

# Royal Succession, Abdication, and Regency in the Realms

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

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

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## Introduction

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

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

## Reception and paramountcy of laws concerning the Crown

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 Clement, *supra* note 6 at 2.

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

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

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

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

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

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

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

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

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

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

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

22 *Ibid.*, 37-38.

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

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

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

## Termination of British legislative power over the Realms

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

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

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

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

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25 Laskin, *supra* note 13 at 72.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

39 *Ibid* at para 24.

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

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

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

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

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

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

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

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

44 *Ibid* at paras 141-146.

45 *Ibid* at para 154.

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

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

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

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

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

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48 *Ibid* at paras 48 and 54.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **Abdication**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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63 Gwyer Memorandum, *supra* note 51.

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

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

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

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

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

## Regency

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Conclusion

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

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

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

