The Role of Religion in the Law of Royal Succession in Canada and Australia

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It is sometimes assumed that Commonwealth nations share the same law of succession, including the religious tests that govern succession to the British Crown. This assumption has led some to argue that the laws of succession in Commonwealth countries such as Canada and Australia are immune to constitutional challenges in order to reconcile these religious tests with the constitutional guarantees of religious freedom in those countries. Through a comparative examination of the laws of succession and constitutional protections of religious liberty in Canada and Australia, the author of this article challenges these propositions and argues that each country has a distinct law of succession that is subject to different constitutional scrutiny within their respective regimes.

Beginning with a discussion of the religious tests that govern British royal succession, the author lays out the conflict these create with religious protections in sections 2(a) and 15(1) of the Canadian Charter of Rights and Freedoms *and section 116 of the Australian Constitution. The author then reviews the laws of succession of Canada and Australia and the relationship between these laws and that of the UK. From this review, the author argues that there is a single rule in the Canadian law of succession, the rule of symmetry, which requires the Canadian monarch to be the same as the British one. Conversely, the author argues that Australia adopted the British law of succession into Australian law via its constitution.*

The author thus concludes that while the UK's religious tests impact succession to the Crown of Canada, they are not subject to constitutional challenge there because they are not part of Canadian law. In contrast, those same tests are subject to challenge in Australia and are likely invalid there because they became subject to the Australian Constitution when they became part of Australian law.

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Introduction

It is well known that various religious tests govern succession to the Crown of the United Kingdom. Those religious tests compel conformity to religious dogma and impose a penalty of disqualification from the throne for failing to conform. Only certain believers—Protestants—may accede to the Crown of the United Kingdom. Perhaps the most widely known of the religious tests is the requirement that the monarch must not be a Roman Catholic.

It is a widely held assumption that, because Commonwealth realms such as Canada and Australia currently share the same monarch as the United Kingdom, the religious tests governing the British monarchy also govern the monarchies in Canada and Australia. This assumption is problematic. The existence of the religious tests in the United Kingdom is the result of the religious and constitutional struggles of English history. Yet, the principles arising from those historical English struggles have no relevance to Commonwealth realms such as Canada and Australia, which hold to constitutional principles guaranteeing religious equality. By challenging the conclusions of prior work and reanalyzing the case law upon which those prior conclusions are built, this article seeks to challenge the assumption that the monarchies of Commonwealth realms such as Canada and Australia are governed by the same rules as the British monarchy.

That assumption is evident in a recent comment piece by Margaret Ogilvie in which she argues that the religious tests governing succession to the Crown are not amenable to successful constitutional challenge in Commonwealth realms such as Canada or Australia even though those countries have constitu-

tional guarantees of religious freedom.[1] She writes that the position of the Crown, including the religious tests governing succession to the Crown, is "completely insulated from challenge".[2] Whilst Ogilvie's substantive discussion is limited to Canada, she assumes in her commentary that her conclusion is equally applicable to "other Commonwealth countries founded on similar principles" such as Australia.[3]

Relying on case law that will be discussed and analyzed in this article, Ogilvie's essential reasoning is based on a key assumption. That assumption is that the "Crown in Canada is the same Crown as in the UK and other Commonwealth countries where the Queen is Queen of that country".[4] This proposition has a logical corollary. In order not to fracture that principle, it is a constitutional necessity that the rules governing succession to the Crown of the United Kingdom, including the various religious tests, must also govern succession to the Crown of those Commonwealth countries.[5] This corollary is at the core of Ogilvie's conclusion.

This article challenges Ogilvie's conclusion, the case law and reasoning on which it based, and the assumption that the conclusion applies equally to other Commonwealth realms. There are real reasons to believe that Australia's constitutional religious freedom provision may have work to do in respect of the law of royal succession.[6] Indeed, as this article seeks to show, that constitutional provision appears to have the effect of invalidating the religious tests governing succession to the Crown of Australia. However, as this article also seeks to show, Ogilvie is correct that Canada's constitutional religious freedom provisions do not have that effect, but for different reasons than those given in the case law on which she relies.

These conclusions matter. Of course, what rules are governing succession to the Crown in the various Commonwealth realms matters because the monarch serves important constitutional functions in those realms and determining who is the monarch is therefore important. However, the conclusions in this article matter more broadly. It is wrong to assume that the rules governing royal succession are not subject to the constitutional rules of Commonwealth realms. It is therefore wrong to assume that the same monarch is necessarily shared throughout the Commonwealth realms. The ordinary process of consti-

1. MH Ogilvie, "Queen of Canada and Not of Babylon: The Constitutional Status of the Crown in Canada and Freedom of Religion" (2015) 17:2 Ecc LJ 194 at 195–96, 202.

2. *Ibid* at 201.

3. *Ibid* at 202.

4. *Ibid* at 200. See also *ibid* at 195–96.

5. *Ibid* at 195–96.

6. This article uses Canada and Australia as comparators because there is a comparatively more developed case law and scholarly commentary on the relevant legal issues in those jurisdictions compared to other Commonwealth realms.

tutional reasoning needs to be applied. Assumptions about the constitutional position of the monarchy should not be made.

This article proceeds as follows. Part I outlines the various religious tests governing succession to the Crown. Part II provides an overview of the religious freedom provisions found in the *Canadian Charter of Rights and Freedoms* and the *Commonwealth of Australia Constitution Act 1900* (Australian Constitution) and how those provisions prohibit religious tests for public offices. Part III then describes the role of the monarch in the constitutional systems of Canada and Australia. Through a careful examination of competing judicial decisions, Part IV explains the source of the rules governing the succession to the Crown of Canada. Through a careful analysis of scholarly commentary and the limited relevant case law, Part V demonstrates how the rules governing the succession to the Crown of Australia are substantively Australian law. Part VI of the article is key. It examines whether the Canadian and Australian constitutional religious freedom provisions apply to the law of royal succession. This part explains, for reasons different than those advanced by Ogilvie and relying on case law decided after her article was written, why there is no constitutional religious freedom problem with the Canadian law of royal succession. This part also explains why the conclusion is different in Australia and how the religious freedom provision of the Australian Constitution operates to invalidate the religious tests that Ogilvie suggests govern the succession to the Crown of Australia. The Conclusion offers some observations about the implications of the analysis in this article.

I. The Religious Tests Governing the Royal Succession

As a first step in the development of this article's argument challenging the assumption that the monarchies of Commonwealth realms such as Canada and Australia are governed by the same rules as the British monarchy, it is necessary to set out the religious tests that are in issue. A mix of common law (largely derived from feudal laws governing the inheritance of real property[7]) and statute governs the law of royal succession—the rules governing who inherits the

7. See William Blackstone, *Commentaries on the Laws of England: Book I: Of the Rights of Persons*, ed by Wilfrid Prest (Oxford: Oxford University Press, 2016) at 126.

position of monarch—in the United Kingdom.[8] Among those rules are several religious tests.

The religious tests governing the royal succession in the United Kingdom originate in a number of statutes.[9] The principal statutes are: the *Bill of Rights*;[10] the *Claim of Right Act 1689*;[11] the *Coronation Oath Act 1688*;[12] the *Act of Settlement*;[13] the *Union with Scotland Act, 1706*;[14] the *Union with England Act 1707*;[15] the *Union with Ireland Act, 1800*;[16] and the *Accession Declaration Act, 1910*.[17] Graham McBain has summarized the combined effect of these statutes as requiring that the monarch:

- Cannot be (or become) a Roman Catholic and be (or remain) sovereign;
- Cannot marry a Roman Catholic and become (or remain) sovereign;
- Must declare, on accession, himself (or herself) to be a '*faithful protestant*';
- Must join '*in communion*' with the Church of England;
- Must give a coronation oath in which he (or she) promises to maintain the
    - (i) laws of God,
    - (ii) the true profession of the gospel, and
    - (iii) the protestant reformed religion established by law.
- Also, to maintain and preserve:
    - (iv) the settlement of the Church of England and its doctrine, worship, discipline and government, by law established; and
    - (v) the legal rights and privileges of the bishops and clergy of the Church of England (and their churches);
- Must swear to maintain the Church of Scotland;
- Bears the title '*Defender of the Faith*'[.][18]

8. See generally Halsbury's Laws of Canada, vol 20, 5th ed, *Constitutional and Administrative Law* (London: LexisNexis UK, 2014) at paras 42–48 [Halsbury's Laws]; Vernon Bogdanor, *The Monarchy and the Constitution* (Oxford: Oxford University Press, 1998) ch 2 at 42ff; Damien Freeman, "The Queen and Her Dominion Successors: The Law of Succession to the Throne in Australia and the Commonwealth of Nations Pt 1" (2001) 4:2 Constitutional L & Policy Rev 28 at 29–30. For a discussion of the historical development of the law of royal succession, see William Huse Dunham Jr & Charles T Wood, "The Right to Rule in England: Depositions and the Kingdom's Authority, 1327–1485" (1976) 81:4 Am Hist Rev 738; Howard Nenner, *The Right to be King: The Succession to the Crown of England, 1603–1714* (Houndmills, UK: Macmillan Press, 1995).

9. For a detailed discussion of the religious tests governing the royal succession, see Graham McBain, "The Religion of the Queen: Time for Change" (2011) 30:2 UQLJ 305.

10. (Eng), 1 Will & Mar sess 2, c 2.

11. (Scot), 1689, c 28.

12. (Scot), 1 Will & Mar, c 6.

13. (Eng), 12 & 13 Will III, c 2, s 2.

14. (Eng), 6 Anne, c 11.

15. (Scot), 1707, c 7.

16. (UK), 39 & 40 Geo III, c 67.

17. (UK), 10 Edw VII & 1 Geo V, c 29.

18. McBain, *supra* note 9 at 307.

A new monarch's accession to the Crown occurs instantaneously on the death of the previous monarch.[19] Some of the religious tests governing the royal succession operate as conditions precedent (such as the requirement not to be a Roman Catholic[20]) such that failure to comply prevents a person's accession. Others operate as conditions subsequent (such as the requirement to swear particular oaths at the monarch's coronation ceremony[21] and the requirement to not be a Roman Catholic[22]) such that failure to comply forfeits the Crown.[23]

A recent change to the rules of royal succession in the United Kingdom removed one of the religious tests listed above. Section 2 of the *Succession to the Crown Act, 2013* (UK) removed the requirement that the monarch must not marry, or be married to, a Roman Catholic.[24] That Act did not otherwise alter the religious tests governing succession to the Crown.[25]

II. The Australian and Canadian Constitutional Prohibitions on Religious Tests

The next key step in developing this article's argument is to explain how both Canadian and Australian constitutional law prohibit religious tests for holding public office. In Canada, this is a result of sections 2(a) and 15(1) of the *Charter*.[26] Section 2(a) states: "Everyone has the following fundamental

19. See *Calvin's Case* (1608), 77 ER 377 at 389 (KB (Eng)). Chief Justice Coke explained: "But the title is by descent; by Queen Elizabeth's death the Crown and kingdom of England descended to His Majesty, and he was fully and absolutely thereby King, without any essential ceremony or act to be done *ex post facto*: for coronation is but a Royal ornament and solemnization of the Royal descent, but no part of the title." *Ibid.*

20. See *Act of Settlement*, *supra* note 13, s II.

21. See e.g. *Accession Declaration Act, 1910*, *supra* note 17.

22. See *Act of Settlement*, *supra* note 13, s II.

23. See Blackstone, *supra* note 7 at 127, 141 ("[t]he doctrine of *hereditary* right does by no means imply an *indefeasible* right to the throne" and that "the inheritance is conditional" at 127, 141 [emphasis in original]).

24. *Succession to the Crown Act, 2013* (UK), c 20, s 2. For discussion on the process for altering the law of royal succession in the various realms, see Anne Twomey, "Changing the Rules of Succession to the Throne" [2011] Public L 378 [Twomey, "Changing the Rules"]; Josh Hunter, "A More Modern Crown: Changing the Rules of Succession in the Commonwealth Realms" (2012) 38:3 Commonwealth L Bull 423.

25. For a discussion of this legislation, see Neil Parpworth, "The Succession to the Crown Act 2013: Modernising the Monarchy" (2013) 76:6 Mod L Rev 1070; UK, HL, "*Succession to the Crown Bill*", Library Note 2013/005 (2012–2013); UK, HC, "*Succession to the Crown Bill 2012–2013*", Research Paper 12/81 (2012–2013).

26. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

freedoms: (a) freedom of conscience and religion". Section 15(1) states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on . . . religion." In Australia, the prohibition on religious tests for holding public office at the federal level is a result of section 116 of the Australian Constitution.[27] The fourth clause of section 116 states: "[N]o religious test shall be required as a qualification for any office or public trust under the Commonwealth." This section of the article provides a brief overview of the Canadian and Australian jurisprudence concerning the constitutional prohibitions on religious tests for holding public office, and how the religious tests governing the royal succession would violate these provisions should the provisions be applicable.

A. Canadian Jurisprudence

The *Charter*'s guarantee of freedom of conscience and religion extends to immunity from religious tests for holding public office. The leading case on section 2(a) of the Canadian *Charter* is *R v Big M Drug Mart Ltd.*[28] The case required the Supreme Court of Canada to decide whether a law requiring businesses to close on Sundays violated freedom of conscience and religion because it compelled people to observe the Christian Sabbath. In answering that question, the Supreme Court outlined the general principles arising from section 2(a). The Court said:

> Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal . . .. But the concept means more than that.
>
> Freedom can primarily be characterized by the absence of coercion or constraint . . . Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others.[29]

To condition the holding of public office to individuals satisfying a religious test is a clear example of an indirect form of control determining or limiting alternative courses of conduct. In the case of royal succession, the heir to the throne can only convert to Roman Catholicism at the cost of losing his

27. *Commonwealth of Australia Constitution Act 1900* (Cth), s 116 [Australian Constitution].
28. [1985] 1 SCR 295, 60 AR 161.
29. *Ibid* at 336–37.

or her place as heir, and the monarch can only do so at the cost of forfeiting the Crown. The Court also said: "[W]hatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose".[30]

Both of these passages were reaffirmed by the Supreme Court of Canada in subsequent case law.[31] Referring to the second quoted passage, the Supreme Court of Canada described one aspect of the freedom guaranteed by section 2(a) as "the freedom from conformity to religious dogma".[32] The religious tests governing succession to the Crown expressly require affirmations of religious belief, participation in specific religious practices and conformity to religious dogma. Moreover, those tests exist for sectarian purposes; their historical purpose was, and continuing function is, to ensure a Protestant monarchy.

In *Mouvement laïque québécois v Saguenay (City)*, the Supreme Court of Canada considered whether a bylaw requiring a town council to commence its proceedings with a Catholic prayer violated the *Charter* guarantee of freedom of religion and conscience.[33] In deciding that question, the Court explained some of the general principles that are relevant to the question of the religious tests governing royal succession and the *Charter*. The Court said:

> When all is said and done, the state's duty to protect every person's freedom of conscience and religion means that it may not use its powers in such a way as to promote the participation of certain believers or non-believers in public life to the detriment of others. It is prohibited from adhering to one religion to the exclusion of all others.[34]

It is obvious that the religious tests governing succession to the Crown violate these principles. Those religious tests compel conformity to religious dogma and impose a penalty of disqualification from the throne for failing to conform. Only certain believers—Protestants—may accede to the Crown.

The equal protection and anti-discrimination guarantee of section 15 of the *Charter* also extends to immunity from religious tests for public office.

30. *Ibid* at 347.

31. See e.g. *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at 757–58, 761, 35 DLR (4th) 1.

32. *Ibid* at 760.

33. 2015 SCC 16, [2015] 2 SCR 3 [*Saguenay*]. This case was decided under the Quebec *Charter of human rights and freedoms*, which contains a provision accepted as having the same meaning as section 2(a) of the Canadian *Charter*. *Ibid* at para 63, citing *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City)*, 2000 SCC 27 at para 85, [2000] 1 SCR 665.

34. *Saguenay*, *supra* note 33 at para 76.

Section 15 jurisprudence has been described as being "complex, and [defying] any attempt at a quick and accurate summary".[35] In one of the leading cases on section 15[36]—*R v Kapp*—the Supreme Court of Canada explained how section 15 should be applied.[37] The case concerned the grant of a commercial fishing licence to three Aboriginal groups allowing them an exclusive right to engage in commercial fishing in a river for a specified period. As an act of protest, non-Aboriginal fishers fished in the river during the specified period. Those fishers were prosecuted. The protesters argued that the charges they faced were racially discriminatory. The Supreme Court of Canada outlined a two-step test for applying section 15(1):

(1) Does the law create a distinction based on an enumerated or analogous ground?
(2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[38]

The Supreme Court of Canada reformulated the second step of the test in its subsequent case law.[39] In *Quebec (Attorney General) v A*, Abella J explained that the second step of the *Kapp* test "improperly focuses attention on whether a discriminatory *attitude* exists, not a discriminatory *impact*".[40] The second step of the test is therefore more properly: "[W]hether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group".[41] Accepting this reasoning,[42] the Supreme Court in *Kahkewistahaw First Nation v Taypotat* explained:

> The second part of the analysis focuses on arbitrary — or discriminatory — disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage.[43]

35. The Honourable Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 5th ed (Toronto: Irwin Law, 2013) at 331.

36. *Ibid* at 348; The Honourable Lynn Smith & William Black, "The Equality Rights" in Errol Mendes & Stéphane Beaulac, eds, *Canadian Charter of Rights and Freedoms*, 5th ed (Markham, Ont: LexisNexis, 2013) 951 at 963.

37. 2008 SCC 41, [2008] 2 SCR 483.

38. *Ibid* at para 17.

39. For a recent example, see *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 19–20, [2015] 2 SCR 548 [*Taypotat*].

40. 2013 SCC 5 at para 331, [2013] 1 SCR 61, Abella J, dissenting in result (majority opinion on s 15(1)) [emphasis added].

41. *Ibid* at para 331.

42. *Taypotat*, *supra* note 39 at para 18.

43. *Ibid* at para 20.

There can be no doubt that the religious tests governing royal succession fail the Supreme Court's two-step test. The religious tests governing royal succession create a distinction based on religion and that distinction creates a disadvantage and denies a benefit by limiting the office of monarch to those who satisfy the religious tests.

The key question is not whether the religious tests governing succession to the Crown, outlined above, are inconsistent with the *Charter*. They clearly are inconsistent. The key question is whether the *Charter* applies to those tests. This article will return below to whether the *Charter* applies to the law of royal succession.

B. Australian Jurisprudence

The religious tests clause of section 116 of the Australian Constitution, in its express terms, prohibits religious tests for public office. However, there is very little case law on the religious tests clause of section 116. In *Crittenden v Anderson*, Crittenden claimed that Anderson was disqualified from election to the House of Representatives, the lower House of Australia's federal parliament, on the ground that Anderson owed allegiance to a foreign power.[44] Holding allegiance to a foreign power is a ground of disqualification from election to parliament under the Australian Constitution.[45] The foreign power was said to be the "Papal State" (i.e., Vatican City) and the allegiance was said to arise simply because Anderson was a practising Catholic. A single justice of the High Court of Australia sitting as the Court of Disputed Returns struck out the claim, relying on section 116 to do so. Justice Fullagar did not give detailed reasons for his decision, stating only that: "Effect could not be given to the petitioner's contention without the imposition of a 'religious test'."[46]

In *Williams v Commonwealth of Australia*, the High Court was asked to invalidate a federal government program known at the time as the National Schools Chaplaincy Program on the basis of the religious tests clause.[47] As part of the program, the Commonwealth (as the federal level of government in Australia is referred to) would enter into contracts with non-government organizations under which the Commonwealth provided funds to those organizations so that the organizations could provide chaplaincy services in public schools. The contracts incorporated program guidelines, which prescribed criteria

44. (23 August 1950) (HCA), extracted in "An Unpublished Judgment on s 116 of the Constitution" (1977) 51 Austl LJ 171.

45. Australian Constitution, *supra* note 27, s 44(i).

46. *Crittenden v Anderson*, *supra* note 44 at 171.

47. [2012] HCA 23, 248 CLR 156 [*Williams*].

governing who organizations could employ as chaplains. One of the criteria for appointment as a chaplain was recognition "through formal ordination, commissioning, recognised qualifications or endorsement by a recognized or accepted religious institution or a state/territory government approved chaplaincy service".[48] The plaintiff argued that this criterion for employment as a chaplain imposed a religious test for an office or public trust under the Commonwealth.[49]

The High Court held that the plaintiff's case "fails at the threshold" because the chaplains did not hold positions under the Commonwealth.[50] The Court explained:

> The chaplains engaged by SUQ hold no office under the Commonwealth. The chaplain at the Darling Heights State Primary School is engaged by SUQ to provide services under the control and direction of the school principal. The chaplain does not enter into any contractual or other arrangement with the Commonwealth. That the Commonwealth is a source of funding to SUQ is insufficient to render a chaplain engaged by SUQ the holder of an office under the Commonwealth.
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> . . .
>
> [T]he force of the term "under" indicates a requirement for a closer connection to the Commonwealth than that presented by the facts of this case.[51]

The classic text on the Australian Constitution, John Quick and Robert Garran's *Annotated Constitution of the Commonwealth of Australia*, offers no substantive discussion on the meaning of the religious tests clause.[52] However, recent Australian scholarship has offered some relevant explanations of the religious tests clause. A detailed analysis of history and case law gave rise to this definition of "religious test":

> [R]eligious tests come in many forms. These include a requirement to participate in particular religious practices, a requirement to disclaim belief in a particular religious doctrine, a requirement to take a religious oath of office such that a person must hold some religious belief, a requirement to be or not to be of a particular religious status, as well as a requirement to swear or affirm to particular religious beliefs.[53]

Australian scholarship has also explained that: "[A] religious test is required as a qualification where in a real and practical sense it serves as a condition

48. *Ibid* at para 305.

49. *Ibid*.

50. *Ibid* at para 108-09.

51. *Ibid* at paras 109–10.

52. John Quick & Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney: Angus & Robertson, 1901).

53. Luke Beck, "The Constitutional Prohibition on Religious Tests" (2011) 35:2 Melbourne UL Rev 323 at 339 [Beck, "Religious Tests"].

precedent or as a condition subsequent to holding the relevant office or position".[54]

The difficult question is not whether the religious tests governing succession to the Crown, outlined above, are religious tests within the meaning of section 116 of the Australian Constitution. They plainly are. Indeed, they are the paradigm form of religious test in English law. As with the Canadian situation, the key question is whether section 116 applies to those tests. This article will return below to whether section 116 applies to the law of royal succession.

III. The Monarch in the Canadian and Australian Constitutional Systems

A preliminary step in determining whether the Canadian *Charter* and the Australian religious tests clause apply to the rules of royal succession is understanding the place and role of the monarch in the Canadian and Australian constitutional frameworks. Like the United Kingdom, Canada and Australia are constitutional monarchies operating systems of responsible government. A significant difference from the constitutional system of the United Kingdom is that both Canada and Australia are federal states with written constitutions. Those written constitutions are the supreme law of those countries and laws inconsistent with the written constitution are unconstitutional and of no effect.[55]

The monarch is an integral feature of the constitutional structures of both Canada and Australia. The executive government and authority of and over Canada is vested in the monarch,[56] who is also a constituent component of the Canadian Parliament.[57] The Queen in Council also has power to disallow legislation within two years of its receiving royal assent by the Governor General.[58] Command-in-Chief of the Canadian Armed Forces is also vested in the Que-

54. *Ibid* at 345.

55. See *Constitution Act, 1982*, s 52(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*]. There is no equivalent provision in the Australian Constitution but the principle is accepted. See *Australian Communist Party v The Commonwealth* (1951), 83 CLR 1 at 262 (HCA) ("in our system the principle of *Marbury v Madison* is accepted as axiomatic" [footnotes omitted]). See *Marbury v Madison*, 5 US 137 (1803).

56. See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 9, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

57. *Ibid*, s 17.

58. *Ibid*, s 56.

en.[59] The Queen is also a feature of the constitutional structures of the Canadian provinces. The provincial Lieutenant Governors of Ontario and Quebec have power, for example, to summon, "in the Queen's Name", meetings of the legislatures of their respective provinces.[60]

In Australia, the Queen is a part of the Australian Parliament[61] and has power to disallow legislation within one year of it receiving royal assent,[62] which is granted by the Governor General on the monarch's behalf.[63] Members of the House of Representatives and Senators must take an oath or make an affirmation of allegiance to the Queen.[64] In addition, the executive power of the Commonwealth is vested in the Queen.[65] The Australian Constitution also provides that the Queen in Council may determine appeals from the High Court of Australia,[66] although this provision is now redundant.[67] The monarch is also a feature of the constitutional systems of the Australian states. For example, the monarch is a part of the parliaments of four of the Australian states.[68]

It is important to emphasize that the Queen referred to in the Constitution of Canada is not the Queen of the United Kingdom but the Queen of Canada. Likewise, the Queen referred to in the Australian Constitution is the Queen of Australia and not the Queen of the United Kingdom. The Crown is not a single, indivisible institution. The offices of Queen of the United Kingdom, Queen of Canada, Queen of Australia and of the other Commonwealth realms are separate offices. In *Shaw v Minister for Immigration and Multicultural Affairs*, Gleeson CJ, Gummow and Hayne JJ of the High Court of Australia said:

> The constitutional term "subject of the Queen" must be understood in the light of the development and evolution of the relationship between Australia and the UK and between the UK and those other countries which recognise the monarch of the UK as their monarch. In particular, the

59. *Ibid*, s 15.
60. *Ibid*, s 82.
61. See Australian Constitution, *supra* note 27, s 1.
62. *Ibid*, s 59.
63. *Ibid*, s 58.
64. *Ibid*, s 42, Schedule.
65. *Ibid*, s 61.
66. *Ibid*, s 74.
67 See *Privy Council (Limitation of Appeals) Act 1968* (Cth); *Privy Council (Appeals from the High Court) Act 1975* (Cth); *Kirmani v Captain Cook Cruises Pty Ltd (No 2)* (1985), 159 CLR 461 (HCA).
68. See *Constitution Act 1902* (NSW), s 3; *Constitution Act 1867* (Qld), s 2A(1); *Constitution Act 1975* (Vic), s 15; *Constitution Act 1889* (WA), s 2(2).

expression "subject of the Queen" can be given meaning and operation only when it is recognised that the reference to "the Queen" is not to the person but to the office. That recognition necessarily entails recognition of the reality of the independence of Australia from the UK.[69]

The acceptance that constitutional references to "the Queen" are to the office and not the person, coupled with the acceptance of the reality of Australia's complete constitutional independence from the United Kingdom, compels the conclusion that constitutional references to the Queen are to the Queen of Australia as distinct from the Queen of the United Kingdom. The same reasoning is applicable to the Canadian situation. As the Federal Court of Canada has explained: "[T]here exists a king or queen of Canada, distinct at law from the British Monarch and there is now a distinction between the king or queen of Great Britain and the king or queen as Head of State for Canada".[70] The United Kingdom courts also accept that the office of Queen of the United Kingdom is distinct from the offices of Queen of Canada, Queen of Australia and the other Commonwealth realms.[71]

If references to the monarch in the various documents that comprise the Constitution of Canada[72] are to the Canadian monarch and in the Australian Constitution are to the Australian monarch, then an important constitutional issue is determining royal succession. The law of royal succession determines who occupies the office of monarch in Canada and Australia.

IV. The Law of Royal Succession in Canada

The next step in challenging the assumption that the monarchies of Commonwealth realms such as Canada and Australia are governed by the same rules as the British monarchy is to identify the rules governing royal succession in those countries. This section of the article addresses the law of royal succession in Canada. The Constitution of Canada does not specify the rules governing the royal succession. However, lower Canadian courts have addressed the issue.

In *O'Donohue v Canada*, the Ontario Superior Court held that Canadian constitutional rules demand that the person who happens to be monarch of the

69. [2003] HCA 72 at para 14, 218 CLR 28 [*Shaw*].

70. *Roach v Canada (Minister of State for Multiculturalism and Culture)(TD)*, [1992] 2 FC 173 at 177, 88 DLR (4th) 225.

71. See *R v Secretary of State for Foreign and Commonwealth Affairs; ex parte Indian Association of Alberta*, [1982] QB 892 (CA).

72. See *Constitution Act, 1982*, *supra* note 55, s 52(2).

United Kingdom is monarch of Canada.[73] In that case, the Court struck out an action brought by a Roman Catholic Canadian challenging certain provisions of the *Act of Settlement* disqualifying Catholics from becoming monarch. The claim was that those provisions breached section 15(1) of the *Charter*. The Court did not address the substantive *Charter* question. The Court struck out the claim on the ground that the plaintiff lacked standing, since he was not personally affected, and because the issue was non-justiciable. In holding that the question was not justiciable, Rouleau J outlined what he considered to be the law of royal succession in Canada. Justice Rouleau's reasoning was adopted without criticism and followed by Hackland RSJ in the Ontario Superior Court in 2013 in *Teskey v Canada (Attorney General)* (*Teskey*).[74]

In her comment piece claiming that the religious tests governing succession to the Crown are not amenable to successful constitutional challenge in Commonwealth realms, Ogilvie discusses *Teskey* and another case. In that other case, *McAteer v Canada (Attorney General)* (*McAteer*), the applicants argued that the oath required of new Canadian citizens violated their *Charter* right to freedom of religion because the oath required swearing allegiance to the Queen of Canada.[75] Because the Queen must be Protestant, the citizenship oath was said to compel new citizens to make an oath supportive of one religion over others. The Ontario Court of Appeal rejected that argument holding that the oath itself is secular and is an oath not to the Queen as an individual but to the Canadian form of government.[76] In neither *Teskey* nor *McAteer* was the validity of the law of royal succession in issue.[77] Ogilvie bases her claim that the religious tests governing succession to the Crown are not amenable to successful constitutional challenge on *O'Donohue*.[78]

A. The Problematic O'Donohue *Analysis of the Canadian Law of Royal Succession*

There were three essential steps in Rouleau J's reasoning in *O'Donohue* to reach the conclusion that the person who happens to be monarch of the

73. (2003), 109 CRR (2d) 1, 2003 CanLII 41404 (Ont Sup Ct J) [*O'Donohue* ONSC cited to CRR]. The Court of Appeal for Ontario dismissed an appeal saying only: "We agree with the reasons of Rouleau J". *O'Donohue v Canada*, 2005 CanLII 6393, 2005 CarswellOnt 951 (WL Can) (CA).

74. 2013 ONSC 5046, 290 CRR (2d) 36; aff'd 2014 ONCA 612, 337 DLR (4th) 39 [*Teskey*].

75. 2014 ONCA 578, 121 OR (3d) 1 [*McAteer*].

76. *Ibid* at para 120.

77. *Ibid* ("the appellants do not challenge the constitutionality of the requirement that the Queen be Anglican" at para 107).

78. Ogilvie, *supra* note 1 at 195–96.

United Kingdom is monarch of Canada. The first step relied on the constitutional preamble to identify that an organizing principle of the Canadian constitutional system is that the monarch of Canada must be the same person as the monarch of the United Kingdom. The second, related step relied on importing the British rules of royal succession into the Canadian constitutional regime as necessary to give effect to that organizing principle. The third step in Rouleau J's reasoning was an application of the principle that the *Charter* cannot be used to amend or override another part of the Constitution.[79]

Canadian constitutional jurisprudence accepts that the preamble to the *Constitution Act, 1867* identifies certain organizing principles of the Canadian constitutional system and that those principles may be used to fill gaps in the express terms of the constitutional text.[80] Justice Rouleau relied heavily on the Canadian constitutional preamble in his reasoning. The preamble states: "Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom."[81]

From this text, Rouleau J concluded that the existence of Canada as a "constitutional monarchy, where the monarch is shared with the United Kingdom and other Commonwealth countries, is, in my view, at the root of our constitutional structure".[82] There is a significant problem with this step in Rouleau J's reasoning. The statement is conclusory. Justice Rouleau did not provide any explanation as to how the preamble leads to this conclusion.[83]

Canadian constitutional jurisprudence also accepts that unwritten concepts, essential to the proper functioning of the constitutional scheme, are by

79. See *Reference re Bill 30, An Act to Amend the Education Act (Ont)*, [1987] 1 SCR 1148 at 1197, 40 DLR (4th) 18; *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 373, 100 DLR (4th) 212 [*New Brunswick Broadcasting*].

80. See *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at 75, 156 Nfld & PEIR 1 [*Reference re Remuneration*].

81. *Constitution Act, 1867*, *supra* note 56, Preamble.

82. *O'Donohue* ONSC, *supra* note 73 at para 21.

83. *Ibid.* Academic conclusions to the same effect also tend to be conclusory in the sense that no reasons are articulated to explain how it is that conclusion flows from the text of the preamble. See e.g. Ian Holloway, "The Law of Succession and the Canadian Crown" in D Michael Jackson & Philippe Lagassé, eds, *Canada and the Crown: Essays on Constitutional Monarchy* (Montreal & Kingston: McGill-Queen's University Press, 2013) 107 ("the preamble to the Constitution Act, 1867 makes it clear that *our* monarch must be the same person as the monarch of the United Kingdom" at 113 [emphasis in original]).

necessity incorporated into the Canadian constitutional regime.[84] On this basis, Rouleau J explained:

> [I]t is clear that Canada's structure as a constitutional monarchy and the principle of sharing the British monarch are fundamental to our constitutional framework. In light of the preamble's clear statement that we are to share the Crown with the United Kingdom, it is axiomatic that the rules of succession for the monarchy must be shared and be in symmetry with those of the United Kingdom and other Commonwealth countries.
>
> . . .
>
> [T]he rules of succession are . . . essential to the proper functioning of the shared monarchy principle . . . [T]he rules of succession are [not] part of the written constitution, but they are, in my view, part of the unwritten or unexpressed constitution and are therefore not subject to the *Charter*.[85]

There are a number of problems with Rouleau J's reasoning. The first problem concerns the claim that the preamble requires that the Canadian monarch be the same person as the British monarch. Anne Twomey has offered a strong rebuttal of this proposition. She points out that, as explained earlier in this article, in British law the law of royal succession is a mix of common law and statute.[86] Twomey contends that this means that the monarch is determined by an application of the law of the land: "If Canada has a Constitution '*similar* in principle to that of the United Kingdom', then its monarch too is determined by the law of the land", the relevant law of the land being Canadian law.[87] Of course, Rouleau J's reasoning holds that the British rules have been incorporated into Canadian constitutional law such that they are the law of the land. However, that reasoning is entirely circular: those rules are only incorporated, Rouleau J reasons, because that incorporation is necessary to give effect to the principle that the British and Canadian monarchs must be the same person.

The second problem with Rouleau J's reasoning is the idea that there is a "commitment to symmetry" in the Canadian constitutional system with the monarch of the United Kingdom and of the other Commonwealth realms.[88] Twomey argues that this is simply untrue as a matter of history and law and points to the circumstances surrounding the abdication of Edward VIII to demonstrate her point.[89]

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84. See generally *New Brunswick Broadcasting*, *supra* note 79.

85. *O'Donohue* ONSC, *supra* note 73 at paras 27–28.

86. Anne Twomey, "Succession to the Crown of Canada" in Michel Bédard & Philippe Lagassé, eds, *La Couronne et le Parlement: The Crown and Parliament* (Montreal: Éditions Yvon Blais, 2015) 319 at 344 [Twomey, "Crown of Canada"].

87. *Ibid* [emphasis in original].

88. *O'Donohue* ONSC, *supra* note 73 at para 34.

89. Twomey, "Crown of Canada", *supra* note 86 at 347.

Edward VIII signed his abdication declaration on December 10, 1936. *His Majesty's Declaration of Abdication Act 1936* (UK) commenced operation on December 11, 1936.[90] Under the terms of the *Statute of Westminster 1931*, *His Majesty's Declaration of Abdication Act* extended in its application to Australia and New Zealand without either country needing to take any steps.[91] This was because, at the time, Australia and New Zealand had not yet adopted section 4 of the *Statute of Westminster*, which provides: "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof."[92]

However, at the time of Edward VIII's abdication, Canada had adopted section 4 of the *Statute of Westminster*. Accordingly, Canada's consent and request was required for *His Majesty's Declaration of Abdication Act* to have effect in Canada. That was provided by an executive Order in Council and the *Succession to the Throne Act, 1937* (Can).[93] Similarly, the Irish Free State enacted the *Executive Authority (External Relations) Act 1936* to give effect to the abdication, which commenced operation on December 12, 1936.[94]

The result was that during the abdication crisis of 1936 there was a different king in various dominions on different days. As Twomey explains:

> In South Africa, the Duke of York succeeded to the throne upon Edward VIII signing the Instrument of Abdication on 10 December 1936. In the United Kingdom, Canada, Australia and New Zealand, the succession occurred on 11 December, when the relevant legislation was passed by the Westminster Parliament and came into force in those countries. In the Irish Free State, the change did not occur until 12 December 1936, when Irish legislation was passed and came into effect. Thus, from 10–12 December 1936 the divisibility of the Crown extended as far as different Kings.[95]

In other words, "it is possible for the laws of [royal] succession to diverge and apply differently in Commonwealth Realms".[96] Similarly, Kenneth Bailey has commented:

90. (UK), 1 Edw VIII & 1 Geo VI, c 3.

91. *Statute of Westminster 1931*, (UK), 22 & 23 Geo V, c 4.

92. *Ibid*, s 4.

93. Canada, Privy Council, *Order in Council regarding Canadian Request and Consent for Enactment of United Kingdom Legislation altering Succession*, PC 1936-3144 1867-1946 (Dominion of Canada), vol 70, extra, 10 December 1936, page 1; *Succession to the Throne Act*, SC 1937, c 16.

94. (Irish Free State), *Number* 58 of 1936.

95. Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Annandale: Federation Press, 2010) at 458, 445–46.

96. Twomey, "Changing the Rules", *supra* note 24 at 386.

> [S]ince the Statute of Westminster the unity of the Commonwealth rests rather in the King's person than in his office; . . . the office of King can under the existing law be discharged by different persons for different parts of the Commonwealth; and . . . the unity of the Commonwealth, through the person of the King, is now maintained, not by chance indeed, but by deliberate agreement.[97]

Curiously, Rouleau J appears to have recognised this fact in his judgment. Referring to the *Succession to the Throne Act, 1937* (Can), Rouleau J said that: "Arguably, without this statute, Edward VIII's abdication would not have been effective in respect of the Crown of Canada."[98] In other words, Rouleau J seems to have explicitly recognised, albeit he hedged his position by saying "arguably", that the monarch of the United Kingdom is not necessarily, simply by virtue of that fact, the monarch of Canada. Justice Rouleau does not appear to have recognised this inconsistency in his reasoning.

B. A More Persuasive Analysis of the Canadian Law of Royal Succession

A more recent case provides a less problematic explanation of the law of royal succession in Canada. In 2016, in *Motard c Canada (Procureure générale)* (*Motard*), the Superior Court of Quebec heard a challenge to the validity of the *Succession to the Throne Act, 2013*,[99] a Canadian version of the United Kingdom Act of the same name, noted above, that ended male primogeniture in the royal succession.[100] The first argument against the Canadian Act was that the legislation effected a change to the "office of the Queen" and the procedure in section 41(a) of the *Constitution Act, 1982* for obtaining provincial consent to such legislation had not been followed. The Court found that while the legislation related to a change to the rules of succession to the Office of the Queen, it did not affect any change to the office itself in terms of its powers, status and constitutional role.[101] It followed that section 41(a) was not engaged. The second argument was that the *Succession to the Throne Act, 2013* was contrary to the *Charter*.[102]

Justice Bouchard dismissed the *Charter* challenge for slightly different, and ultimately more persuasive, reasons than were given in *O'Donohue,* but still focu-

97. KH Bailey, "The Abdication Legislation in the United Kingdom and in the Dominions" (1938) 3:11 *Politica* 147 at 149.

98. *O'Donohue* ONSC, *supra* note 73 at para 34.

99. SC 2013, c 6.

100. 2016 QCCS 588, 2016 CarswellQue 1000 (WL Can) [unofficial translation by WL Can] [*Motard*].

101. *Ibid* at para 139.

102. *Ibid* at para 16.

sed on the preamble. As in *O'Donohue*, *Motard* held that there is a constitutional "rule of symmetry" requiring that the monarch of the United Kingdom be the monarch of Canada and that this rule arises from the preamble.[103] Like Rouleau J in *O'Donohue*, Bouchard J did not articulate how the text of the preamble leads to the conclusion that there is a constitutional demand that the Canadian monarch be shared in common with the British monarch.

Diverging from the analysis in *O'Donohue*, Bouchard J explained that while the principles concerning royal succession that arise from laws such as the *Act of Settlement* may be part of the backdrop or context of Canadian constitutional law, those laws are not part of Canadian law.[104] Justice Bouchard said:

> Although this British Act touches on royal succession, it should be recalled that in this respect it is not so much the provisions of the law that form part of the Constitution of Canada but rather the principles that arise therefrom and are woven into the backdrop to the Constitution of Canada.
>
> The preamble to the *1967 Act* incorporates the principle of Parliamentary privilege into Canadian constitutional law, not the legal source of the privilege. Similarly, the rule recognizing and identifying the sovereign of Canada as the person who is the sovereign of the United Kingdom is also incorporated into the Constitution, while British law governing succession to the throne is not.[105]

This reasoning is not subject to the charge of circularity levelled at Rouleau J's reasoning in *O'Donohue*. On Bouchard J's approach, there is no need to incorporate any rules to give effect to the principle that the British monarch is the Canadian monarch because that principle is itself the substantive legal rule. The rules governing the royal succession contained in the *Bill of Rights*, the *Act of Settlement* and elsewhere are not part of the Canadian Constitution, so they do not require domestic alteration within Canada to ensure symmetry of monarchs.[106]

According to Bouchard J, the Canadian Parliament needed to enact the *Succession to the Throne Act 2013* (Can) not to effect a change in Canadian law but to satisfy a condition precedent existing as a convention of British law for the British Parliament to legislate with respect to the royal succession as a matter

103. *Ibid* at para 153.
104. *Ibid* at para 55.
105. *Ibid* at paras 152–53.
106. *Ibid* at para 148.

of British law.[107] This explanation is also applicable to the Canadian legal moves at the time of Edward VIII's abdication.

Further, because the preamble to the *Constitution Act, 1867* does not incorporate any British laws concerning royal succession as part of Canadian law, there is no problem arising from a foreign parliament purporting to legislate for Canada. The Canadian constitutional principle that the person who happens to be monarch of the United Kingdom is therefore monarch of Canada continues to operate as the rule of automatic recognition by force of the Canadian Constitution.[108]

The rule of symmetry has a major flaw. The analysis in both *O'Donohue* and *Motard* starts from the proposition that the constitutional preamble leads to the conclusion that there is a constitutional demand that the Canadian monarch be shared in common with the British monarch. Neither case gives detailed reasons for this conclusion. This is just as well because thoughtful consideration of the issue might expose a major flaw: should the United Kingdom ever decide to abolish its monarchy and become a republic then there would be no monarch to which the rule of symmetry could refer. One potential analysis to address this issue might be to say that the continuance of the British monarchy is an assumption upon which the Canadian Constitution is premised and that the courts, as faithful observers of the Constitution, must reason consistently with that assumption.

Applying the principles outlined by Bouchard J to resolve the case was straightforward. There was nothing discriminatory about the *Succession to the Throne Act 2013* (Can). The discriminatory rules about royal succession are found in various other British laws. Those laws are British laws and therefore obviously not subject to the *Charter*.[109] In addition, the principle that the person who is monarch of the United Kingdom is, by virtue of that fact, the monarch of Canada is not subject to the *Charter* because that principle is a structural constitutional principle and such principles cannot be invalidated by the *Charter*.[110]

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107. *Ibid* at paras 127–28. See also Peter W Hogg, "Succession to the Throne" (2014) 33:1 NJCL 83 at 94; Hunter, *supra* note 24 at 439–42; Halsbury's Laws, *supra* note 8 at para 45. Halsbury's Laws states that: "Within the United Kingdom, it is a constitutional convention . . . that the assent of the Parliament of each of the Commonwealth countries retaining the monarch as their head of state is required in respect of any alteration in the law", i.e., alterations in the law touching the succession to the throne. *Ibid.*

108. *Motard*, *supra* note 100 at paras 141–50.

109. *Ibid* at para 151.

110. *Ibid* at para 154.

V. The Law of Royal Succession in Australia

In challenging the assumption that the monarchies of Commonwealth realms such as Canada and Australia are governed by the same rules as the British monarchy it is also necessary to identify the rules governing the royal succession in Australia. The Australian courts have never had to decide a question concerning the law of royal succession in Australia. However, unlike the Canadian Constitution, the Australian Constitution provides some textual guidance that suggests that the Canadian jurisprudence is not applicable. Covering clause 2 provides: "The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom."[111] The Act referred to in covering clause 2 is the *Commonwealth of Australia Constitution Act 1900* (UK), section 9 of which contains the Australian Constitution.[112] As Anne Twomey explains, there are three possible views as to the meaning and effect of that clause.[113]

The first view is that covering clause 2 "mandates that whoever is the sovereign of the United Kingdom is also, by virtue of this external fact, sovereign of Australia".[114] This would be an Australian version of the Canadian rule of symmetry. This interpretation, whilst potentially open on the text, has been rejected by scholars.[115] Anne Twomey has described it as: "[O]ld-fashioned and most unlikely to be accepted by the Australian courts".[116] Leslie Zines points out that this interpretation is anachronistic because it only makes sense if there is a separate Australian Crown, which was not the case when the provision was drafted.[117] Zines also points out that this interpretation would cause serious constitutional problems if the United Kingdom were ever to abolish its monarchy to become a republic; in that situation, there would be no British monarch to which the provision could refer.[118]

111. *Commonwealth of Australia Constitution Act, 1900* (UK), 63 & 64 Vict, c 12, s 2 [*Australia Constitution Act*, (UK)].

112. *Ibid*, s 9. The provisions of the *Commonwealth of Australia Constitution Act, 1900* (UK) are referred to as "covering clauses" rather than "sections" to avoid any confusion with the sections of the Australian Constitution, which is contained in section 9, covering clause 9 of the imperial Act.

113. See Twomey, "Crown of Canada", *supra* note 86 at 341–44; Twomey, "Changing the Rules", *supra* note 24 at 390–92.

114. Twomey, "Crown of Canada", *supra* note 86 at 341.

115. See e.g. George Winterton, "The Evolution of a Separate Australian Crown" (1993) 19:1 Monash UL Rev 1 at 2.

116. Twomey, "Crown of Canada", *supra* note 86 at 341.

117. Leslie Zines, *The High Court and the Constitution*, 5th ed (Annandale: Federation Press, 2008) at 436.

118. *Ibid* at 437.

Zines' argument would be weaker if a rule of symmetry could be inferred from Australia's constitutional preamble but this is not a constitutionally permissible form of reasoning in Australia. A further argument against an Australian rule of symmetry, based on distinguishing *O'Donohue* and *Motard*, is therefore this. Both of those Canadian cases placed emphasis on the words of the Canadian preamble referring to: "One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom."[119] The preamble to the *Commonwealth of Australia Constitution Act 1900* (UK) refers to "one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland".[120]

Several key reasons prevent Australian courts adopting reasoning similar to that in *O'Donohue* and *Motard*. First, the Australian preamble does not refer to the nature of the Constitution as the Canadian preamble does. Secondly, the Supreme Court of Canada has held that in Canada the "preamble is clearly part of the Constitution".[121] By contrast, the Australian preamble is not part of the Australian Constitution. The Australian preamble is a preamble to an imperial statute, section 9 of which states: "The Constitution of the Commonwealth shall be as follows."[122] There is no scope to hold that the Australian preamble is part of the Australian Constitution. Thirdly, there is no doctrine in Australian law similar to the Canadian doctrine that allows constitutional organizing or structural principles to be inferred from the preamble and then applied as substantive rules. To the extent that references to the preamble feature in Australian constitutional jurisprudence, the High Court has "largely referred to [the preamble] in its historical role as a statement of fact at the time the Constitution was enacted or as incidental support for arguments that find their basis elsewhere in the text or structure of the Constitution or constitutional principle".[123] Finally, because the preamble is not part of the Australian Constitution it is not subject to the referendum procedure for constitutional amendment outlined in section 128.[124] The preamble therefore can probably be amended by ordinary legislation, albeit following a convoluted

119. *Constitution Act, 1867*, *supra* note 56, Preamble.

120. *Australia Constitution Act*, (UK) *supra* note 111, Preamble.

121. *Reference re Remuneration*, *supra* note 80 at para 94.

122. *Australia Constitution Act*, (UK), *supra* note 111, s 9.

123. Anne Twomey, "Constitutional Recognition of Indigenous Australians in a Preamble" (2011) Sydney Law School Research Paper No 2/2011, online: <papers.ssrn.com/ sol3/ papers. cfm?abstract_id=1922425> at 42.

124. Australian Constitution, *supra* note 27, s 128.

procedure.[125] This is not a strong basis from which to infer substantive constitutional principles.

The second view of the meaning of covering clause 2 is this:

> [C]overing clause 2 is merely an interpretative provision which simply assumes, but does not enact, the existence of a succession law that is operative in Australia. According to this view, covering clause 2 operates to ensure that references to the sovereign are not taken to be confined to the sovereign at the time of the enactment, but extend to whoever happens to be the sovereign from time to time in accordance with the applicable law. As the United Kingdom can no longer legislate for Australia, the applicable law would be the pre-existing law of succession as altered by Australian law.[126]

Twomey explains that this approach is consistent with the legal approach taken to other British laws that applied to Australia by paramount force before the *Statute of Westminster* came into force.[127] If those laws are repealed or amended in the United Kingdom, any such repeal or amendment has no effect in Australia and those laws continue to operate in the original form in which they were applied to Australia unless subsequently altered by Australian law.[128]

The third view covering clause 2 is this:

> [C]overing clause 2 incorporated by reference into the *Commonwealth of Australia Constitution Act* the British laws of succession to the throne. Under s 4 of the *Statute of Westminster*, those laws could be amended or repealed by United Kingdom legislation to which Australia had given its request and consent. That is no longer the case. Section 1 of the *Australia Acts 1986* provides that no Act of the United Kingdom Parliament may now extend to Australia as part of Australian law. In *Sue v Hill*, three Justices of the High Court of Australia noted that covering clause 2 identifies the Queen 'as the person occupying the hereditary office of Sovereign of the United Kingdom under rules of succession established in the United Kingdom.' Their Honours went on to state:
>
> The law of the United Kingdom in that respect might be changed by statute. But without Australian legislation, the effect of s 1 of the *Australia Act* would be to deny the extension of the United Kingdom law to the Commonwealth, the States and the Territories.
>
> The argument here is that the rules of succession have been effectively patriated with the Australian Crown and while they continue to exist in their current British form, they may only be amended or repealed by Australian action.[129]

125. See Anne Twomey, "The Preamble and Indigenous Recognition" (2011) 15:2 Australian Indigenous L Rev 4 at 11–12.

126. Twomey, "Crown of Canada", *supra* note 86 at 342.

127. *Ibid* at 344–45.

128. See e.g. *Copyright Owner's Reproduction Society Ltd v EMI (Australia) Pty Ltd* (1958), 100 CLR 597 (HCA); *Bistricic v Rokov* (1976), 135 CLR 552 (HCA).

129. Twomey, "Crown of Canada", *supra* note 86 at 342–43.

The difference between the second and third views of covering clause 2 concerns the route by which the law of royal succession became part of Australian law. For immediate purposes, it is not necessary to determine which of approaches two and three to identifying the Australian monarch is correct or preferable. On both views, the law of royal succession is subject to alteration by Australian law.

Importantly, since on both views of the situation the various rules governing the royal succession are now substantively Australian, rather than British, law, that law is necessarily subject to the demands of the Australian Constitution. That includes, if the situation falls within its scope, the religious tests clause of section 116.

VI. Do the Canadian and Australian Constitutional Prohibitions on Religious Tests Apply to the Monarch?

Having gone through the necessary preliminary steps in the analysis, it is now possible to determine whether the Canadian and Australian constitutional prohibitions on religious tests apply to the monarch. The analysis involved is quite different for each country. The Canadian position is that the *Charter* prohibitions on religious tests do not apply to the monarch. The Australian position is that there is reason to believe that the section 116 prohibition on religious tests does apply to the monarch and invalidates the religious tests.

A. Canada

It is clear from the discussion above that the religious tests governing succession to the Crown of the United Kingdom are inconsistent withsections 2(a) and 15(1) of the Canadian *Charter*. However, those tests are not subject to the *Charter*. *O'Donohue* and *Motard* give different reasons for this conclusion. According to the reasoning of Rouleau J in *O'Donohue*, on which Ogilvie relies, those religious tests are part of Canadian law imported through the preamble in order to give effect to the principle that the Canadian monarch must be the same person as the British monarch. However, because those religious tests are part of Canadian constitutional law they are not subject to the *Charter*. It is settled law that the *Charter* cannot be invoked to trump other parts of the Canadian Constitution.

Justice Bouchard in *Motard* provides more persuasive reasoning for the conclusion that the religious tests are not subject to the *Charter*. It is a substantive rule of Canadian constitutional law that the person who is the monarch

of the United Kingdom is, by virtue of nothing more than that fact alone, the monarch of Canada. It follows that the religious tests governing succession to the Crown of the United Kingdom are not part of Canadian law at all. On this basis, there are no religious tests forming part of Canadian law and therefore the *Charter* question simply does not arise.

B. Australia

The Australian situation is significantly different. There is no rule of symmetry in Australian law. Rather, as explained above, the substantive rules governing the royal succession have been adopted into Australian law and are substantively Australian law. Whether the religious tests governing the royal succession are invalid by reason of section 116 turns on whether the monarch holds an "office or public trust under the Commonwealth", since it is only for such positions that the prohibition on religious tests applies.[130]

Damien Freeman has suggested, as an aside in a footnote in an article focusing on the means by which the Australian Parliament could alter the law of royal succession, that the Queen of Australia does not hold an "office" for the purposes of section 116.[131] The reason Freeman gives for coming to this conclusion is based in policy: the conclusion avoids section 116 operating to invalidate the religious tests governing the royal succession.[132] There are two principal problems with this analysis. First, the methodology employed by Freeman is not the orthodox approach of asking what the text of the Australian Constitution means and what effect that meaning has. Instead, Freeman employs a heterodox approach of asking what conclusion is necessary to achieve a policy result (namely, preserving the validity of the religious tests governing the royal succession) that has been deemed desirable but that has no basis in the text of the Australian Constitution. The second problem with this analysis is that it contradicts High Court authority. In *Sue v Hill*, the High Court of Australia referred to the monarch "as the person occupying the hereditary *office* of Sovereign".[133] Freeman's suggestion contradicts this authority. In

130. Australian Constitution, *supra* note 27, s 116.

131. Freeman, *supra* note 8 at 53, n 62.

132. *Ibid.*

133. [1999] HCA 30 at para 93, (1999) 199 CLR 462 [emphasis added].

Williams v Commonwealth of Australia, the High Court commented that the expression "office . . . under the Commonwealth" in section 116 should not be given a restricted meaning.[134] Freeman's analysis gives that term a restricted meaning. The comparative insight that the Canadian constitutional text expressly uses the expression "office of the Queen" also speaks against Freeman's conclusion.[135]

There can be little doubt that the position of Queen of Australia is an office. Moreover, the monarch's position is probably both an office and a public trust. The High Court has not defined the term "public trust" in section 116. However, based on an extensive consideration of English and Australian law, an Australian scholar has offered this definition: "[A] person holds a public trust if they exercise public or governmental functions".[136] On this definition, the monarch's position is a public trust.

The more difficult issue concerns the meaning of the words "under the Commonwealth" and whether the monarch's position is under the Commonwealth. In a recent article titled, "When is an Office or Public Trust 'Under the Commonwealth' for the purposes of the Religious Tests Clause of the *Australian Constitution*?", I argue that there are four possible meanings of the expression "under the Commonwealth".[137] These meanings spring from an analysis of case law and history showing that there are two possible meanings of "under" and two possible meanings of "the Commonwealth". The word "under" means either a relationship of supervision in the sense of control and direction[138] or a vertical familial relationship in the sense that there is a relationship of progeny or origins such that a position owes its existence to the Commonwealth.[139] As to the meaning of "the Commonwealth", the term refers

134. *Supra* note 47 at para 110.

135. *Constitution Act, 1982*, *supra* note 55, s 41(a).

136. Beck, "Religious Tests", *supra* note 53 at 349. See also John Barratt, "Public Trusts" (2006) 69:4 Mod L Rev 514 ("the word 'trust' was in statutory use from at least the late seventeenth century, to describe the personal obligation of those exercising governmental power" at 516).

137. Luke Beck, "When is an Office or Public Trust 'Under the Commonwealth' for the Purposes of the Religious Tests Clause of the Australian Constitution?" (2015) 41:1 Monash UL Rev 17.

138. *Ibid* at 22–27.

139. *Ibid* at 27–29.

either to the federal-level government in Australia[140] or to the Australian nation as a whole.[141]

To determine which of the four possible meanings of "under the Commonwealth" is correct, I assess each interpretation according to four criteria. Those criteria are meaningfulness, avoidance of undesirable and perverse outcomes, reconciliation of existing cases, and consistency with the drafting history of the religious tests clause.[142] Applying those criteria, I conclude that only two of the four possible interpretations have intellectual plausibility. The first is the meaning based on "under" as a familial relationship and "the Commonwealth" as the Australian nation.[143] The second intellectually plausible meaning is based on "under" as a familial relationship and "the Commonwealth" as the federal government.[144]

The meanings involving "under" as a relationship of supervision are rejected principally because that meaning would exclude members of Parliament from the scope of the religious tests clause, which is both an undesirable outcome and inconsistent with the decision in *Crittenden v Anderson*.[145] I come down on the side of the meaning based on "under" as a familial relationship and "the Commonwealth" as the federal government.[146] I prefer that meaning on the basis that it excludes state officials from the scope of the clause, which I explain is consistent with the intentions of those who drafted the religious tests clause.[147]

It is possible to argue that the Queen of Australia's position is indeed under the Commonwealth in the sense of both meanings that I identify as plausible. The Queen of Australia has a clear familial relationship with the Commonwealth in the sense of the Australian nation. In *Shaw v Minister for Immigration and Multicultural Affairs*, the High Court commented that constitutional references to the Queen are "not to the person but the office. That recognition necessarily entails recognition of the reality of the independence of Australia from the UK."[148] The relevant point being that the position of Queen of

140. *Ibid* at 31–32.
141. *Ibid* at 32.
142. *Ibid*.
143. *Ibid* at 34–37.
144. *Ibid* at 37–38.
145. *Ibid* at 33.
146. *Ibid* at 38.
147. *Ibid*.
148. *Shaw*, *supra* note 69 at para 14.

Australia came into existence because of the evolution of Australia to independent nationhood.[149]

The Queen also has a clear familial relationship with the federal-level government in the sense that the position is a member of the family of institutions that make up the federal level of government. As explained above, the Commonwealth's executive power is vested in the Queen[150] and the Queen is a constituent part of the federal parliament, which is invested with the Commonwealth's legislative power.[151]

On either of these two bases, the Australian monarch's position is an office or public trust under the Commonwealth and therefore the prohibition on religious tests attaches to it. It follows that there can be no religious rules governing succession to the Australian Crown as there are governing succession to the British Crown.

Of course, the framers of the Australian Constitution did not expressly intend the religious tests clause to operate in respect of the rules of royal succession. The framers described the purpose of the clause as giving effect to "the principle that religion or no religion is not to be a bar in any way to the full rights of citizenship",[152] as part of section 116's broader function as a "safeguard against religious intolerance".[153] Accession to the Crown cannot readily be seen as an ordinary incident of citizenship. Moreover, at the time of the drafting of the Australian Constitution, there was no independent Australian Crown and it therefore could not have been in contemplation that the provisions of the Australian Constitution would affect the law of royal succession. However, from the point in time that a separate Australian Crown came into existence, the law of royal succession became substantively Australian law for the reasons explained above and therefore subject to section 116. As Kirby J explained in *Singh v Commonwealth of Australia*:

> The adaptation of the Constitution to the practical and statutory change in the position of the Queen as Queen of Australia has been recognised in many cases. These cases, in turn, demonstrate the capacity of the Constitution to move with international and national realities.[154]

149. See e.g. Winterton, *supra* note 115 at 2; Hon Justice BM Selway, "The Constitutional Role of the Queen of Australia" (2003) 32:3 Comm L World Rev 248.

150. Australian Constitution, *supra* note 27, s 61.

151. *Ibid*, s 1.

152. Austl, Victoria, *Official Record of the Debates of the Australasian Federal Convention Held at Parliament House, Melbourne, 20th January to 17th March 1898*, Parl Paper No 19 (1898) at 660.

153. *Ibid* at 1779.

154. [2004] HCA 43 at para 263, 222 CLR 322.

Similarly, as Deane J explained in *Sykes v Cleary*, the development of Australia's independence "compels the adjustment of the content or operation of some of the provisions of the Constitution so that they accord with the realities of contemporary national sovereignty and international relationships".[155] For these reasons, the fact that the religious tests clause was never intended to operate in respect of the law of royal succession is of little consequence in the same way that it is of little consequence that it was never intended that there be a separate Australian Crown.

It follows that from the emergence of a separate Australian Crown and a substantively Australian law of royal succession, section 116 should operate to invalidate the religious rules governing the royal succession. The other non-religious rules governing the royal succession, such as primogeniture, are obviously unaffected by section 116.

Conclusion

The Scottish political scientist Norman Bonney has argued that Commonwealth realms like Canada and Australia should dispense with the religious tests governing succession to the Crown because in those countries there is a general political commitment to a secular and multi-faith multiculturalism.[156] It was, it seems in part, an expression of that commitment that the plaintiffs in *O'Donohue* and *Motard* launched their *Charter* challenges to the law of royal succession in Canada. Like those plaintiffs, Bonney argues that religious tests for the head of state of Canada and Australia are profoundly inconsistent with that commitment.[157] Bonney may well be right as a matter of social policy. As a matter of constitutional law, however, Bonney's complaint does not arise. Bonney wrongly assumes that the monarchies of Commonwealth realms such as Canada and Australia are governed by the same rules as the British monarchy.

As this article has demonstrated, the law of royal succession in Canada does not involve any religious tests. That law consists of a single rule: the rule of symmetry. Whoever happens to be the monarch of the United Kingdom is, by virtue of that fact alone, monarch of Canada (of course, since the monarchy of the United Kingdom happens to be conditioned by religious tests it

155. (1992), 176 CLR 77 at 119.

156. Norman Bonney, *Monarchy, Religion and the State: Civil Religion in the United Kingdom, Canada, Australia and the Commonwealth* (Manchester: Manchester University Press, 2013).

157. *Ibid* at 150–67.

may be said that religious tests *indirectly* do apply to the monarch of Canada). The situation in Australia is different. There is a whole body of rules governing the royal succession in Australia. It is not settled by what legal route those rules came to be substantively Australian law. However, because those rules are substantively Australian law they are subject to the demands of the Australian Constitution. As this article has shown, there is every reason to believe that the requirement of section 116 of the Australian Constitution that "no religious test shall be required as a qualification for any office or public trust under the Commonwealth" operates to invalidate any religious test purporting to govern the royal succession in Australia.[158]

Since there is no rule of symmetry in Australia and because the substance of the rules governing the royal succession differs because of the religious tests clause of the Australian Constitution, it is theoretically possible for there to be a different monarch in Australia than there is in the United Kingdom. As this article has explained, the existence of different monarchs in different Commonwealth realms has occurred before. Nevertheless, the non-religious rules of royal succession, principally primogeniture, seem to provide at present the same line of succession in Australia as there is in the United Kingdom and therefore Canada.[159] In other words, the invalidity in Australia of the religious tests governing the royal succession seems, at present, to have no effect on the existing line of succession.

This article has shown that Ogilvie was right that there is no scope to challenge the rules of royal of succession in Canada, albeit for reasons different to those that she gives. However, Ogilvie was in error to suggest that the religious tests that purport to apply to the law of royal succession cannot be challenged in other Commonwealth realms such as Australia.

Ogilvie's error arises from the same source that Bonney's complaint arises. Both scholars assume that the monarchy is the same throughout the Commonwealth realms and subject to the same rules. This is not true, as the discussion of the Australian position in this article has shown. It is wrong to make broad generalizations respecting the legal and constitutional status of the monarchy and about the amenability of aspects of the monarchy to constitutional challenge. The status of the monarchy in each constitutional realm is dependent upon the underlying constitutional structure and the relationship of the monarch to that structure in each country. It may well be that close analysis of the

158. Australian Constitution, *supra* note 27, s 116.

159. The first three in the line of succession being: (1) Prince Charles, Prince of Wales; (2) Prince William, Duke of Cambridge; and (3) Prince George of Cambridge.

constitutional position in other Commonwealth realms leads to a conclusion, like in Australia, that the religious tests purporting to govern the monarchy are unconstitutional.