

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

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

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

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Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 [Emphasis added].

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

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

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

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

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

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

6 [Emphasis added].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 [Emphasis added].

13 RSC 1985, c R-12.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 Bagehot, *supra* note 5 at 34.

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

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

The Queen, the Crown, the Accession and the Coronation

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

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

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

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

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

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

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

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

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

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

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

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

Parliament, the Queen, and the Constitution

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

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

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

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

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

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

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

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

Other statutes have modernized aspects of the vice-regal institution,³³ or, like the *Royal Assent Act*, have facilitated the exercise of a constitutional power. That Act did not attempt to change the fundamental requirement, expressed in section 55 of the *Constitution Act, 1867*, that for a bill to become law, it must receive assent by the Governor General in the Queen’s name. Rather, it provided for different ways of signifying assent, including by written instrument.³⁴ The amendment to the *Canada Elections Act* that instituted what is commonly called a fixed date, on a four-year cycle, for general elections to the House of Commons, was careful to preserve the prerogative power of the Governor General to dissolve the House, as contemplated by section 50 of the *Constitution Act, 1867* and the *Letters Patent* of 1947.³⁵

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

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

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

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

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

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

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

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

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

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

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

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

In the Constitution of Canada, there is no power of legislative inter-delegation similar to the provision in the Australian Commonwealth constitution. The Parliament of Canada, however, unlike the Australian central Parliament, possesses (as we have seen) a general and residuary power to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the provincial legislatures.³⁹ The Canadian approach was supported, in the view of the Minister of Justice and Attorney General of Canada, not only by sound legal principle but also by Canadian practice and tradition, as manifested in three precedents dealing with changes relating to the succession to the Throne⁴⁰ or the royal style and titles,⁴¹ in which the Parliament of Canada had also signified its assent

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴⁴ *Ibid* at 267.

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

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

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

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

45 *Ibid* at 269.

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

47 Walters, *supra* note 43 at 287.

48 *Ibid* at 291.

The Courts, the Constitution, and the Crown

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

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

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

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

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

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

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

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

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

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

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

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

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

55 *Ibid* at para 62.

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

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

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

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

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

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

⁵⁸ *Ibid* at paras 138, 155, 158, respectively.

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

Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

