The Queen of Canada is dead; long live the British Queen?

Philippe Lagassé

Canada's most monarchist government in decades has dealt a serious blow to the Canadian Crown. In an effort to quickly enact changes regarding royal succession, the government has introduced a bill that undermines the concept of a truly independent Canadian Crown, the foundation of Canadian sovereignty. Equally troubling, the government claims that altering the succession to the throne does not require a constitutional amendment. In making this argument, the government has overlooked the very nature of the Crown in law and the Canadian constitution. However commonsensical the proposed changes to the law governing the succession may be, such a cavalier approach to the Crown, to the foundation of sovereign authority of and in Canada, merits scrutiny.

Heritage Minister James Moore laid out the government's thinking at a press conference this past Wednesday. According to the minister, succession to the throne is not a matter of Canadian law. Instead, succession is a question of British law alone. Only the British Parliament can set the rules for who ascends to the throne, while the Canadian Parliament's only authority lies in assenting to the changes. Put differently, the authority to legislate the rules of succession belongs with the British Parliament because the Canadian constitution does address matters of succession. The legal pretext for this interpretation is the preamble to the 1931 *Statute of Westminster*, which states that the United Kingdom will obtain the assent of the Dominions when altering the succession to, and royal titles and styles of, their shared Crown.

For Mr. Moore, the absence of an explicit reference to succession in the codified parts of the Canadian constitution also explains why no constitutional amendment is needed to alter the succession in Canada. Although the *Constitution Act, 1982* states that changes to the “office of the Queen” require a constitutional amendment that is approved by Parliament and the provincial legislatures, the government interprets “office” to mean only those powers and privileges of the Crown that are identified in the codified constitution. Hence, succession doesn't pertain to the office because succession isn't mentioned in the codified constitution.

Unfortunately for the government, these interpretations of the *Statute of Westminster* and office of the Queen are problematic.

The conventions outlined in the preamble to the *Statute of Westminster* depended on the power of the United Kingdom to legislate for the Dominions and on the idea that all the realms were under a single Crown. Neither of these conditions holds anymore, as Australian legal scholar Anne Twomey has shown. When Canada and the other Dominions altered their royal styles and titles in 1953, the realms did not assent to British legislation; they legislated for themselves. And Canada's act made no mention of the *Statute of Westminster*. In the 1970s Australia and New Zealand enacted new royal

styles and titles without consulting the other Dominions, sapping the prescriptive authority of the *Statute*'s preamble. Claims that the preamble still applies to succession were further undermined in the 1980s. The authority of the preamble depended on section 4 of the *Statute*, which allowed the British Parliament to legislate for the Dominions. The *Canada Act, 1982* ended the British Parliament's authority to legislate for Canada and abolished s. 4 of the *Statute*. Australia followed suited with the *Australia Act, 1986*, as did New Zealand with its *Constitution Act, 1986*. The United Kingdom is no longer able to legislate for Canada, Australia or New Zealand, even in matters of succession, and even if they assent.

As important, the United Kingdom cannot legislate the succession to the Canadian throne because the British and Canadian Crown are no longer one and the same. The British and Canadian Crowns are legally distinct and independent entities.

The emergence of the distinct and independent Canadian Crown happened gradually and it took time to be properly recognized. Somewhat ironically, the process began with *Statute of Westminster*, which granted the Dominions legislative independence. As Canadian cabinets monopolized the authority to advise exercises of the Crown's powers in right of Canada in the decades that followed, the idea of a Canadian Crown took shape. In the early 1950s, the title of Queen of Canada was created. During her coronation, Queen Elizabeth II was proclaimed the Queen of Canada. As the government's own publication, *A Crown of Maples* notes, "The proclamation reaffirmed the newly crowned monarch's position as Queen of Canada, a role totally independent from that as Queen of the United Kingdom and the other Commonwealth realms."

The final step toward a distinct Canadian Crown was achieved in 1982, when the Canadian constitution was patriated and Canada became a fully sovereign and independent state. While the 1982 patriation ended Canada's legal ties to Great Britain, the expanded Canadian constitution retained the Crown as the concept of the Canadian state and as ultimate source of sovereign authority in Canada. This fully independent Canadian state could not have the British Crown as the source of its sovereign authority. Nor could it be a shared Crown. The only way Canada could be completely sovereign and independent was to decouple the Canadian Crown from its British counterpart.

The fact that only the Canadian Parliament and provincial legislatures can amend the constitutionally-entrenched office of the Queen is a testament to this development. The *Canada Act, 1982* and *Constitution Act, 1982* gave the Canadian Parliament and provincial legislatures absolute control over the office of the Canadian Sovereign and the wholly independent Canadian Crown. Any claim that Canada and Britain share a Crown in the legal or constitutional sense is therefore incompatible with the complete sovereignty that Canada achieved in 1982.

Justice Minister Rob Nicholson admitted as much when the succession bill was introduced in the House of Commons on Wednesday. The minister noted the Governor

General had given the bill the consent of the Canadian Crown, a requirement for any bill that touches on the powers and privileges of the Crown. Since the British Crown had already given its consent to the British succession bill and the Canadian government claims that the Crown is shared, it is unclear why the consent of the Canadian Crown was required. The only plausible answer is that the succession bill affects the separate and distinct powers and privileges of the Canadian Crown.

If the United Kingdom cannot legislate the rules of succession for the Canadian Crown, it follows that Canada must have the power to determine the rules of succession for its Sovereign and head of state. At present, the Canadian rules of succession are those that were inherited from the United Kingdom. And an argument might be made that they must mirror those of Great Britain absent a constitutional amendment, owing to the preamble of the *Constitution Act, 1867*. But mirroring the British rules does not mean Canada can simply assent to British bills to bring its succession into line with the United Kingdom's. If Canada is a sovereign state and has an independent Crown, the Canadian legislatures must pass substantive legislation to ensure that Canada's rules of succession do reflect those of Great Britain, not merely assent to a British law. Here again, the Governor General's granting of Crown consent to the Canadian bill indicates the government is at least partially aware the British and Canadian Crowns cannot be affected by the same British law.

If we accept that Canada is fully sovereign and that the Canadian Crown is fully independent, then there must be some part of the codified constitution that addresses succession, whether explicitly or implicitly. A strong case can be made that the "office of the Queen" mentioned in s.41(a) must be the provision that addresses the succession to the Canadian throne. Accordingly, any change to the succession to the throne must trigger the amending process identified by s.41(a).

Succession must pertain to the office of the Queen because of the Crown is a 'corporation sole'. Corporations sole fuse an office and an office-holder. The office and office-holder are treated as synonymous in law. This means that, legally speaking, all references to the Queen, Her Majesty, and the Crown in Canadian statutes and the constitution refer to the same thing. When the constitution speaks of the office of the Queen, then, it is referring to both the Sovereign and the Crown in the broadest sense. Most importantly for our purposes, this further means that the office of the Queen extends not only to the current office-holder, but to those who will succeed to the office. This is necessarily true precisely because the Crown is a corporation sole.

The purpose of having the Crown as a corporation sole is to ensure that successors to the office of the Sovereign retain all the powers, duties, constraints of the Crown when they ascend to the throne. Hence, there is no need to reiterate the established powers, duties and constraints of the Crown when a new Sovereign ascends to the throne. Nor is there any need to rewrite any statutes. Having the Crown as a corporation sole allows for a seamless and automatic transition between the current Sovereign and her successor. So, when the Prince of Wales becomes King Charles III, all references in

Canadian statues and the constitution to the Queen and Her Majesty will automatically apply to him because the Crown is a corporation sole.

It is the idea of corporation sole that underlies the cry of “the king is dead; long-live the king!” The Crown is never vacant and the Sovereign never dead because, as a corporation sole, the office of Queen (or King) is immediately filled by successors when a monarch passes. Hence, as the canonical jurist of English law William Blackstone noted when discussing the concept: “Corporations sole consist of one person only and his successors, in some particular fashion, who are incorporated in law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense, the king is a sole corporation.” The office of the Queen *necessarily* refers to both the current Sovereign and her successors.

To reiterate, then, altering the rules of succession requires a constitutional amendment under s. 41(a) because the Crown is a corporation sole, a legal status that was purposefully designed to ensure that the office of the Queen includes matters of succession.

Recognizing that the Crown is a corporation sole also helps us answer the question that hovers over this entire discussion, namely: how can the Canadian and British Crown be distinct if they’re both personified by Elizabeth II?

The Canadian and British Crowns are distinct corporations sole. As a result, the Queen of Canada and Queen of the United Kingdom are legally distinct office-holders, just as the Canadian Crown and British Crown are distinct offices. However, the natural person who occupies these offices, Elizabeth Windsor, is the same. One woman personifies distinct and separate offices. This means that the Canadian and British Crown are under a personal union, but not a legal or constitutional one. Elizabeth Windsor holds the legally independent offices of the Queen/Crown of Canada and the Queen/Crown of the United Kingdom. But when she acts as the Queen of Canada, she is not acting as the Queen of the United Kingdom. The fact that Elizabeth Windsor is both the Queen of Canada and the United Kingdom does not mean that the two states shared a single Crown or Sovereign.

To conclude, it is worth discussing what might happen if we accept the government’s argument that succession is only a matter of British law and that changes to the rules of succession do not require a constitutional amendment. The most obvious consequence of the government’s position is that Canadian republicans will have been proved right: the Crown is an inherently British entity and Canada cannot claim to be an independent state until our ties to the House of Windsor are cut or we become a republic. The government’s view would also mean that Canada would effectively cease to be a constitutional monarchy if the United Kingdom decided to become a republic. The concept that underlies Canada’s entire system of government, the Crown, could be dismantled by another country.

The government's narrow construction of the office of the Queen under s. 41(a) of the *Constitution Act, 1982* may lead to some interesting outcomes, too. If the office of the Queen covers only those powers of the Crown that are explicitly identified in the codified constitution, a future Parliament could pass various statutes to undermine the monarchy without consulting the provinces. One could image, for instance, a future Parliament passing a regency act that transforms the Governor General from the representative of the monarch to the personification of the Crown in Canada, owing to the Sovereign absence in Canada. Coupled with a new set of letters patent that transferred all of the Sovereign's remaining authority to the Governor General, this regency act could be used to exclude the royal family from all Canadian affairs. Since this kind of act would not affect the powers of the Crown included in the codified constitution, Parliament could pass it without consulting the provinces. Of course, it is difficult to imagine that this was the intended spirit of s.41(a), but a narrow construction of the office of the Queen might allow it.

Suffice it to say, while the changes to the succession are laudable, a greater degree of caution and debate is warranted here.

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