra* note 101 à la p 64; Pelletier, «Morganatic Marriage», *supra* note 67 au para 50. Voir aussi Banks, *supra* note 141 à la p 536.

144. *Declaration of Abdication Act*, *supra* note 20, préambule.

145. Wade, dans son commentaire sur la loi de 1936, écrit: «Why did Canada alone expressly request and consent to the measure which she did by Order in Council, though the Dominion Parliament has since given its approval to the alteration in succession to the throne? So far as the Commonwealth of Australia and the Dominion of New Zealand are concerned, neither has yet adopted sect. 4 of the Statute of Westminster». Wade, *supra* note 101 à la p 65. L'Australie répondit aux exigences énoncées aux deuxième et troisième paragraphes du préambule du *Statut de Westminster* par résolution des deux chambres fédérales: Austl, *supra* note 82; La Nouvelle-Zélande fit de même, par résolution des deux chambres: N-Z, *supra* note 82. Voir Twomey, *Laws of succession*, *supra* note 16 aux para 6.8 et 6.9.

146. *Supra*, note 101 aux pp 26 et 28. Pour l'Australie et la Nouvelle-Zélande, seule une convention constitutionnelle constatée dans le préambule du *Statut de Westminster*, *supra* note 11, exigeait la demande et le consentement du Dominion à une législation impériale

b. Le cumul des exigences formelles et conventionnelles

Il y a donc bel et bien eu, en 1936, changement au droit canadien de la succession royale par une modification formelle de la Constitution canadienne effectuée par le Parlement britannique légiférant « pour le Canada » à la demande et avec le consentement du gouvernement canadien. Ainsi, ce n'était pas par excès de précaution que l'on cita expressément l'article 4 du *Statut de Westminster*. Le Parlement du Royaume-Uni était d'ailleurs bien au fait de l'intention qu'il exprimait dans cette loi. À ce propos, le premier ministre Baldwin déclara, à la Chambre des communes, ce qui suit :

The provisions of this Bill require very few words of explanation from me at this stage. It is a matter which, of course, concerns the *Dominions and their Constitutions* just as it concerns us [nos italiques]¹⁴⁷.

Le législateur britannique était, de toute évidence, bien conscient de modifier la constitution des dominions, dont celle du Canada.

i. L'assentiment a posteriori et juridiquement facultatif du Parlement canadien

Sur le plan juridique, l'abdication est devenue effective et exécutoire, en droit canadien, par la loi impériale du 11 décembre 1936. Toutefois, même si la procédure de l'article 4 du *Statut de Westminster* représentait une exigence de forme essentielle en droit constitutionnel canadien, une intervention du Parlement canadien demeurerait requise afin de se conformer aux exigences conventionnelles du deuxième paragraphe du préambule de 1931.

La *Loi sur la modification de la loi concernant la succession au trône*¹⁴⁸ fut donc adoptée le 19 janvier 1937, soit après l'entrée en vigueur de la modification des règles de succession à laquelle le Canada avait consenti. La *Loi canadienne de 1937* se voulait alors

147. R-U, HC, *Parliamentary Debates*, vol 318, col 2199 (12 décembre 1936) (M. Baldwin). Cet extrait a d'ailleurs été cité par le premier ministre du Canada, Mackenzie King, et figure au *Journal officiel des débats de la Chambre des communes* sous la traduction suivante : « Les dispositions du bill [d'abdication] ne requièrent que très peu d'explications de ma part à cette phase de la discussion. C'est un sujet qui intéresse évidemment *les dominions et touche à leurs lois organiques tout comme il nous intéresse nous-mêmes* » [nos italiques] : *Débats de la Chambre des Communes, supra note 120 à la p 67* (William Lyon Mackenzie King).

148. *Loi canadienne de 1937, supra note 81.*

l'expression d'un « assentiment » du Parlement du Canada, lequel faisait suite – comme cela a déjà été dit – à la modification du droit constitutionnel canadien par le Parlement britannique. Cette loi répondait à la convention constitutionnelle prévue au préambule du *Statut de Westminster*.

Aussi, le législateur canadien de 1937 était, à l'époque, bien conscient de son caractère déclaratoire qui ne visait qu'à satisfaire des exigences conventionnelles. Comme Benoît Pelletier le souligne :

It [la loi] was designed, according to Prime Minister Mackenzie King, « to carry out the constitutional convention expressed in the preamble to the Statute of Westminster » even though, as recognized by Mackenzie King himself, the preamble « is not an operative part of the statute » [nos italiques]¹⁴⁹.

Or, le respect de la convention constitutionnelle dont il est fait mention au préambule du *Statut de Westminster* n'était ni une condition suffisante ni une condition juridiquement nécessaire à la modification, par le Canada, des règles de succession. Mackenzie King savait pertinemment que le préambule ne figurait pas dans la partie opérante du Statut et que la *Loi canadienne de 1937* n'était votée que pour répondre à la convention constitutionnelle.

Bien qu'importante d'un point de vue politique, la convention constitutionnelle demeurait une exigence facultative sur le plan du droit strict. Elle visait à préserver l'allégeance commune à un même titulaire des différentes charges royales (union personnelle) par une forme de coordination¹⁵⁰ favorisant l'harmonisation des règles. Formellement, la convention ne limitait pas l'action des divers parlements. Cela était très explicite dans le mémorandum de Gwyer qui établissait la position de principe du gouvernement britannique quant aux aspects juridiques de la crise de l'abdication :

The Preamble only states the constitutional position; it does not of itself make an alteration in the law touching the Succession to the Throne invalid unless assented to by the Parliaments of all the Dominions as well as by the Parliament of the United Kingdom¹⁵¹.

149. Pelletier, « Morganatic Marriage », *supra* note 67 au para 51.

150. Dans la même optique, les avis juridiques du gouvernement fédéral, produits en 1936, faisaient référence à une « *co-ordinate authority* » Bibliothèque et Archives nationales Canada, « Edward VIII », *supra* note 55 à la p 45.

151. Gwyer, *supra* note 67 au para 11. Pour une analyse de cet aspect du mémorandum Gwyer : Coffey, *supra* note 67 à la p 105.

Le défaut des Parlements des dominions de fournir leur assentiment à une modification des règles de succession n'aurait donc pas affecté la validité des changements opérés dans le respect des procédures formelles de modification.

Ce fut d'ailleurs pour cette raison qu'il était possible, pour le Parlement du Canada, d'agir *a posteriori* : du 11 décembre 1936 au 19 janvier 1937, les modifications aux règles de succession furent valides et effectives – au Royaume-Uni comme au Canada –, et ce, malgré l'absence d'assentiment du Parlement canadien, dont la convocation, avant l'adoption de la loi britannique du 11 décembre, avait été jugée irréalisable par le gouvernement de Mackenzie King.

En somme, l'assentiment du Parlement canadien est une exigence conventionnelle, juridiquement facultative, qui s'ajoute à la modification formelle des règles de succession. Les avis juridiques du gouvernement du Canada, préparés en 1936, sont en outre très clairs sur ce point. La modification des règles de succession « requires legislative action in order to make the alteration effective, so also must it require legislative action by each of the Dominion Parliaments for the like purpose »¹⁵².

ii. Le caractère supralégislatif des règles de succession avant comme après le rapatriement de la Constitution du Canada

Le cumul des exigences formelles et conventionnelles visait à respecter l'indépendance et la souveraineté de chaque État, tout en préservant, par convention constitutionnelle, l'harmonie entre les règles de succession. Le caractère cumulatif de ces exigences a d'ailleurs été reconnu et longuement expliqué par Wheare, dans *The Statute of Westminster and the Dominion status*, publié en 1953¹⁵³. Dans

152. Bibliothèque et Archives nationales Canada, « Edward VIII », *supra* note 55 à la p 45.

153. Il écrit : « Moreover, in the case of action by the Parliament of the United Kingdom, there was the further rule that if such legislation [sur la succession royale ou les titres royaux] was intended to apply to the Dominion of Canada as part of the law of that Dominion, it was necessary to obtain not only the assent of the Parliament of Canada and of the Parliament of all the other Dominions, but also the request and consent of the Dominion of Canada. The passing of the Statute affected these rules, in so far as their application to Canada was concerned, in two ways. In the first place, it affirmed the rules, reciting them in paragraphs 2 and 3 of the Preamble. In the second place it supplemented the conventional rules by a rule of construction, in terms of strict law. For section 4

la même optique, Ernest Lapointe, ministre fédéral de la Justice¹⁵⁴, résuma ainsi la position du gouvernement lors des débats de 1937 entourant l'adoption de la loi canadienne :

Lors de l'abdication d'Édouard VIII, le Parlement du Royaume-Uni dut, par suite des circonstances, adopter une loi pour deux fins principales [...]. Cette loi, en ce qui concerne l'abdication et l'accession, devait s'appliquer par le fait même au dominion *et devait faire partie de la loi de ce dominion*, et par conséquent elle *devait nécessiter au préalable la demande et le consentement* du dominion à son adoption, conformément à l'article 4 du *Statut de Westminster*. En ce qu'elle vise à modifier la loi concernant la succession au trône, l'assentiment du Parlement du dominion est requis conformément à la convention constitutionnelle énoncée dans le deuxième considérant du *Statut de Westminster*, mais cet assentiment pouvait être donné dans tout délai ultérieur raisonnable, attendu qu'il *ne s'agit pas d'une condition préalable à l'adoption de la loi, mais seulement d'une convention* limitant son application dans le dominion. Quant à la première, *le Gouvernement a procédé ainsi que le veut l'article 4, lequel n'exige certainement pas l'assentiment du Parlement*. Relativement à la deuxième, le Gouvernement demande maintenant au Parlement son assentiment à la modification de la loi concernant la succession au trône, de façon à donner effet à la convention [nos italiques]¹⁵⁵.

En défendant l'idée selon laquelle ces règles constitutionnelles devaient être modifiées suivant la procédure de l'article 4, ce discours d'Ernest Lapointe reconnaissait, du même coup, la réception et la « canadienisation » des règles de succession.

Au même titre que la modification des règles de succession opérées en 1936, les autres modifications apportées aux normes constitutionnelles rigides durant la période de 1931 à 1982 devaient impérativement se faire conformément aux exigences de l'article 4. En effet, la procédure prescrite par le *Statut de Westminster* a été

enacted that *no law thereafter passed by the United Kingdom Parliament—and this includes law altering the Succession to the Throne and the Royal Style and Titles—should extend to the Dominion of Canada as part of the law of the Dominion*, unless it was declared in that Act that the Dominion had requested and consented to it. The passing of the Statute thus *added an element of strict law to the conventional rules* governing the enactment by the United Kingdom Parliament of laws, extending to Canada, altering the Succession to the Throne or the Royal Styles and Titles » [nos italiques]. Wheare, *supra* note 51 à la p 198.

154. Ernest Lapointe était ministre de la Justice sous Mackenzie King. Il a joué un rôle significatif dans les développements constitutionnels de la décennie 1920-1930 ; il est notamment cité dans la Déclaration Balfour de 1926 à titre de président d'une sous-conférence impériale.

155. *Débats de la Chambre des Communes*, *supra* note 120 à la p 81 (Ernest Lapointe).

suivie lors de l'adoption de la *Loi de 1982 sur le Canada*¹⁵⁶ et pour l'ensemble des modifications constitutionnelles adoptées par le Parlement britannique pour le Canada entre 1931 et 1982. Que ce soit pour modifier les règles de succession (1936)¹⁵⁷, pour le partage des compétences en matière d'assurance-emploi (1940)¹⁵⁸, pour l'adhésion de Terre-Neuve à la fédération (1949)¹⁵⁹ ou encore pour opérer un rapatriement partiel (1949)¹⁶⁰ ou total (1982)¹⁶¹ de la Constitution, toujours une même constante : le recours systématique à la procédure des articles 4 et 7 du *Statut de Westminster*.

L'utilisation de cette procédure de modification du droit constitutionnel canadien confirma le statut supralégislatif du droit canadien de la succession royale, et ce, bien avant l'adoption de l'alinéa 41a) de la *LC de 1982*. En effet, toutes les lois impériales ayant été édictées « pour le Canada » en vertu de l'article 4 l'ont été en raison de l'incapacité des autorités canadiennes à modifier les normes constitutionnelles rigides, et il est difficile de voir comment les règles de succession, tant par leur objet que par leur rang dans la hiérarchie des normes, pourraient échapper à cette catégorisation¹⁶². Le respect de la procédure prescrite par l'article 4 du *Statut de Westminster*, qui figure expressément dans le préambule de la loi britannique de 1936 sur l'abdication de même que dans les autres modifications effectuées par le Parlement britannique entre 1931 et 1982, incluant la *Loi de 1982 sur le Canada*, confère à chacune de ces lois britanniques la nature de normes rigides et supralégislatives au Canada.

156. Par exemple, le préambule de la *Loi de 1982 sur le Canada* précise que cette loi constitutionnelle a été adoptée à la demande et avec le consentement du Canada : « Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth » [nos italiques]. *Loi de 1982 sur le Canada*, *supra* note 9, préambule. Voir aussi Garry Toffoli, « Is There a Canadian Law of Succession and Is There a Canadian Process of Amendment? » (9 février 2013), en ligne : The Canadian Royal Heritage Trust <<http://crht.ca/wp-content/uploads/2013/02/CRHT-Background-Paper-on-Canadas-Law-of-Succession.pdf>>.

157. *Declaration of Abdication Act*, *supra* note 20.

158. *Loi constitutionnelle de 1940* (R-U), 3 & 4 Geo VI, c 36.

159. *Loi constitutionnelle de 1949* (R-U), 12, 13 & 14 Geo VI, c 22, préambule : « And whereas Canada has requested, and consented to, the enactment of an Act of the Parliament of the United Kingdom [...] ».

160. *Ibid.*

161. *Loi de 1982 sur le Canada*, *supra* note 9. Voir aussi *Loi constitutionnelle de 1946* (R-U), 9 & 10 Geo VI, c 63 ; *Loi constitutionnelle de 1951* (R-U), 14 & 15 Geo VI, c 32 ; *Loi constitutionnelle de 1960* (R-U), 9 & 10 Eliz II, c 2 ; *Loi constitutionnelle de 1964* (R-U), 1964, c 73.

162. *O'Donohue*, *supra* note 33, confirmé par la Cour d'appel de l'Ontario : 137 ACWS (3d) 1131, 2005 CarswellOnt 95, 2005 CanLII 6369 (ONCA).

Du reste, le fait que la convention constitutionnelle mentionnée au deuxième paragraphe du préambule du *Statut de Westminster* requiert un « assentiment » du Parlement du Canada a suscité une riche réflexion parmi les autorités fédérales quant au caractère de cette « compétence », dans un contexte où le Parlement du Canada n'avait pas, à cette époque, la capacité de modifier le droit constitutionnel du Canada. Sur ce point, les avis juridiques du gouvernement fédéral distinguent clairement la compétence formelle de modifier le droit constitutionnel canadien, qui relevait du Parlement britannique à la demande et avec le consentement du Canada, de l'exercice d'une compétence purement déclaratoire, et en aucun temps exécutoire, de fournir un « assentiment ». Cela ressort explicitement de l'extrait suivant :

It is true that this provision is set forth in the preamble to the Act. Consequently, it cannot be regarded as actually changing the law. It can merely be regarded as expressing a solemn constitutional convention, whereby any such alterations require the assent of all the Parliaments. *While this recital cannot be regarded as adding to the powers of the Parliament of Canada, in the strictly legal sense, it places beyond dispute the propriety of parliamentary action expressing Canadian assent. It has already been pointed out that, apart altogether from the Statute of Westminster, there could be no question raised, if the Parliament of Canada expressed its assent to action which was beyond its ordinary legislative powers. The fact that the Parliament of Canada could not deal with the matter by substantive enactment could not properly be raised as an objection. There is no rule known to the Constitutional Law of Canada or of Great Britain requiring a Parliament to limit its activity to substantive enactment. Indeed, the precedents run the other way [nos italiques]*¹⁶³.

Ainsi, l'adoption du préambule du *Statut de Westminster* n'eut pas pour effet d'attribuer le champ de compétence de la succession royale au Parlement fédéral, il ne lui confia que la capacité à exprimer un « assentiment », juridiquement non exécutoire, pour les besoins de la convention constitutionnelle, et laissa la compétence formelle de modifier les règles de désignation du chef de l'État canadien entre les mains des organes visés par la procédure de l'article 4.

L'assentiment des autorités canadiennes prévu au deuxième paragraphe du préambule du *Statut de Westminster* ne pouvait être donné indépendamment de l'article 4 du Statut avant l'abrogation de cet article en 1982. La convention constitutionnelle du préambule

163. Bibliothèque et Archives nationales Canada, « Edward VIII », *supra* note 55 aux pp 14-15.

n'habilitait pas les Parlements britannique et canadien à contourner l'article 4 du *Statut de Westminster*. De même, elle ne peut permettre, aujourd'hui, au Parlement canadien de contourner les exigences de la Partie V de la *LC de 1982*¹⁶⁴. Autrement dit, un amendement qui eut été effectué par le Parlement britannique, sans respecter les conditions de l'article 4, n'aurait pu changer l'ordre de succession au Canada. Prise isolément, la *Loi canadienne de 1937* – tout comme celle de 2013 par ailleurs – ne pouvait modifier utilement le droit canadien. En 1936, comme en 2013, le respect de la convention constitutionnelle dont il est fait mention au préambule du *Statut de Westminster de 1931* n'était ni une condition suffisante ni une condition juridiquement nécessaire à la modification du droit canadien de la succession royale.

Les exigences impératives de l'article 4, contrairement au préambule du *Statut de Westminster*, ont été abrogées, en 1982, à l'occasion du rapatriement de la Constitution¹⁶⁵. Depuis l'adoption de la *Loi de 1982 sur le Canada*, le Parlement britannique a perdu toute compétence sur le droit canadien de la succession royale, qui est dorénavant modifiable suivant les règles établies par la Partie V de la *LC de 1982*. Comme l'explique Peter Hogg, le rapatriement signifie, par définition, « the relinquishment by the United Kingdom Parliament of its residual power to legislate for Canada (this is the “patriation” of the constitution) »¹⁶⁶. Cette extinction marque la fin de la capacité législative du Parlement britannique. Ainsi, la procédure employée en 1936 n'est plus possible aujourd'hui. Constatant cela, Banks estime¹⁶⁷, à juste titre :

An abdication act passed by the United Kingdom Parliament to give effect to the monarch's instrument of abdication would not extend to Canada.

-
164. Pierre Thibault, Sophie Thériault, David Robitaille, et Marie-Ève Sylvestre, « Loi sur la succession au trône – Ottawa doit refaire ses devoirs », *Le Devoir* [de Montréal] (2 juillet 2013) en ligne : *Le Devoir* <<http://www.ledevoir.com/politique/canada/381956/ottawa-doit-refaire-ses-devoirs>>.
165. L'annexe A de la *Loi de 1982 sur le Canada*, adoptée par le Parlement britannique, contient une version française de cette loi. L'article 4 de l'annexe A attribue à cette loi le titre abrégé en français de *Loi de 1982 sur le Canada*. L'annexe B forme la *Loi constitutionnelle de 1982*, *supra* note 9. L'article 53 et l'annexe de la *LC de 1982*, *supra* note 5, ont abrogé l'article 4 du *Statut de Westminster*, *supra* note 11. La procédure de modification de la Constitution du Canada de l'article 4 a été remplacée par les procédures de modification qui se trouvent à la Partie V de la *LC de 1982* (*ibid.*).
166. Peter Hogg, « Constitutional Law – Amendment of the British North America Act – Role of the Provinces » (1982) 60 R du B can 307 [antérieur à la *Loi de 2013*] à la p 309.
167. Banks prétend toutefois, à tort selon nous, que la modification de la succession royale peut se fonder sur la compétence fédérale résiduaire. Banks, *supra* note 141 à la p 539.

Charles III (or whatever name the Prince of Wales took on ascending the Throne) would be King of the United Kingdom of Great Britain and Northern Ireland, but Elizabeth II would still be Queen of Canada¹⁶⁸.

En clair, la procédure rigide de l'article 4 du *Statut de Westminster*, qui avait été suivie en 1936, a été remplacée par la procédure rigide de la Partie V de la *LC de 1982*. Le pouvoir du Parlement britannique de légiférer pour le Canada à la demande et avec le consentement des autorités canadiennes, qui a rendu possible les modifications aux normes rigides de la Constitution durant la période de 1931 à 1982, est désormais remplacé par les procédures complexes des articles 38 à 43 de la *LC de 1982* qui requièrent des résolutions des chambres fédérales et de celles d'un certain nombre de provinces¹⁶⁹. La Partie V de la *Loi constitutionnelle de 1982* prévoit dorénavant une procédure exhaustive de modification de la Constitution du Canada¹⁷⁰. Dès lors, l'assentiment des autorités canadiennes visé par le deuxième paragraphe du préambule du *Statut de Westminster* ne peut être donné indépendamment de la Partie V de la *LC de 1982*, tout comme il ne pouvait l'être indépendamment de l'article 4 du Statut avant l'abrogation de cet article en 1982.

CONCLUSION

La crise de l'abdication du roi Édouard VIII est instructive, et ce, pour au moins trois raisons. En premier lieu, l'incapacité conjoncturelle du gouvernement de Mackenzie King à réunir rapidement le Parlement canadien a permis de distinguer – dans le temps et

168. Banks, *ibid* à la p 537.

169. Brun, Tremblay et Brouillet, *supra* note 30 aux pp 229-230; Duplé, *supra* note 51 aux pp 689-690.

170. À l'unanimité de ses membres, la Cour suprême affirmait en 1982: «La Loi constitutionnelle de 1982 [...] prévoit une nouvelle procédure de modification de la Constitution du Canada qui remplace complètement l'ancienne tant au point de vue juridique que conventionnel.» *Renvoi sur l'opposition du Québec à une résolution pour modifier la Constitution*, [1982] 2 RCS 793 à la p 806. Dans la même optique, la Cour d'appel, à l'unanimité, s'exprimait ainsi: «Depuis le rapatriement de la Constitution, la partie V de la Loi constitutionnelle de 1982 constitue un code complet qui décrit les différentes procédures applicables à toute modification à la Constitution»: *Projet de loi fédéral relatif au Sénat (Re)*, 2013 QCCA 1807 au para 25. Voir aussi: *Renvoi relatif à la réforme du Sénat*, *supra* note 2, par 28. Pour en savoir plus sur le caractère exhaustif de la Partie V: Catherine Mathieu et Patrick Taillon, «Aux frontières de la modification constitutionnelle: le caractère para-constitutionnel de la réforme du Sénat canadien», dans *La réforme du Sénat*, en ligne: (2013) 5 *Revue québécoise de droit constitutionnel* aux pp 39-43 <http://www.aqdc.org/pub/cms_volume_tablemat.php?id_volume=5>.

dans les formes – les exigences formelles des exigences conventionnelles, de même que le caractère impératif des premières par rapport aux secondes. Dans des circonstances différentes, nul doute que la demande et le consentement du Canada, d'un côté, et l'assentiment du Parlement, de l'autre, auraient pu se retrouver pêle mêle dans un même projet de loi voté *a priori*, ce qui aurait rendu moins limpides les enseignements à tirer de ce qui demeure, à ce jour, le seul précédent à la lumière duquel la réforme de 2013 peut être comparée.

En second lieu, le Parlement britannique, légiférant pour le Canada en vertu de l'article 4 du *Statut de Westminster*, a explicitement reconnu¹⁷¹ que le droit de la succession royale faisait partie du droit constitutionnel canadien, lors de la mise en œuvre formelle, en décembre 1936, de l'abdication du roi et des changements à la succession royale qu'elle entraînait.

En troisième lieu, l'étude des archives et de la correspondance durant cette crise montre bien le succès du gouvernement de Mackenzie King à imposer aux autorités britanniques le respect des exigences propres à la modification du droit constitutionnel canadien. Ainsi, la vigueur avec laquelle Mackenzie King et son gouvernement ont défendu la souveraineté canadienne dans cette affaire a permis au Canada d'affirmer de nouveau un peu plus son indépendance politique et d'utiliser, à son profit, le nouveau cadre juridique mis en place depuis l'entrée en vigueur du *Statut de Westminster*. À une époque où de nouveaux rapports entre le Canada et le Royaume-Uni restaient encore à établir, le gouvernement de Mackenzie King s'est montré soucieux d'assurer la primauté du droit constitutionnel canadien tout en demeurant solidaire à l'endroit des autres royaumes du Commonwealth.

Cette attitude, conforme au principe de *rule of law*, détonne grandement avec celle plus contemporaine du gouvernement Harper. Alors que la réforme de 1936 fut menée de main de maître par un gouvernement attentif à la promotion de l'indépendance canadienne, même s'il ne disposait pas de tous les leviers constitutionnels pour le faire, celle de 2013 est intervenue dans un contexte fort différent. Bien qu'il soit désormais émancipé de l'emprise du Parlement du Royaume-Uni, dont le pouvoir de légiférer pour le Canada s'est définitivement éteint lors du rapatriement de 1982¹⁷², le Canada a, en 2013, tenté

171. Voir *supra* notes 144 et 147.

172. *Loi de 1982 sur le Canada*, *supra* note 9, art 2.

de ne retenir du précédent de 1936 que les exigences conventionnelles, favorables aux intérêts réels ou supposés du gouvernement en place. Que ce soit par nostalgie impériale ou par souci d'éviter les négociations avec les provinces canadiennes, les autorités fédérales ont, comme dans le dossier de la réforme du Sénat et dans celui de la nomination du juge Nadon, tâché de se soustraire aux exigences formelles prévues par la Partie V de la *LC de 1982*.

En prétendant que l'ordre juridique canadien reconnaît et intègre automatiquement les changements apportés aux règles de succession par le Parlement britannique, et ce, même après l'adoption de la *LC de 1982*, les autorités fédérales se sont limitées, en 2013, à une simple loi d'assentiment qui, suivant l'argumentaire des autorités fédérales, ne modifie en rien le droit canadien de la succession royale, lequel n'existerait tout simplement pas¹⁷³. Cela ressort, entre autres, du titre officiel de la *Loi de 2013*¹⁷⁴ et du libellé de son article 2 de même que des propos du ministre responsable de la loi, Rob Nicholson, qui le reconnaissait explicitement dans un texte paru en 2013, peu après l'adoption de la loi¹⁷⁵. Or, en procédant de cette manière, les autorités fédérales ont fait fi de pans importants de l'histoire constitutionnelle canadienne, et tout particulièrement des changements juridiques formels opérés en 1936.

Cette réécriture de l'histoire préconisée par le gouvernement de Stephen Harper est, selon nous, d'autant plus regrettable qu'elle s'effectue non seulement au détriment de l'indépendance du Canada par rapport aux autorités britanniques, mais aussi – et surtout – au mépris de la primauté du droit.

173. Pelletier, «Morganatic Marriage», *supra* note 67; Sénat, Comité sénatorial permanent des affaires juridiques et constitutionnelles, *Témoignages*, 41^e lég, 1^{re} sess, no 32 (20 mars 2013) (Garry Toffoli); Garry Toffoli et Paul Benoit, «Changing the Rules of Royal Succession for Canada» (4 février 2013), en ligne : The Canadian Royal Heritage Trust <<http://crht.ca/wp-content/uploads/2013/02/CRHT-Background-Paper-On-Changing-The-Rules-Of-Succession-To-The-Throne-For-Canada.pdf>>.

174. *Loi d'assentiment aux modifications apportées à la loi concernant la succession au trône*, LC 2013, c 6, art 2.

175. Il écrit : «Le projet de loi C-53 vise à donner l'assentiment du Parlement du Canada aux modifications à la loi concernant la succession au trône qui sont proposées dans le projet de loi du Royaume-Uni. Ce sont les lois du Royaume-Uni qui régissent les lois sur la succession. Le Parlement du Royaume-Uni a le pouvoir législatif absolu de modifier les lois du Royaume-Uni concernant la succession au trône, y compris la Déclaration des droits britannique de 1688 et l'Acte d'établissement de 1700.» : Nicholson, *supra* note 10.

CONCLUSION

Philippe Lagassé

Le Parlement et la Couronne sont des institutions symbiotiques. La Couronne convoque, ouvre, proroge et dissout le Parlement, ce qui nous rappelle que ce dernier était à l'origine un organe consultatif convoqué par le monarque. Et les lois ne peuvent prendre effet qu'après avoir reçu la sanction royale, ce qui montre que l'autorité souveraine réside dans la Couronne. De même, les projets de loi de finances doivent être recommandés par la Couronne, et les lois qui touchent aux privilèges et aux prérogatives de la Couronne nécessitent occasionnellement le consentement royal. Les ministres de la Couronne sont presque toujours des parlementaires, et le droit du premier ministre de former le gouvernement repose sur la confiance de la Chambre des communes envers son ministère. Cependant, c'est en vertu des pouvoirs de la Couronne que le gouvernement domine la Chambre et le processus législatif. Cette domination du pouvoir exécutif sur l'assemblée législative s'enracine dans la relation entre la Couronne et le Parlement.

Depuis la Glorieuse Révolution de 1688, le Parlement est habilité à déterminer la portée des pouvoirs de la Couronne, et même la nature de la monarchie elle-même. Cette suprématie du Parlement sur la Couronne est généralement considérée comme un des piliers du système de gouvernement britannique. Mais la doctrine de la souveraineté du Parlement est plus compliquée au Canada qu'au Royaume-Uni, pays dont le Canada est censé émuler la constitution, puisque le système britannique vient de Londres. Or, la Couronne au Canada a une existence distincte aux paliers fédéral et provinciaux, et la division des compétences entre le Parlement et les assemblées législatives des provinces implique que la souveraineté législative de la Couronne est elle aussi divisée entre les deux ordres de gouvernement. Ainsi, le Parlement britannique peut, sur adoption d'une simple loi, abolir n'importe quel des privilèges ou des prérogatives de la Couronne, mais le Parlement canadien, contraint par sa constitution codifiée, ne pourrait probablement pas en faire autant, à moins de modifier la

constitution. Or, la procédure de révision constitutionnelle du Canada confère à « la charge de Reine, celle de gouverneur général et celle de lieutenant-gouverneur » le plus haut degré de protection, de sorte qu'elle ne pourrait être modifiée qu'avec le consentement unanime du Parlement et des assemblées législatives de toutes les provinces. Il est vrai que certains des pouvoirs et privilèges de la Couronne ne relèvent peut-être pas de cette « charge », mais les autres ne peuvent pas être supprimés sur adoption d'une simple loi. Cette situation soulève une question : pourrait-on, au moyen de nouvelles conventions constitutionnelles ou de pratiques de démocratisation, restreindre indirectement l'exercice de certains pouvoirs de la Couronne ?

La *Loi de 2013 sur la succession au trône* fait actuellement l'objet d'une contestation, et la portée de la charge de la Reine au Canada sera peut-être clarifiée lorsque les tribunaux du Québec trancheront à son sujet. L'affaire combine deux questions : la succession royale relève-t-elle du droit canadien, et dans l'affirmative, les règles gouvernant la succession font-elles partie de la charge de la Reine ? La réponse à ces deux questions nous instruira sur la place de la Couronne dans le droit et la constitution du Canada. Si l'affaire se rend jusqu'à la Cour suprême du Canada, elle pourrait même aider à distinguer les aspects de la Couronne qui peuvent être révisés par simple loi, et ceux qui nécessitent une modification de la constitution. Cette contestation pourrait donc enrichir notre compréhension de la Couronne de la même façon que les renvois relatifs au Sénat et à la *Loi sur la Cour suprême* l'ont fait pour ces deux institutions.

Les chapitres du présent volume portent sur différentes facettes de la relation entre la Couronne et le Parlement. Leurs auteurs ont cherché à approfondir notre connaissance et notre compréhension de ces deux institutions et de leur interaction dans la structure constitutionnelle du Canada.

Au premier chapitre, André Émond fait un survol historique de l'évolution commune de la Couronne et du Parlement au Royaume-Uni. Émond retrace avec précision les étapes par lesquelles le Grand conseil du royaume est devenu un parlement de lords et de représentants des communes. Il traite ensuite, tour à tour, de l'établissement du rôle législatif du Parlement et de l'importance, pour l'ascension graduelle de l'institution, du pouvoir d'ouvrir des crédits, de la souveraineté du Parlement par rapport au pouvoir et aux privilèges de la Couronne, et enfin de la montée du premier ministre et du Cabinet. Selon Émond, les germes du système actuel remontent à l'époque où la Couronne a commencé à dépendre du Parlement pour l'ouverture

des crédits ; selon cette hypothèse, l'avenir de la Couronne dans la constitution britannique répondrait donc à une certaine téléologie.

L'article de David E. Smith porte sur l'évolution de la dynamique entre la Couronne et le Parlement au Canada. L'absence du monarque sur le territoire, la volonté d'indépendance politique et la structure fédérale du Canada, selon Smith, ont fait de la Couronne du Canada une institution plus distante, mais simultanément plus résistante, que la Couronne britannique. Les Canadiens ne se considèrent pas comme des sujets, écrit Smith, mais s'il fallait résumer en un mot l'essence de la constitution canadienne, ce mot serait peut-être, avant tout autre, celui de Couronne. C'est cette dualité qui exprime peut-être le mieux l'image de la Couronne dans l'esprit des Canadiens et de leur Parlement : une institution comprise inadéquatement, mais selon toute apparence solidement ancrée dans la constitution. Smith conclut que la relation entre la Couronne et les tribunaux est peut-être aussi importante dans le contexte canadien que ne l'est au Royaume-Uni l'interaction entre le Parlement et la monarchie.

Le rôle de la Couronne du point de vue législatif fait l'objet des trois chapitres suivants, rédigés respectivement par John Mark Keyes, Charles Robert et Rob Walsh. Tout d'abord, Keyes explore le rôle législatif du pouvoir exécutif, c'est-à-dire la recommandation, la sanction et le consentement royaux. Il analyse ces tâches de la Couronne dans leur rapport aux autres pouvoirs de l'État, notamment le pouvoir judiciaire. Constatant que les trois fonctions sont dans une large mesure non justiciables, il soutient que les institutions parlementaires, et non les juges, doivent veiller à leur bon exercice. Dans le chapitre suivant, Robert procède à l'analyse comparative des fonctions royales et du discours du Trône au Canada et au Royaume-Uni. Comme Smith, il juge que l'absence du souverain explique le particularisme des pratiques de la Couronne au Canada. Ainsi, s'il est vrai que la recommandation royale suscite une frustration comparable chez les députés des deux pays, la Chambre des communes du Canada s'avère mieux disposée à en accepter la nécessité. Le consentement royal n'est pas appliqué au Canada comme l'est le consentement de la Reine au Royaume-Uni, probablement en raison d'un manque d'expérience et d'une compréhension imparfaite de cette pratique. Quant à la sanction royale, elle n'est pas la même au Canada qu'au Royaume-Uni : entre autres différences, il n'est pas rare qu'elle soit confiée au suppléant du gouverneur général. Par contre, le discours du Trône canadien ressemble à son équivalent britannique – sauf sur le plan de la longueur du texte et de l'apparat de la cérémonie. Dans le troisième et dernier chapitre consacré aux fonctions royales, Walsh

décrit et défend les décisions récentes du Président de la Chambre des communes sur les critères requérant la recommandation royale. Notamment, il rappelle que la simple « présomption » de dépense de fonds publics n'est pas suffisante.

Les quatre chapitres subséquents abordent des débats actuels sur les rôles et les pouvoirs de la Couronne, et la capacité du Parlement de les circonscrire. Premièrement, le lieutenant-colonel Alexander Bolt répond à l'idée, affirmée récemment, comme quoi la convention constitutionnelle empêcherait l'exécutif de déployer les forces armées sans vote préalable de la Chambre des communes. Bolt conteste cette thèse, contraire selon lui à l'expérience du Royaume-Uni et du Canada et à la logique des conventions constitutionnelles. Deuxièmement, Paul Benoit s'en prend directement à l'idée largement reçue, et attestée par la jurisprudence anglaise et canadienne, selon laquelle le Parlement peut supplanter les prérogatives de la Couronne. Il soutient que « la prérogative » représente le privilège et le devoir de prendre des décisions dans des contextes particuliers. « La prérogative » exécutive de la Couronne au regard des nominations et des affaires étrangères ne peut donc pas être cédée au Parlement sans qu'il n'en résulte un dénigrement du système britannique de gouvernement. Ces décisions doivent nécessairement être prises par la Couronne sur l'avis de ses conseillers et fonctionnaires ; elles ne relèvent pas du corps législatif.

Dans le chapitre suivant, Patrick Baud et moi-même nous interrogeons sur la capacité du Parlement de modifier les rôles, pouvoirs et fonctions de la Couronne relevant du champ d'application probable de l'alinéa 41a) de la *Loi constitutionnelle de 1982*. Nous soutenons que la charge de Reine, de gouverneur général et de lieutenant-gouverneur est ouverte à trois interprétations. La première confère à la charge une définition très étroite qui donne au Parlement une marge de manœuvre considérable pour altérer unilatéralement la Couronne, mais les deux autres ne lui laissent au contraire qu'un faible pouvoir de modifier la place de la Couronne dans la constitution sans consentement unanime. Christopher McCreery, dans le dernier de cet ensemble de quatre chapitres, décrit la réforme apportée par le gouvernement conservateur à un des aspects de la Couronne, soit la procédure de nomination du gouverneur général et des lieutenant-gouverneurs. Soucieux que la procédure soit gouvernée davantage par le mérite que par des considérations partisans, le gouvernement a en effet établi des comités de nomination des représentants de la Reine. En conclusion du chapitre, McCreery propose une analyse critique du recours de plus en plus fréquent à la suppléance du secrétaire du gouverneur général.

Les quatre derniers chapitres offrent des arguments pour ou contre la *Loi de 2013 sur la succession au trône*, dans l'attente du jugement des tribunaux sur sa validité et sa constitutionnalité. Du côté des défenseurs de la *Loi* et de la position du gouvernement fédéral, Mark D. Walters invoque la règle simple qui se trouve selon lui dans l'architecture constitutionnelle du Canada : le souverain du Royaume-Uni est le souverain du Canada. C'est ce dont feraient foi le préambule de la *Loi constitutionnelle de 1867*, son article 2 aujourd'hui abrogé, et le serment d'allégeance. Conformément à cette règle et au préambule du Statut de Westminster, le Parlement du Canada a eu raison d'adopter une loi qui se contentait de donner assentiment à la loi adoptée à Londres sur la réforme des règles de succession. Le sénateur Serge Joyal abonde dans le même sens : l'identification du souverain du Canada à celui du Royaume-Uni est un des fondements de la constitution canadienne, et la *Loi de 2013 sur la succession au trône* respecte les précédents pertinents.

Par contre, Anne Twomey oppose à la validité de cette loi des arguments juridiques et historiques. Elle explique comment les lois sur la succession s'appliquaient au Canada avant le Statut de Westminster, et examine pourquoi le gouvernement canadien n'a pas cru qu'il y avait identification du souverain du Canada à celui du Royaume-Uni lors de la crise d'abdication de 1936. Les précédents et l'évolution de la constitution canadienne depuis le Statut de Westminster, selon elle, montrent que le Canada ne peut pas modifier les règles de succession au trône du Canada par le simple assentiment à une loi britannique. Julien Fournier, Patrick Taillon et Geneviève Motard ajoutent à l'analyse de Twomey leur « autopsie » de la réponse du Canada à la crise d'abdication de 1936. Ils expliquent comment les lois sur la succession s'appliquaient aux colonies britanniques, et exposent le raisonnement juridique qui a poussé le gouvernement canadien, non pas à donner son assentiment à la loi adoptée par Londres, mais à demander au Parlement britannique de légiférer pour que le Canada change la loi successorale. Ils concluent de cet épisode de 1936 qu'il existe un droit canadien sur la succession royale, et que celui-ci ne peut pas être altéré par le simple assentiment à la loi britannique.

Il reste bien des choses à dire et à écrire sur la Couronne et le Parlement du Canada. Le présent volume vise à approfondir la réflexion et à stimuler la discussion en vue d'une analyse toujours plus poussée de ces deux assises fondamentales de l'État canadien. La Couronne et le Parlement, unis par une évolution commune depuis près d'un millénaire, ne pourront jamais être compris que l'un avec l'autre.

CONCLUSION

Philippe Lagassé

Parliament and the Crown are symbiotic institutions. The Crown formally summons, opens, prorogues, and dissolves Parliament, reflecting the legislature's origins as a council called to advise the monarch. Legislation requires royal assent to become law, highlighting that the Crown remains the locus of sovereign authority. Money bills require the Crown's recommendation to make their way through the legislative process, and royal consent is occasionally needed to ensure the passage of laws that affect the Crown's privileges and prerogatives. Ministers of the Crown are almost always parliamentarians and the right of a first minister to form a government depends on his or her ministry holding the confidence of the House of Commons. However, when they hold that confidence, governments use the Crown's powers to dominate the Commons and the legislative process. The executive's dominance over the legislature finds its ultimate root in the relationship between the Crown and Parliament.

Since the Glorious Revolution of 1688, Parliament has had the authority to determine the scope of the Crown's authority and the very nature of the monarchy itself. Parliamentary supremacy over the Crown is generally considered a pillar of the Westminster system of government. Yet the doctrine of parliamentary supremacy is more complicated in Canada than in the United Kingdom, where Westminster originated and whose constitution Canada is meant to emulate. The Canadian Crown exists in distinct federal and provincial capacities and the division of powers between Parliament and the provincial legislatures means that legislative supremacy of the Crown is split between the levels of government. While the British Parliament can abolish any of the Crown's prerogatives and privileges through ordinary statute, a codified constitution arguably constrains the ability of Canadian legislatures to do the same without a constitutional amendment. Canada's constitutional amending procedures place the "office of the Queen, Governor General and Lieutenant Governor of a province" under the greatest degree of protection, requiring the

unanimous agreement of Parliament and all provincial legislatures. While it is doubtful that all of the Crown's powers and privileges fall under these offices, those that do cannot be erased by a regular statute. This has raised the question of how the exercise of certain Crown powers might be subject to indirect constraint through the development of new constitutional conventions and democratizing practices.

Greater clarity about the scope of the Queen's Canadian office may be forthcoming when courts in Quebec rule on a challenge to the *Succession to the Throne Act, 2013*. The case focuses on two questions: whether royal succession is a matter of Canada law, and if so, whether the rule of succession form part of the office of the Queen. The answers to these questions will be revelatory about the Crown's place in Canadian law and the constitution. If the case reaches the Supreme Court of Canada, it may also shed light on which aspects of the Crown are susceptible to alteration by regular statute and which require a constitutional amendment. In this way, the succession case promises to do for our understanding of the Crown what the *Senate* and *Supreme Court Act* references did for our comprehension of these institutions.

The chapters collected in this volume address various facets of the relationship between the Crown and Parliament. In so doing, the chapters have sought to deepen knowledge and understanding of these two institutions and their interaction in Canada's constitutional construct.

In the opening chapter, André Émond offers an historical overview of the shared evolution of the Crown and Parliament in the United Kingdom. Émond carefully traces the steps that transformed the monarch's great council of state into a parliament of lords and representatives of the commons. He then examines the establishment of Parliament's legislative role and the importance that the granting of supply played in the gradual ascendance of the institution. Parliament's supremacy over the Crown's power and privileges is outlined, followed by a discussion of the emergence of the prime minister and Cabinet. Émond concludes that the seeds of the Westminster system as we know it today were first planted when the Crown came to depend on Parliament for the granting of supply, which suggest that a certain teleology surrounds the Crown's future in the British constitution.

David E. Smith contribution examines how the dynamic between the Crown and Parliament developed in Canada. The absence of a

resident monarch, the quest for political independence, and Canada's federal structure, Smith argues, have forged a Canadian Crown that is at once more alien yet more resilient than its British counterpart. While "Canadians do not think of themselves as subjects," he notes, if Canada's constitution were captured in a nutshell, "the nutshell would necessarily encase, more than anything else, the Crown." It is this duality that perhaps best expresses how Canadians and their Parliament confront the Crown: as an institution which is not well understood, but which appears solidly anchored in the constitution. Smith thus concludes that the relationship between the Crown and the courts may be as important in a Canadian context as the interaction between the legislature and the monarchy in the British practice of Westminster government.

The Crown's role in the legislative process are analyzed three chapters by John Mark Keyes, Charles Robert, and Rob Walsh. Keyes' chapter explores the executive's role in the legislative process through the granting of royal recommendation, royal assent, and royal consent. He analyses how these functions of the Crown relate to the other branches of the state, notably the judiciary. He finds that these functions are largely non-justiciable. Accordingly, responsibility for ensuring that these functions are performed correctly lies with parliamentary institutions, not the courts. Robert's contribution provides a comparative analysis of these royal functions, along with the speech from the throne, in Canada and the United Kingdom. As with Smith, Robert finds that the Sovereign's absence from Canada has resulted in the development of particular Canadian practices regarding the Crown. Royal recommendation has produced comparable frustrations amongst members of Parliament in both countries, though the Canadian House of Commons as proved more willing to accept the need for recommendations. Royal consent is applied differently in Canada than the Queen's consent in the United Kingdom, likely owing to a lack of experience and understanding of the practice. Royal assent in Canada differs from the United Kingdom as well, notably through the not uncommon reliance on a deputy of the Governor General to perform the function. The speech from the throne, on the other hand, resembles British practice in Canada, though the pageantry and length of the allocution are quite different. Walsh's commentary on the royal recommendation rounds out these chapters on the royal functions. He offers an overview and defence of recent rulings by the Speaker of the House of Commons. As he colourfully explains, when determining the requirement for a royal recommendation, "it was not good enough that you *smell* money, damn it!"

Contemporary debates about the roles and powers of the Crown, and Parliament's ability to affect them, guide the next four chapters. Lieutenant-Colonel Alexander Bolt's chapter engages with recent claims that a constitutional convention requires a vote in the House of Commons before the executive can exercise the Crown's prerogative to deploy armed forces. Looking at both the United Kingdom and Canada, Bolt argues that talk of a convention of Commons control over military deployments is unsupported by the logic of constitutional conventions or the available evidence from either country. In a direct challenge to the prevailing wisdom and British and Canadian jurisprudence, Paul Benoit challenges the very notion that Parliament can supplant Crown prerogative. He argues that "the prerogative" must be understood as the privilege and duty of making decisions in particular contexts. In that context, "the prerogative" that the Crown enjoys as the executive power over appointments and foreign affairs cannot be ceded to Parliament without denigrating the Westminster system of government. These are necessarily decisions that the Crown makes on the advice of its counsellors and servants, rather than matters that concern the legislature.

Parliament's ability to alter the Crown's roles, powers, and functions are then assessed in a chapter by this author and Patrick Baud. Focusing specifically on what aspects of the Crown are likely to fall under the ambit of paragraph 41(a) of the *Constitution Act, 1982*, we argue that the offices of the Queen and vice-regal representatives are open to three interpretations. While one of these interpretations views the offices quite narrowly, thereby giving Parliament significant leeway to unilaterally alter the Crown, the other two suggest that there is little room for Parliament to change the Crown's place in the constitution without a unanimous constitutional amendment. In his contribution, Christopher McCreery outlines how the Conservative government has reformed one aspect of the Crown, the procedure to appoint the Governor General and Lieutenant Governors. Specifically, the government has introduced vice-regal appointment committees inject greater merit and reduce partisan considerations in the nomination process. McCreery also offers a critical analysis of an increased reliance on the Secretary to the Governor General to act as a deputy to the Queen's representative.

As the debate over the validity and constitutionality of the *Succession to the Throne Act, 2013* heads to the courts, the four final chapters of the book provide an overview of the arguments for and against the statute. Writing in favour of the Act and the federal government's position, Mark D. Walters posits that there is a "simple

rule of Crown identification” in Canada’s constitutional architecture. That rule is that whomever is the monarch of the United Kingdom is the monarch of Canada. This is supported by the preamble to the Constitution Act, 1867, the now repealed section 2 of that same act, and the oath of allegiance. Owing to this rule of identification, and the preamble to the Statute of Westminster, the Canadian Parliament correctly passed legislation that merely assented to British legislation altering the rules of succession. Senator Serge Joyal complements Walters’ analysis with a further elaboration of the Crown’s place in Canada’s constitutional architecture. Joyal argues that the Succession to the Throne Act, 2013 follows past precedents and the rule that the monarch of the United Kingdom is the Canadian monarch is an essential feature of the Canadian constitution.

Anne Twomey’s contribution questions the validity of the succession act on legal and historical grounds. She outlines how the law of succession applied to Canada prior to the Statute of Westminster and examines why the Canadian government did not consider that a rule of Crown identification existed during the abdication crisis of 1936. Past precedent and the evolution of the Canadian constitution from the Statute of Westminster on, she argues, belie the idea that Canada can merely assent to British legislation to alter the rules of succession to the Canadian throne. Julien Fournier, Patrick Taillon and Geneviève Motard reinforce Twomey’s analysis with an “autopsy” of Canada’s response to the abdication crisis of 1936. They detail how the laws of royal succession extended to Britain’s colonies and the legal reasoning behind the Canadian government’s decision to have the British Parliament legislate for Canada to alter the law of succession in 1936, rather than simply assenting to the legislation passed in the United Kingdom. They conclude that Canada’s response to the abdication crisis mean that country has its own unique law of royal succession and that these cannot be altered by assenting to British legislation alone.

Far more remains to be written and said about the Crown and Parliament in Canada. To encourage greater reflection, the underlying aim of this book has been to stimulate this discussion and encourage further analyses of these two foundational institutions of the Canadian state. Having evolved together over nearly a thousand years, the Crown and Parliament can only be understood together.