From Loyal Dominion to New Republic: Which realm will get there first?

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Abstract:

In Canada, Australia and New Zealand – all of whom were once loyal dominions in an indivisible British Empire – what might be the chances of successful moves to ditch archaic feudal symbols and create new republican institutions and symbols as this 21st century unfolds? When the Crown research project began I thought New Zealand would not be at the forefront of constitutional change towards a republican constitution. This paper identifies some of the reasons for that view, including the special relationships between Māori and the Crown. It identifies the significant legal and political difficulties facing those seeking to achieve constitutional reform on the Queen's position as the head of state in either Australia or Canada. It concludes, therefore, that New Zealand could be at the forefront of Commonwealth post-colonial settler states transitioning to a new constitutional order. The paper also argues for the importance of abolishing royal prerogative powers, and better defining government's accountability for exercises of state power, even if moves towards a republic are not imminent.

Key Words:

Republicanism, Constitutional amendments, Indigenous relationships with the Crown (Canada and New Zealand), Patriation of Canadian constitution, Abolition of prerogative powers.

Introduction

From 2015 to 2018 I have enjoyed greatly the privilege of working with a team of social anthropologists as we have investigated the roles of the Crown the United Kingdom, Canada, Australia and New Zealand. Crowns feature strikingly in the coats of arms (above) for two of the three former colonies as symbols of constitutional monarchy in these now independent nation states. The exception is Australia – not surprising given the long history and the strength of republican sentiment in Australia – on whose coat of arms indigenous flora and fauna dominate (though the shield in the middle representing the six states does in fact include the crowns of New South Wales and Queensland). This paper was prepared towards the end of our project and is primarily an opinion piece to trace the evolution of my perspectives on possible republican futures for these three realms when the Elizabethan era concludes.

In 2015 I assumed that Australia would certainly be the first of these nations to abolish the monarchy and adopt a republican constitution. In the UK, on the other hand, prospects for a serious move to abolish the British monarchy seemed remote and, even if mooted occasionally, the chances of success appeared to be extremely unlikely. In Canada, Australia and New Zealand – all of whom were once loyal dominions in an indivisible British Empire – what might be the chances of successful moves to ditch archaic feudal symbols and create new republican institutions and symbols as this 21st century unfolds?

Of one thing I was fairly sure – New Zealand would not be at the forefront of constitutional change towards a republican constitution. It was not until 1947 that New Zealand became the last self-governing dominion, of those present when the Balfour Declaration was adopted at an imperial conference in 1926, to adopt the Statute of Westminster 1931 – thus dividing the Crown in right of New Zealand from the once indivisible imperial Crown of the British Empire. Given its history of slow incremental change in constitutional matters, and its willingness to maintain direct political links with Britain long after they had ceased in other Commonwealth nations, New Zealand was not an obvious candidate for leading the charge towards a post-Elizabethan republic. Yet the findings of this research suggest otherwise.

In New Zealand, by contrast with the federal constitutions of Canada and Australia, the flexible un-entrenched Westminster constitution may be reformed radically without any procedural difficulties designed to inhibit constitutional changes or to require a broad national consensus to be obtained. A major political impediment in moving towards eliminating the Crown from our constitutional arrangements, on the other hand, has been a strong sense of the importance of the Crown to Māori. In the past, this has been expressed in powerful symbolism of the direct and personalised nature of the perceived relationship between Queen Victoria (and her heirs and successors) with the *rangatira* [tribal chiefs] who signed the Treaty of Waitangi (and their descendants). Crown symbolism and narratives have

been central to government policies on Treaty of Waitangi Settlements in political discourse since 1995. Now, though, new relationships are evolving between Māori Post Settlement Governance Entities and the state. Moreover, there are indications that elevating the guarantees of the Treaty of Waitangi itself to a higher constitutional plane as a cornerstone of the constitution is now a more important focus than the Crown as such, or the person of the monarch (especially perhaps after the present Queen's death). In this paper I pose the question, will the Realm of New Zealand become a republic before the Commonwealth of Australia or the Dominion of Canada?

Slow incremental changes in New Zealand

My cultural background – I say sometimes that I was 'brought up British,' but on a sheep farm in southern Hawkes Bay – framed New Zealand as the most 'loyal British Dominion.' My grandparents born in New Zealand still called Britain 'Home' though they had never been there. Even after the Statute of Westminster was adopted in 1947, the British Nationality and New Zealand Citizenship Act 1948 still emphasised British nationality. My first passport highlighted that I was a 'British Subject' and, but only in a much smaller font, that I was also a New Zealand citizen. Auckland happily hosted the 'Empire Games' in 1950. Compare that with the Canadian nationalist celebrations around their Canadian Citizenship Act 1946 coming into force. At the first citizenship ceremony on 3 January 1947, 26 individuals from a wide variety of backgrounds were presented with certificates of Canadian citizenship. Among the recipients was Prime Minister Mackenzie King who received certificate 0001.[1]

New Zealand was the last dominion to move from a convention that the Governor-General representing the Queen would be a British person (usually with an aristocratic and/or military lineage) to a convention that the Prime Minister would advise the Queen to appoint an eminent local person to fill that role. That transition did not occur until the 1970s. Even in this twenty-first century, the imperial past lived on in New Zealand for a remarkably long time in that the Judicial Committee of the Privy Council remained the nation's final appellate court. That link was finally severed by the Supreme Court Act 2003 which was passed by a very slim majority in the House of Representatives. In contrast, all routes of appeal from the High Court of Australia to the Privy Council had been closed off in 1975, and from Australian State jurisdictions in 1986. Canada's assertion of independence in relation to the judiciary was much earlier again – with criminal appeals being abolished in 1933 and civil appeals being ended in 1949. Given this history of slow incremental change in constitutional matters, and New Zealand's willingness to maintain direct political links with Britain long after they had ceased in most other Commonwealth nations, it was not obvious to me that New Zealand might be at the forefront of constitutional change towards a republican constitution after the present Queen Elizabeth II dies.

Māori loyalty to the Crown

As counsel for Te Uri o Hau – a *hapū* [tribal unit] of Ngāti Whātua in the Kaipara harbour region north of Auckland – I experienced first-hand evidence that loyalty to the Crown was a matter of considerable significance for many *iwi* [tribes] who felt that their loyalty in the past

[1] Valerie Knowles 2000. *Forging our Legacy: Canadian Citizenship and Immigration, 1900-1977*. Ottawa: Public Works and Government Services Canada, p.66.

had not been reciprocated by successive settler governments. At a Waitangi Tribunal hearing this unreciprocated loyalty was demonstrated by important symbolic acts. Outside the Aotearoa *wharehui* [meeting house] at Ōtamatea resides a bust of Queen Victoria. Oral history recorded that it was gifted to Ngāti Whātua in appreciation of their loyalty to the Crown during the internal wars of the 1860s.[1] For the Waitangi Tribunal hearings that bust was brought within the *wharehui*, placed on a table with the Union Jack beneath and a *korowai* [formal feathered cloak] draped around the bust. The symbolism of the claimants' history, in which they had always sought an authentic bicultural partnership under the mantle of the Queen and the Treaty of Waitangi, was clear to all.

Most of the Māori interviewees for the pilot study we undertook before our Royal Society grant advocated for the importance of the Crown as a means to achieve robust Treaty Settlements since 1995 from the government of the day (for example, Sir Tipene O'Regan);[2] or the Crown as a target to try to push the government beyond its own template for Treaty Settlements – the Crown as the arch-thief.[3] However, we did find prominent Māori who expressed republican views. One of them was Nanaia Mahuta – then an Opposition MP and now Minister of Māori Development. Her Waikato Tainui heritage is as an important member of the *Kahui Ariki* [the Māori King Movement royal family]. In spite of that lineage in the Māori world, her political opinions as a Labour Party MP were stridently republican.[4] This presents the possibility that republican views might gain further traction in Māori circles, or at least might lessen Māori resistance to retaining the Crown as the central symbol of the New Zealand state.

Whilst Crown symbolism was central to the Treaty Settlement negotiations of the decades since 1995, especially in the formal apologies of the Crown to *iwi* embedded in the many Treaty Settlement Acts of Parliament, this may diminish in importance as new relationships between Māori and the state evolve post-settlements. There are signs that there is less focus now on the Crown as such, or on the person of the monarch, and more importance attributed to debates on elevating the guarantees of the Treaty of Waitangi onto a higher constitutional plane. This was evidenced in a mild and somewhat ineffective way by the Māori Party policies that led to the 2013 Constitutional Advisory Panel Report.[5] It is apparent in the Waitangi Tribunal report on sovereignty questions in Te Paparahi o Te Raki,[6] and especially in the Independent Working Group report on constitutional transformation: Matike Mai Aotearoa.[7] New forms of constitutional recognition for indigenous rights have also emerged from Treaty Settlements since 2014 including the recognition of *mana motuhake o Tūhoe* (Tūhoe self-governance) in the Tūhoe Claims Settlement Act 2014; and novel recognitions of

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[1] Timespanner (2010). 'An Enigma beside the Otamatea River.' timespanner.blogspot.co.nz/2010/07/enigma-beside-otamatea-river.html (Accessed 30 April 2018).
[2] Sir Tipene O'Regan, Ngāi Tahu leader, interviews, 2013.
[3] Margaret Mutu, University of Auckland professor and Māori activist, interviews, 2013.
[4] Nanaia Mahuta, interviews, 2013.
[5] Constitutional Advisory Panel (2013). *New Zealand's Constitution: A Report on a Conversation*. Wellington: New Zealand Government.
[6] Waitangi Tribunal (2014). *He Whakaputanga me te Tiriti: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040). Lower Hutt: Legislation Direct.
[7] Independent Working Group on Constitutional Transformation (2016). *Matike Mai Aotearoa*: www.converge.org.nz/pma/MatikeMaiAotearoaReport.pdf (accessed 30 April 2018).

separate legal personality for ancestral lands and rivers in that Act and the Whanganui River Claims Settlement Act 2017. These examples portend Government/Māori relationships shifting away from Crown breaches of duties to Māori in the past. Instead, new cultural, social, economic and political norms are being embedded into the relationships between the government and the scores of *iwi* who have completed Treaty settlements. In this future-oriented context, development aspirations of *iwi* may render the Crown symbolism less important than creating pathways to greater *iwi* autonomy in genuine partnerships with the government. A reformed constitution in a republican polity is now not so difficult to imagine. New Zealand, therefore, could be at the forefront of Commonwealth post-colonial settler states transitioning to a new constitutional order – rather than being a rear-guard hold-out retaining loyalty to the Crown.

Different issues in the United Kingdom

The United Kingdom retains the flexibility of its Westminster constitution so that a determined government can push through radical law changes – and can do so eventually even in the face of determined opposition from the House of Lords. It is true that there are significant strains on the unity of the UK at present and suggestions that it is tending towards a fully federal system or even a break-up of the union. Negotiations to exit the UK from the European Union may encourage centrifugal pressures on the union constitution, especially in respect of Scotland, Northern Ireland and Wales. It is also true that doubts have been expressed by judges of the final appellate court as to whether absolute parliamentary sovereignty remains entirely untrammelled.[8] In litigation concerning the ban on fox hunting, and interpretation of the Parliament Acts of 1911 and 1949 as to the number of occasions that the House of Lords may defy the will of the House of Commons, several judges took the opportunity to make observations suggesting that parliamentary sovereignty is not absolute. Lord Steyn was one of them and his speech stated:

> [It] is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish. (*Jackson v Attorney-General* **[**2005] UKHL 56, at [102])

Scholars anxious to constrain judicial activism and uphold parliamentary sovereignty have been critical of those observations.[9] Yet, if banning fox hunting proved to be so controversial, then abolition of the monarchy most surely would be highly contested. The prospects for a serious move to abolish the British monarchy appear remote and, even if mooted, the chances of success appear to be extremely unlikely in the United Kingdom. Even Jeremy Corbyn, the socialist leader of the Labour Party and a life-long avowed republican, made that abundantly plain during the 2017 general election campaign: 'It's not on anybody's agenda, it's certainly

[8] Alison Young (2009). *Parliamentary Sovereignty and the Human Rights Act.* Oxford: Hart Publishing; Alison Young (2017). *Democratic Dialogue and the Constitution.* Oxford: Oxford University Press.

[9] Richard Ekins, Associate Professor of Law, Oxford University, interviews, 2017; Richard Ekins (2017). 'Legislative Freedom in the United Kingdom.' *Law Quarterly Review*. 133: 582-605.

not on my agenda and, do you know what, I had a very nice chat with the Queen.'; 'I believe in a democracy and we live in a democracy. We have a titular head of state as the monarch but without political power.'; 'The law is there, and that's what will prevail.'[10]

Pathways seldom travelled in Australia

Equally significant, but not obvious to me at the outset of our research, is just how difficult it will be to achieve constitutional reform on the Queen's position as the head of state in either Australia or Canada. Australia has long had a strong republican movement. The leaders of that movement in recent years have included the current Prime Minister of Australia Malcolm Turnbull, the former Western Australia premier Geoff Gallop and now author (and former national rugby union captain) Peter FitzSimons. FitzSimons has stated: "I think most Australians agree that there is a fundamental injustice at the heart of our system when a young boy or girl growing up in this great country can aspire to just about any job except the one that should be the most representative of all – head of state."[11] Probably 'most Australians' would agree with him, but the hurdles to be overcome to achieve constitutional amendments are not easy to surmount. There have been very few successful constitutional reform referenda in the entire history of the Commonwealth of Australia since 1901. The majority thresholds required are particularly difficult as there must be a majority for reform in a majority of the states. If advocates for a republic had presented a united front in 1999, there can be little doubt that Australia would no longer be a constitutional monarchy. That did not happen:

> In November 1999 Australian voters participated in two referenda on the questions of whether Australia should become a republic and whether a new preamble should be added to the Commonwealth Constitution. Voters received a government-sponsored booklet spelling out the proposed changes to the words of the Constitution, and including two thousand word arguments on the YES and NO cases. These were the 43rd and 44th constitutional referenda since the first in 1906 and, like most attempts, these two failed. Over the years, only eight amendments have been made: single changes in 1906, 1910, 1928, 1946 and 1967; and three changes in 1977. On five occasions a national majority has been gained, though not a majority of States, causing the proposed alteration to fail.[12]

Whilst there is a sense of an increasing momentum towards the republican option in Australia, and it is now being spoken of openly in political circles as a possibility even before the present Queen's demise, it will take quite some time for republicans in Australia to organise and promote a new proposal for constitutional change. Having failed before in 1999, proponents of change will surely be especially careful to craft a referendum proposal that is more likely to succeed than the last effort. A nation-wide referendum that wins a national

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[10] Tom Parfitt (2017). 'Paxman grills Corbyn over views on monarch during debate.' *Express*: www.express.co.uk/news/politics/810766/Jeremy-Corbyn-Paxman-election-debate-2017-Queen-monarchy-royals (Accessed 30 April 2018).

[11] Glenn Davies (2015). 'It's a great time to be an Australian republican.' *Independent Australia*:independentaustralia.net/australia/australia-display/its-a-great-time-to-be-an-australian-republican,8109 (Accessed 30 April 2018).

[12] Scott Bennett (2003). *The Politics of Constitutional Amendment*, Research Paper No. 11 2002-03. Canberra: Information and Research Services, Department of the Parliamentary Library, p.1.

plurality of votes and obtains a majority in a majority of the states cannot be guaranteed to succeed even after the present Queen's death.

Even more daunting difficulties in Canada

The situation in Canada is different again, and prospects for a republican constitution seem remote. Our interviewees were emphatic that no-one in a position of power contemplates it as even the vaguest of possibilities in either the short term or the long term (Lutz and Foster, Interviews, 2015). There are small groups of republican activists. One of their number will often be quoted in the news media if a monarchy or royalty story is being told. The announcement of an impending visit to Canada by the Prince of Wales and the Duchess of Cornwall as part of celebrations for the 150th anniversary of the constitution of Canada under what was then the British North America Act 1867 – now the Constitution Act 1867 – elicited these ritualised binary responses:[13]

> Robert Finch, Dominion Chairman of The Monarchist League of Canada, welcomed news of the visit by the heir to the throne.
> 'It's an excellent opportunity for Prince Charles to further build upon his role at such a historic milestone,' he told CBC News. 'It's equally exciting for Canadians to once again get the chance to see and meet Charles and Camilla and to get to know them more.'

And from a republican:

> Tom Freda, national director of Citizens for a Canadian Republic, said he looks forward to heightened debate over the monarchy's constitutional relevance that traditionally comes with royal visits.
> 'We welcome all visitors to Canada, including members of the British Royal Family,' he said. 'As long as the majority of Canadians support inviting them, and the true cost of hosting is revealed — something the government hasn't been quite up front with in the past — we have no objection per se.'[14]

Those whom I interviewed suggested that committed republicans are few and are gaining no traction for their aspirations. They will achieve publicity in the news media from time to time, but nothing more.[15] That may understate the republican sentiment in some quarters. There was litigation in 2013 by three permanent residents wishing to become citizens who challenged the legal requirement to take an oath of allegiance to the Queen of Canada rather than to the state of Canada. In 2015 an Ontario Court of Appeal ruled that the group was wrong to take the oath literally. That decision, citing previous Canadian court rulings, held that new citizens are not swearing allegiance to the Queen herself and that "the reference to the Queen is symbolic of our form of government and the unwritten constitutional principle of democracy." The ruling also held that a citizenship ceremony does not violate the appellants' freedom of expression because "they have the opportunity to publicly disavow what they consider to be the message conveyed by the oath" after they take it. The Supreme

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[13] Kathleen Harris (2017). 'Princes Charles, Camilla plan visit to celebrate Canada's 150th birthday.' *CBC News*: www.cbc.ca/news/politics/royal-visit-canada-150-1.4073556 (Accessed 30 April 2018).
[14] Harris (see note 14).
[15] Nathan Tidridge, teacher and monarchy advocate, interview, 2017.

Court refused to allow an appeal against that decision.[16] Elsewhere in this special issue Phillipe Lagassé deals with controversy and ongoing litigation concerning Canada's Succession to the Throne Act 2013.

On the other hand, there was much positive affirmation for the Canadianised 'Maple Crown' monarchy in a number of interviews.[17] In part, that may be because there is a strong strand of Canadian nationalism that is very keen to differentiate Canada from the politics and constitution of the republic to their south. As David Onley, former Lieutenant Governor of Ontario, put it: 'We, of course, being right alongside the United States get a ringside seat sometimes too close for comfort of just how well a republic works!'[18] Similarly from Richard Berthelson, who has worked in both federal and provincial vice-regal offices: 'the whole notion of a constitutional monarchy I think to a lot of Canadians is taking on a different hue in view of how we see a head of state operate in the United States.'[19] I detected a sense that Canadians' pride in their tolerant multi-cultural polity is complementary to having an apolitical head of state rather than a president directly elected relying on money raised by super-sized Political Action Committees – with the approval of the US Supreme Court in *Citizens United v. Federal Election Commission* 558 US (2010); *McCutcheon v. Federal Election Commission* 572 US (2014). The primary practical reason, though, for the lack of interest in Canada for seeking a republican constitution is not hard to find. It is the deeply entrenched position of the monarchy in the provisions of the Constitution Act 1982 itself. Any proposal to amend that Act in order to create a republican state structure is extraordinarily unlikely to succeed.

The patriation of the constitution of Canada, to release it from its origins as the British North America Act 1867 and to become an autochthonous constitution with a new charter of rights included, took many generations of political effort. It is referred to as 'patriation' (not 'repatriation') to describe bringing the constitution home for the first time and ending the application of an Act of the imperial parliament passed when the British Empire was an indivisible entity ruled by the Queen of the United Kingdom (and, from 1876, Empress of India). The patriation effort began immediately after the Balfour Declaration issued by the Imperial Conference of British Empire leaders in 1926. Successive Canadian Prime Ministers starting with W L Mackenzie King in 1927 made attempts to localise the amending formula for the constitution. His and others failed to build sufficient agreement from the provinces. It was not until 1982 that a patriation proposal was implemented and, even then, it went through without the concurrence of the Quebecois whose provincial government had sought enhanced recognition of their distinct society. The position of the Queen as the Queen of Canada was one of many negotiating chips in play during the intense political efforts to achieve a consensus amongst the ten provincial premiers and the Prime Minister Pierre Trudeau. It has frequently been asserted that the Crown had little meaning for Trudeau himself, but he most certainly did care about patriation and about the Charter of Rights. As he sought to cobble together an agreement as close as possible to a consensus, an entrenched position for the Queen as head of state was one means to keep on board some of the provincial premiers who

[16] Ayelet Shachar (2018). 'Constituting Citizens: Oaths, Gender, Religious Attire.' In Richard Albert and David Cameron, eds., *Canada in the World: Comparative perspectives of the Canadian Constitution*. Cambridge: Cambridge University Press, pp. 126-127.
[17] Department of Canadian Heritage 2015. *A Crown of Maples: Constitutional Monarchy in Canada*. Gatineau: Department of Canadian Heritage.
[18] David Onley, interview, 2017.
[19] Richard Berthelson, interview, 2017.

were reluctant to embrace patriation. Entrenchment of the monarchy certainly did not feature in Trudeau's initial Bill C-60. Berthelsen spoke about that Bill when I interviewed him. He was pleased that as a young man he had played a small role in ensuring that, whilst patriation removed the role of the British Parliament, the centrality of the office of the Queen in the new constitution was retained.[20] The position now is that the office of the Queen is one of just four matters in the Constitution Act 1982 that are subject to the highest possible degree of entrenchment, and it is indeed the first item mentioned in section 41:

> 41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province: **(a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;** (b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force; (c) subject to section 43, the use of the English or the French language; (d) the composition of the Supreme Court of Canada; and (e) an amendment to this Part.

Given the difficulty Canadian governments have had since 1927 in persuading even a majority of provincial governments to agree with constitutional reform initiatives, let alone reach unanimity, the chances of resolutions from both federal houses of parliament and from every single one of the ten provincial legislatures for changing the office of the Queen is considered hugely improbable. Moreover, the difficulty of winning support for constitutional reform (not covered by section 41) has not lessened since 1982. Intense federal government efforts to diminish Quebecois separatist sentiment and to embrace Quebec fully within the patriated constitutional arrangements have come to nought. The Meech Lake Accord in 1987 would have recognised Quebec's status as a distinct society and would have re-created a provincial veto power, but it failed to win support in Manitoba and Newfoundland. The Charlottetown Accord in 1992 addressed greater autonomy for both Quebec and aboriginal peoples but was rejected in a national referendum (it lost decisively in Quebec and in the western provinces). Then there was the Supreme Court ruling (*Reference re Secession of Quebec* [1998] 2 SCR 217) that the constitution vouchsafes order and stability, and accordingly secession of a province 'under the Constitution' could not be achieved unilaterally, that is, without principled negotiation with other participants in confederation within the existing constitutional framework. This constitutional dance then led to the Clarity Act 2000 requiring that any future referendum on the secession of a province must have a clear majority, be based on an unambiguous question, and have the approval of the federal House of Commons.

Indigenous perspectives in Canada

Another reason for the perception that the Queen in right of Canada is not seen as an irrelevant colonial relic is the determined contribution of First Nations and other aboriginal peoples to political and legal debates. It may seem a paradox that some indigenous peoples rely on appeals to the Crown. The very political fiction which dispossessed them in the first place is now asked to deliver their claims for sovereignty and redress. Why is so much indigenous faith placed in the Crown? Many of my Canadian interlocutors stressed that when

[20] Richard Berthelsen, interview, 2017.

democratic representative institutions claim full power and authority over First Nations then there has to be a morally legitimate way to challenge the tyranny of the democratic majority. The promises made on behalf of the Crown in a very personalised manner in many treaties and the Royal Proclamation 1763 provide a moral, and increasingly a legal, mechanism to frustrate proposals that an elected government wants to push through. John Borrows, professor of law and member of the Anishinabe nation, said this:

> The father in Anishinaabemowin is from our word for motion … it's someone who walks before, say deep snow, snow shoes that makes it easier for those to follow behind. So picture a big snowy scene, there's this man with snow shoes going out and then all the families behind and their journey is made easier because of that person breaking the path in the snow. And so the Great Father, Crown, King would be that person who walks out in front that makes it easier for those who follow to be able to make their way in the world. So again it's very personified, it's very family oriented.

And then:

> So our understanding of the Crown is in conflict; the court, federal and provincial government have one vision of the Crown as divided, by and large most treaty Indians have a notion of a Crown responsibility being a federal Ottawa Crown, or many think it's not even the Ottawa Crown, it's the crown in right of Britain.

Steven Point is an indigenous leader, a judge and a former Lieutenant Governor of British Columbia and so is well versed in modern connotations of the Crown. The origins for his people was that there was 'the notion, the idea at least, that there was a Queen somewhere, someone that was like a chief, a big chief somewhere else. My mother talks about that, that the Indians understood that there was, somewhere, far away, this big, big person right? That there was this Queen that was going to look after us and this King that was going to look after us and all that. And that they would take care of us, oh, wow.'[21]

Hence the importance of the 'honour of the Crown' jurisprudence developed by the Supreme Court of Canada since 1982. This has included imposing duties on provincial and federal governments not merely to consult with First Nations, but a duty to consult and to accommodate if possible (*Haida Nation v. British Columbia (Minister of Forests)* [2004] SCC 73). The constitutional recognition of existing aboriginal rights in the Constitution Act 1982, section 35 – a late bonus for indigenous peoples won during the patriation debates – has provided new redress options for old grievances. The 'honour of the Crown' is now a concept that is pertinent to a wide range of judicial decisions – on the interpretation of treaties from the past and their application to the present; in the evolution of court-enforced remedies for breaches of fiduciary duties; in decisions declaring the existence of unextinguished aboriginal title rights over un-ceded lands; as well as the importance of obligations to consult and accommodate First Nations in complex resource management and development rulings such as the building of oil and gas pipelines.[22]

First Nations leaders are not unrealistic about Crown actions and inactions that adversely affect their communities. They do not have a misplaced faith in the Crown. Grand Chief Ed John from British Columbia put it this way: 'When George III talked about his proclamation of 1763, and the Indian nations with whom we are connected, that there was a different kind of relationship back then. And then when the colonial authorities became a government of

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[21] Steven Point, interview, 2015.

[22] Bruce McIvor (2018). *First Peoples Law: Essays on Canadian Law and Decolonization* (3rd ed.). Vancouver: First Peoples Law Corporation.

Canada in 1867, they began destroying the foundation of this place by establishing laws over here, the first of which was the Indian act. And made a lot of effort under the legal structures over here to condemn it, to put an end to it. So there has been a long, historical, acrimonious relationship, because everyone thought this was the only way, the only laws. And then along comes this new generation of judges, and somewhere in between is section 35, the constitution, here's where we're ending up.'[23] (Interview 2015) Rather they insist that the enduring Crown can and should have its shoddy record in practice examined in the light of prior 'sacred duty' types of commitments made in the past. The enduring Crown can be held accountable**.** One does not have the difficulty of arguing for holding to account governments of the past when all the actors in those governments are long dead. The institution under which they served – the Crown – is still with us. This was symbolically present especially clearly when Nathan Tidridge took me to Brantford in Ontario. We stopped first at a former residential school building that represents one of the most poignant reminders of abuse implemented in the name of assimilation in policies akin to cultural genocide over many decades. That building now houses facilities promoting cultural resurgence and self-governance for Mohawk and other Six Nation peoples. Nearby is Her Majesty's Royal Chapel of the Mohawks. This chapel powerfully symbolises and celebrates the alliance of First Nations with the British Empire fighting American rebels (in what is now usually called the American War of Independence). Expelled from their ancestral lands in New York where they had a Chapel Royal granted by Queen Anne, the Six Nations re-established themselves with two Chapels Royal in Upper Canada (now Ontario). This Crown/First Nations alliance was especially important again in the War of 1812 between Britain and the USA. David Onley spoke to me about the importance of that war and memorials to the Battle of Queenston Heights in which Mohawk and British forces defeated American invaders, though at the cost of the death of their leader – Major General Brock – who was Lieutenant Governor at the time. As Onley put it: 'He was the only Lieutenant Governor to die in office in the field of battle. And one of my objectives as Lieutenant Governor was to make sure it was going to stay that way!'[24]

That this is not just history, but affects current political discourse as well, is doubtless a reason that non-indigenous monarchists like Tidridge place so much emphasis on fostering Crown/First Nations relationships. He argues that the role of the Queen's representative with respect to First Nations should no longer depend on the personal goodwill of a particular governor-general or lieutenant governor. He notes that in 2010 the Queen gifted two sets of silver hand bells to the Haudenosaunee Peoples to acknowledge the 300th anniversary of the Silver Covenant Chain of Friendship established with Queen Anne. These gifts were destined for the Chapels Royal situated in Haudenosaunee territory. In the British Columbia visit by the Duke and Duchess of Cambridge in 2016, Prince William added a ring of reconciliation to the Black Rod, which is used in the legislature when the Queen or her provincial representative is present. The ring is meant to represent the connection between the Crown, indigenous peoples and all British Columbians. For Tidridge, 'If Canada is truly committed to reconciling a nation-to-nation relationship, then the Crown that allowed this country to germinate in these lands needs to be understood and embraced so we can restore ourselves as Treaty people.'[25]

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[23] Grand Chief Ed John, interview, 2017.

[24] David Onley, interview, 2017.

[25] Nathan Tidridge (2016). **'**Why it's time to clearly define the Crown's role with First Nations.' *Maclean's*: www.macleans.ca/society/why-its-time-to-define-the-crowns-role-with-first-nations/ (Accessed 1 May 2018).

Unlike the Treaty Settlements process in New Zealand and the successes of many Māori post settlement governance entities in enhancing *iwi* autonomy, in Canada there remains a long road ahead, and no clarity as to the appropriate pathways for negotiations to resolve historical grievances and establish new Crown/Indigenous relationships. The Liberal Party government elected in 2015 has certainly raised the stakes in its relationship with Indigenous peoples. The mandate letter from Prime Minister Trudeau to the incoming Minister of Crown-Indigenous Relations and Northern Affairs included this wording:

> you will accelerate the work you have already begun to renew the nation-to-nation, Inuit-Crown, and government-to-government relationship between Canada and Indigenous Peoples. You will also modernize our institutional structure and governance so that First Nations, Inuit, and Métis Peoples can build capacity that supports implementation of their vision of self-determination.
>
> This new relationship must be based on the recognition of rights, respect, co-operation, and partnership. I expect you to build on the progress that has been made already, including the establishment of 50 rights and recognition tables across the country, the creation of bilateral mechanisms with National Indigenous Organizations to make progress on shared priorities, and the progress made across government on the Truth and Reconciliation Commission's *Calls to Action*.[26]

In an interview with Joe Wild – senior assistant deputy minister in that Ottawa ministry – he did not underestimate the challenges. In addition to 5 or 6 Inuit groups and maybe 7 Métis peoples, there are some 638 First Nation entities:

> well how do we rebuild a relationship that isn't based on a colonially imposed governance system, where it isn't going to be 638 bands that are going to sit and have nation-to-nation relationships with the government of Canada? How do we actually get back to rebuilding whatever would be, in a modern context, a sense of nation? And that's the challenge.[27]

It will be a while before it is clear whether this new language of the Crown will lead to authentic nation-to-nation relationships. In the meantime, it is inevitable that historic symbolism invoking the Crown, and personalised understandings of links between the Great Mother and her First Nation allies, will remain a major motif in indigenous peoples' struggles for recognition of sovereignty/autonomy and self-government.

So what, then, about New Zealand?

There is no doubt that republican initiatives will not be progressed in the United Kingdom and Canada. It will take some time for republicans in Australia to organise themselves for a further more unified attempt to win a referendum for constitutional change (Compare Horn

[26] Justin Trudeau (2017). Minister of Crown-Indigenous Relations and Northern Affairs Mandate Letter (October 4, 2017): pm.gc.ca/eng/minister-crown-indigenous-relations-and-northern-affairs-mandate-letter (Accessed 1 May 2018).
[27] Joe Wild, interview, 2017.

and Belot 2017 with Glenday 2017)[28]. Might it be plausible that New Zealand will be the first of the Commonwealth nations we have researched to move towards a republic? There are a number of straws in the wind pointing in that direction. It is true that there has never been a highly visible republican movement in New Zealand. Jim Bolger, Prime Minister leading the conservative National Party government at the time, went on record in 1994 as favouring a republic. He thought that this could be achieved by 2000 but his proposal attracted little interest.[29] The public intellectual Bruce Jesson devoted great efforts to promoting important and challenging journalism in New Zealand. In *The Republican*, which he published on a hand-to-mouth basis from 1974 to 1995, republican and socialist arguments were strongly put – but again attracted little interest either in the corridors of power or in the wider community. The lobby group New Zealand Republic was founded in 1994 and manages to be mentioned in the news media very occasionally. Yet by themselves New Zealand republican lobbyists seem as unlikely as their Canadian counterparts to achieve their aims. The terms of reference for the Constitutional Advisory Panel in 2011 did not include discussion of a republican constitution.

However in 2016 the New Zealand context shifted significantly with a publication by long serving minister, prime minister (briefly) and Law Commission President Geoffrey Palmer with constitutional lawyer Andrew Butler. Their book put the arguments for a new constitution.[30] Their concern is that the current constitution is formed by a jumble of statutes and is unclear and inaccessible to most citizens. It can be overridden easily by Parliament and is subject to political whims. Unlike those who have argued in the past for a republic and/or for a written constitution, Palmer and Butler have been bold enough to provide textual precision for a republican written constitution where previously others have feared to tread. And they have done so before the present Queen dies. The book proposed a new constitution that is easy to understand, reflects New Zealand's identity and nationhood, protects rights and liberties, and prevents governments from abusing power. After receiving substantial feedback, the authors have now published a revised text and supporting arguments for their codified constitution proposals.[31] Meanwhile the political landscape has shifted with the election of a Labour Party-led coalition government led by Prime Minister Jacinda Ardern. She is on record with 'I think within my lifetime it is likely that there'll be a transition' to a republic, but not in the first term of the present government.[32] So time will tell.

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[28] Allyson Horn and Henry Belot 2017. 'Bill Shorten renews push for Australian republic, vows to hold referendum within first term of Labor government.' *ABC News*: www.abc.net.au/news/2017-07-29/bill-shorten-renews-push-for-australia-to-become-a-republic/8754948 (Accessed 2 May 2018); James. Glenday (2017). ''Republican' and 'Elizabethan' Malcolm Turnbull meets the Queen at Buckingham Palace.' *ABC News*: www.abc.net.au/news/2017-07-12/malcolm- turnbull-meets-queen-elizabeth-republican-movement/8699490 (Accessed 2 May 2018).

[29] Jim Bolger (1994). 'Bolger sets date for NZ republic.' *Independent*: www.independent.co.uk/news/world/bolger-sets-date-for-nz-republic-1429602.html (Accessed 2 May 2018).

[30] Geoffrey Palmer and Andrew Butler (2016). *A Constitution for Aotearoa New Zealand*. Wellington: Victoria University Press.

[31] Geoffrey Palmer and Andrew Butler (2018). *Towards Democratic Renewal*. Wellington: Victoria University Press.

[32] Max Harris (2018). 'Where to from here? NZ Republic vs Empire 2.0.' *RNZ News*: www.radionz.co.nz/news/on-the-inside/354336/where-to-from-here-nz-republic-vs-empire-2-point-0 (Accessed 2 May 2018).

Abolition of royal prerogative powers

Meanwhile, to conclude this paper I will focus on just one of the key Palmer and Butler proposals. As set out in their 2016 draft, section 13 would have abolished those powers exercised by ministers under the royal prerogative but provided for a five-year transition period during which orderly adjustments and necessary statutes would be passed (2016: 39). In 2018 that have been more ruthless. Section 42 (5) of the revised draft simply abolishes all powers formerly exercisable by ministers under the royal prerogative (2018: 314).

The ancient, arcane and ambiguous nature of royal prerogative powers has been an important focus of my contributions to our Crown project. I agree with a contributor to the Palmer and Butler conversations: 'By abolishing the royal prerogative and replacing the powers with ones conferred by statute, the law would be clearer, more accessible, and more in line with the rule of law and democratic expectations of modern society.'[33] Indeed it seems to me, in line with the thinking of Campbell Sharman, a political scientist who is familiar with both Canada and Australia, that debate about republican initiatives has unfortunately sidelined the more immediate and pressing need to bridle the powers of executive branches of government. Concentrating on a move to a republican constitution entirely misses, he suggests, 'that part of our constitutional structure most in need of change: the limited role of representative institutions in checking the exercise of executive power'.[34] Sharman was a member of a Royal Commission in Western Australia that dealt with corrupt, illegal and improper conduct in the public sector of that state. A major element of that Commission's reasoning was that, in order to prevent repetitions of such behaviour, constitutional reform was vital:

> Limiting the exercise of executive power is a principal goal of constitutional government and is a prerequisite for ensuring the propriety of government activity. Yet, the constitutional laws of the State give little guidance as to the nature and scope of the exercise of executive power.[35]

To the contrary, however, 'little guidance' continues to be the norm in our 21st century as to the use of prerogative powers drawn from a feudal absolutist kingdom of long ago. Democratic accountability for their use has tended to diminish, rather than be enhanced, in the face of necessity arguments adduced in the name of national security, earthquake emergencies and the like. Grants of discretionary powers to the executive always run the risk of being exercised in an arbitrary and capricious manner in the future. Constitutional constraints – including precise statutory statements of the powers themselves and the prospect of judicial review for alleged breaches of citizens' rights – are imperative. Yet the work needed to achieve this constitutional reform should not be underestimated.

In the United Kingdom various proposals have been put forward to deal with the same issues. They include a Select Committee report in 2004 on *Taming the Prerogative: Strengthening*

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[33] Emma Ricketts, (2017). 'Royal prerogative a source of constitutional confusion': constitutionaotearoa.org.nz/the-conversation/royal-prerogative/ (Accessed 2 May 2018).
[34] Campbell Sharman (1994). 'Reforming Executive Power'. In George Winterton (ed.), *We, the People: Australian Republican Government*, St. Leonards, New South Wales: Allen and Unwin, p.113.
[35] Department of the Premier and Cabinet, Western Australia (1996). *Commission on Government, Report No. 5.* Perth: State Law Publisher, p.36.

Ministerial Accountability to Parliament; a Green Paper on *Governance of Britain* issued in 2007 by Gordon Brown when he became Prime Minister, followed by a White paper on *The Governance of Britain – Constitutional Renewal* along with a draft Constitutional Renewal Bill 2008 and a 'Review of the Executive Royal Prerogative' in 2009.[36] Then, under the succeeding coalition government, a House of Commons Committee in 2014 published a report on *Roles and Powers of the Prime Minister* which like the previous reports 'argued for more powers to be placed on a statutory footing, with parliamentary approval.'[37] With respect to ratification of treaties and regulation of the civil service, prerogative powers were supplanted by the Constitutional Reform and Governance Act 2010. For the rest of the ancient, ambiguous and significant executive powers of the Crown wielded by prime ministers and ministers – they remain intact in the United Kingdom.

A number of those we interviewed pondered the wisdom of simply replacing the Crown with State and abolishing royal prerogative powers in a republican constitution. Anne Twomey engaged with the issues at some length in pre-referendum work she did in 1999 as the government of New South Wales prepared for a republican eventuality that did not come to pass. She estimated there might be as many as 20% of references to the Crown could not be dealt with by simplistic substitution.[38] A lesson needs to be learnt from difficulties that continue to dog the courts in Ireland where the royal prerogative powers were presumed to be abolished when the Irish Free State became the Republic of Ireland in 1937. The leading decision is *Byrne v. Ireland* [1972] IR 241. It was understood (initially at least) as removing the prerogative from Irish law in full – which naturally gave rise to issues across various areas in subsequent cases and seems to have been at odds with what Irish politicians and lawyers believed between 1922 and 1937.[39]

Some of the issues that then arose related to the continued applicability post-independence of statutes drafted on the basis of the existence of a royal prerogative. So, for example, use of the power (in a 1908 Act) to detain a young person during His Majesty's pleasure was found to be unlawful in *State (O) v. O'Brien* [1973] IR 50 on the basis that it had been part of the mercy prerogative but now was a sentencing provision and therefore part of the judicial function. That led the courts to develop a policy of detaining persons found guilty but insane 'until further order of the court' until this too was found to be unlawful in *Neilan v. DPP* [1990] 2 IR 267. The non-survival of the prerogative also left open the possibility of lacunae in the presumed powers of the State.[40] This led in *Webb v. Ireland* [1988] IR to very complex litigation (and somewhat strained reasoning to fill the gap) around the entitlement of persons who found a treasure of national importance to retain it if there was no treasure trove prerogative. The interaction between older prerogatives and the constitutional provisions on sovereignty was again considered more recently in the fishing context in *Barlow v. Minister for Agriculture* [2016] IESC 62.

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[36] Gail Bartlett and Michael Everett (2017). *The Royal Prerogative*. London: House of Commons Library, pp.16-18.
[37] Bartlett and Everett (see note 37), pp.18-19.
[38] Anne Twomey (2018). *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems.* Cambridge: Cambridge University Press.
[39] Niall Lenihan (1989). 'Royal Prerogatives and the Constitution.' *Irish Jurist N.S.* 24: 1–12.
[40] Eoin Carolan (2017). Personal communication with the author. 1 August 2017.

Such difficulties should not inhibit undertaking the work that needs to be done. It would be a pity, though, if sooner or later – and either before or after Australia – New Zealand does become a republic but that the powers of the executive branch of government remain ill-defined and insufficiently open to democratic scrutiny.