

REDISCOVERING CONSTITUTIONAL LAW: SUCCESSION UPON THE DEATH OF THE PRIME MINISTER

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Introduction

Canadian legal academics have become mesmerized by the seductive dance of the *Charter*. Before the *Charter's* enactment in 1982, Canadian constitutional law was a rather arcane subject consisting almost solely of division of powers questions. Perhaps not surprisingly, the pronouncements of esteemed members of the Judicial Committee of the Privy Council on such exhilarating subjects as grain and margarine failed to capture the hearts and minds of generations of law students or legal academics. As the Bill of Rights proved to be no more than a cruel tease, it took the *Charter* to make constitutional law respectable, indeed popular, in the legal academy. However, in its excitement to embrace "the new Constitution", the legal academy has almost wholly abandoned entire areas of constitutional law.

Constitutional law consists of more than the coupling of traditional issues of federalism and the newfound infatuation with the *Charter*. Dicey defined constitutional law as including "all rules which directly or indirectly affect the distribution or the exercise of the Sovereign power in the State."¹ This definition of constitutional law has not shrunk over the years. Peter Hogg defines the subject as "the law prescribing the exercise of power by the organs of a State."² Yet like long-lost relatives, whole areas of constitutional law have been forgotten by the current

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¹ A.V. Dicey, *Law of the Constitution*, 8th ed. (Indianapolis: Liberty Fund, 1982) (London: Macmillan, 1915) at cxl.

² P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) at 3.

generation of legal academics, ceded almost completely to the political scientists.³ Issues raising questions about the exercise of executive power once stimulated the interest of legal scholars such as Edward McWhinney⁴ and Eugene Forsey,⁵ but their intellectual progeny have failed to carry the torch.

In this article, I attempt to reclaim a small field of constitutional law which the legal academy has let lay fallow for some time. This article addresses the issue of succession — the transfer of power from one head of government to another. While this issue attracts notable attention abroad, it raises rarely a whisper in Canada. For the most part this is because in the 20th century we faced nothing nearing a crisis at 24 Sussex Drive: no Prime Minister has died in office; none has been impertinent or ill enough to resign suddenly; and none has been forced out. However, our luck should not make us complacent.

The Prime Minister could die in office tomorrow and the shocking truth is that no concrete plan exists to deal with this contingency. While incumbent Canadian Prime Ministers cheated death in the 20th century, the experience of other countries⁶

³ Professor Hogg is a notable exception to this trend with his comprehensive treatment of constitutional law. See *ibid*.

⁴ See e.g. E. McWhinney, *Canada and the Constitution, 1979-1982* (Toronto: University of Toronto Press, 1982) [hereinafter "*Canada and the Constitution*"]; E. McWhinney, "Comment" (1957) 35 *Can. Bar Rev.* 92; E. McWhinney, "Letter to the Editor" (1957) 35 *Can. Bar Rev.* 369.

⁵ See e.g. E. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (Toronto: Oxford University Press, 1968). E. Forsey, "The Courts and the Conventions of the Constitution" (1984) 33 *U.N.B.L.J.* 11; E. Forsey, "Letter to the Editor" (1957) 35 *Can. Bar Rev.* 368.

⁶ By way of example, four American Presidents have died in office in each of the 19th and 20th centuries: William H. Harrison (1841), Zachary Taylor (1850), Abraham Lincoln (1865) (assassination), James A. Garfield (1881) (assassination), William McKinley (1901) (assassination), Warren G. Harding (1923), Franklin D. Roosevelt (1945), and John F. Kennedy (1963) (assassination). See A.M. Dodek, "When Death Strikes the Nation: The Assassination of Prime Minister Rabin and the Problem of Succession" (1996) 19 *Loyola of Los Angeles International and Comparative Law Journal* 57 at 75 n. 107 (collecting sources). Three Australian Prime Ministers have died in office this century: J.A. Lyons (1939), John Curtin (1945), Harold Holt (1967) (disappeared). See G. Winterton, *From Monarchy to Republic* (Melbourne: Oxford University Press, 1986) at 38. Two South African Prime Ministers died in office: J.G. Strijdom (1958) and H.F. Verwoerd (1966) (assassination). See T.R.H. Davenport, *South Africa: A Modern History*, 4th ed. (Toronto: University of Toronto Press, 1991) at 352, 367. Two Israeli Prime Ministers have died in office: Levi Eshkol (1969) and Yitzhak Rabin (1995) (assassination). See Dodek, *supra* at 84. No British Prime Minister died in office last century. Two Indian Prime Ministers have been assassinated: Indira Gandhi (1984) and Rajiv Gandhi (1991). See "Gandhi," online: Encyclopedia.com < <http://www.encyclopedia.com> > (last viewed March 18, 1999).

and of ours in the 19th century⁷ demonstrates that the gates of 24 Sussex Drive may yet open for the grim reaper. When death eventually catches up with a sitting Canadian Prime Minister, where will that leave us?

We are forced to speculate as to how the interplay of uncertain constitutional conventions, untested party electoral machinery, and unpredictable personalities in the Governor General's residence and in the governing party would work to produce a new Prime Minister. This makes for interesting scholarship but problematic politics. It is simply irresponsible and dangerous to tolerate the current situation where the Prime Minister could die politically intestate, and thereby create a situation where political heirs jockey for power while no one minds the store. The office of Prime Minister has become central to the Canadian Constitution. We have moved from parliamentary government to cabinet government and, now, to prime ministerial government. The idea of the Prime Minister as *primus inter pares* is passé in an era of centralization of power in which concerns are expressed over the Prime Minister's autocratic tendencies.⁸

Two issues must be addressed in crafting a succession plan. First, a contingency plan must provide a predictable and reliable response to a sudden departure of a Prime Minister. Second, it must accord with current constitutional principles. This article attempts to provide a framework for an orderly and predictable succession in the event of a sudden vacancy in our nation's highest political office. It will explain the current state of uncertainty regarding succession in Canada, relating and evaluating the Governor General's constitutional power and duty to appoint the Prime Minister. I assert that it is no longer acceptable in Canada for the Governor General to exercise discretion in the selection of a Prime Minister, even, or perhaps especially, in time of crisis. I then evaluate various proposals for succession and argue that the current party rules for selecting an interim leader are problematic and that designating an automatic successor to a deceased Prime Minister/party leader is the preferable solution. I argue that the Deputy Prime Minister is particularly well suited for this role. Finally, I will explain what steps must be taken by the government and by the parties to put in place a policy of predesignated automatic succession.

⁷ Sir John A. Macdonald died in office in 1891 and Sir David Thompson died (in Windsor Castle) in 1894. See *Guide to Canadian Ministries Since Confederation, July 1 1867—February 1, 1982* (Ottawa: Government of Canada Privy Council Office, 1982) at ix n. 2 [hereinafter *Guide to Canadian Ministries*].

⁸ See B. Wallace, "For the love of power — Is Jean Chrétien a closet autocrat?" *Macleans* (19 October 1998) at 16.

The Current State of Uncertainty

Under the Canadian Constitution, the Governor General appoints the Prime Minister. When speaking of “the Constitution,” a point of clarification is required because almost the entire realm of relations between the Governor General and the Prime Minister is regulated by convention and not by our constitutional documents. Indeed, the term “Prime Minister” did not appear in any constitutional text until 1982.⁹ Canadian constitutional texts are similarly silent on responsible government, yet this principle has been termed “the most important non-federal characteristic of the Canadian Constitution.”¹⁰ The most basic principle of responsible government in Canada is that the Governor General must always act under the “advice” (i.e. direction) of ministers who are members of the Parliament and who enjoy the support of a majority of members of the House of Commons (MPs).¹¹

Responsible government requires the existence of a government or a Ministry which is led by the Prime Minister who is selected by the Governor General. The day the Prime Minister dies or the Governor General accepts his or her resignation is the last day of a Ministry¹² and by operation of law the cabinet as a body ceases to exist.¹³ Unlike American Presidents, Canadian Prime Ministers have no designated successors. The Prime Minister does appoint an “acting Prime Minister” to act in his or her absence or “in the event of his being unable to perform the function of his office.”¹⁴ However this appointment terminates upon the death of the Prime Minister.¹⁵ Moreover, when a Prime Minister dies there is not only a void in government but also in the governing party because, by convention, the Prime Minister is the leader of the party that controls a majority in the House of Parliament.

⁹ See *Constitution Act, 1982*, ss. 37, 37.1, 49, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. These sections mandate that constitutional conferences be held on a variety of subjects.

¹⁰ Hogg, *supra* note 2 at 239. See also *Reference re: Amendment of the Constitution of Canada*, [1981] 1 S.C.R. 753, 125 D.L.R. (3d) 1 at 114 (Laskin, C.J.C., Estey and McIntyre JJ, dissenting) [hereinafter *Patriation Reference* cited to D.L.R.).

¹¹ See Hogg, *supra* note 2 at 239; *Patriation Reference*, *supra* note 10 at 82-83.

¹² *Guide to Canadian Ministries*, *supra* note 7 at iv.

¹³ However, the ministers remain in charge of their departments until a new Prime Minister accepts their resignations or new ministers are appointed. See *ibid*. See generally, A. Heard, *Canadian Constitutional Conventions: Marriage of Law and Politics* (Toronto: Oxford University Press, 1991) at 49.

¹⁴ See e.g. P.C. 1998-2065 (23 November 1998).

¹⁵ See J.R. Mallory, *The Structure of Canadian Government*, rev. ed. (Toronto: Gage Publications, 1984) at 99 [hereinafter, *The Structure of Canadian Government*].

None of the parties have designated automatic successors to the party leadership in the event of the death of the party leader.¹⁶ Thus, when a Prime Minister dies or resigns suddenly, there is no Prime Minister, no government party leader, no cabinet and no one charged with running the country until a new Prime Minister is appointed.

The process of succession under the Canadian constitution has been mired in uncertainty for decades. As time passes, various factors combine to compound the problem. The current state of uncertainty derives from a combination of several factors. First, the role of the Governor General in time of crisis has become murkier with the devolution of the Governor's constitutional powers to elected officials. Second, Canada lacks conventions or guidelines to address the issue of prime ministerial succession because the precedents that do exist are no longer relevant to the modern resolution of this problem.

Devolution of the Governor General's Powers

The power to appoint the Prime Minister has been termed the most important of the Governor General's prerogative powers.¹⁷ Dicey explained the prerogative power as "nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown."¹⁸ However, by midway through the 20th century, Britain's leading constitutional scholar could state that the prerogative power no longer carried the importance that it held in Dicey's days.¹⁹ Moreover, in Canada, the Governor General's powers are also prescribed by the Letters Patent which constitute the office.²⁰ Basically, the prerogative power is best

¹⁶ In recent years, the Progressive Conservatives and the Reform Party have designated deputy leaders, but this position is *ad hoc* and is not recognized under the Constitutions of the respective parties. See Progressive Conservative Party of Canada, *Constitution*; Reform Party of Canada, *Constitution of the Reform Party of Canada* (adopted at the Winnipeg Founding Convention, October 20, 1987, and amended at the Saskatoon Assembly, April, 1991, the Winnipeg Assembly, October, 1992, the Ottawa Assembly, October 1994 and the Vancouver Assembly, June 1996 and amended May 28-30, 1998).

¹⁷ See Mallory, *supra* note 15 at 49.

¹⁸ Dicey, *supra* note 1 at 281-2. See also Hogg, *supra* note 2 at 15 (explaining that the prerogative power consists of the powers and privileges accorded by common law to the Crown).

¹⁹ W.I. Jennings, *The Law of the Constitution*, 5th ed. (London: University of London Press, 1959) at 87 [hereinafter; *The Law of the Constitution*].

²⁰ See Letters Patent Constituting the Office of Governor General of Canada (effective October 1, 1947) in M.P. Ollivier, *British North American Acts and Selected Statutes 1867-1962* (Ottawa: Queen's Printer, 1962) at 653-57. The prerogative powers are properly considered constitutional conventions. See

understood as constituting the circumstances under which the Governor General acts without ministerial advice. Understood in this vein, it makes good sense why the appointment of the Prime Minister is considered such a power. Given the context in which the power is exercised — the absence of a Prime Minister — it is constitutionally impossible for the Governor General to act upon ministerial advice, since no Ministry exists. However, in exercising this prerogative power, the Governor General must recognize the working principles of parliamentary government. Normally, the Governor General must call upon the recognized leader of the party capable of commanding the support of a majority of the members of the House of Commons.²¹

The Governor General's prerogative powers²² have diminished considerably since Dicey's days. This is perhaps best demonstrated in Great Britain, the experience of which it is proper to draw upon because, constitutionally and on the basis of the 1947 Letters Patent, the Governor General in Canada holds the same position as the Queen in Great Britain.²³ In Great Britain, diminution of the Queen's discretion occurred through the initiative of political parties. The Labour Party has elected its leader since the party's inception in 1900²⁴ while the Conservatives maintained the approach that the party leader would naturally "evolve" or "emerge" to be chosen by the Queen and that person would then be ratified by the Party.²⁵ Explaining the "emergence theory," Sir Ivor Jennings stated, "one of the Ministers

Patriation Reference, *supra* note 10 at 83.

²¹ See Mallory, *supra* note 15 at 49; *Patriation Reference*, *supra* note 10 at 83.

²² The prerogative powers are sometimes called "reserve powers" because of the notion that they are powers that the Governor General holds in reserve for special situations. See H.V. Evatt, *The King and His Dominion Governors*, 2d ed. (London: Frank Cass, 1967); E. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (Toronto: Oxford University Press, 1968).

²³ See Letters Patent Constituting the Office of Governor General of Canada, s. II (effective October 1, 1947) in Ollivier, *supra* note 20 at 654; R.I. Cheffins & R.N. Tucker, *The Constitutional Process in Canada*, 2d ed. (Toronto: McGraw-Hill Ryerson, 1976) at 84.

²⁴ See V. Bogdanor, *The Monarchy and the Constitution* (Oxford, Clarendon Press, 1995) at 90.

²⁵ See J.P. Mackintosh, *The British Cabinet*, 3d ed. (London: Stevens & Son Ltd., 1977) at 429; W.I. Jennings, *The Queen's Government* (London: Penguin Books, 1954) at 134 (stating that the Queen must give the party a leader which it is prepared to follow) [hereinafter Jennings, *The Queen's Government*]; G. Marshall, *Constitutional Conventions* (Oxford: Clarendon Press, 1984) at 29. See also J.C. Courtney, *The Selection of National Party Leaders in Canada* (Toronto: Macmillan, 1973) at 2 [hereinafter Courtney, *The Selection of National Party Leaders in Canada*].

usually obtains pre-eminence, groomed for the post over several years and steps almost as of right into the post.”²⁶

However, the potential problems with the “emergence theory” were demonstrated in 1953 when Prime Minister Churchill suffered a stroke and his acknowledged number two, Anthony Eden, was recovering in the United States from surgery. No obvious constitutional method existed to set up a caretaker government²⁷ to await Eden's return. The Queen's only option — had Churchill died — would have been to send for someone she trusted to take the reins and then resign when Eden recovered and returned to London. In the end, Churchill recovered and the Queen and the country were not forced to face the issue.²⁸ Actual weaknesses of the Tories' “emergence theory” were demonstrated in the succession events of 1957 and 1963 when contrary to the words of Sir Ivor Jennings, no clear successor to Eden (1957) or Macmillan (1963) “emerged” and the Queen was drawn into party politics in selecting a Prime Minister who then became leader of the Conservative Party.²⁹ After the succession episodes of 1957 and 1963, the Conservative Party amended its constitution to elect its leader in a similar fashion to that adopted by the Labour Party,³⁰ effectively removing the sovereign's discretion in selecting a party leader.³¹

²⁶ Jennings, *The Queen's Government*, *supra* note 25.

²⁷ As none exists in Canada.

²⁸ Bogdanor, *supra* note 24 at 87.

²⁹ See *ibid.* at 93-99; A. Sampson, *The Anatomy of Britain Today* (London: Houghton and Stoughton, 1965) at 34.

³⁰ See S.D. Bailey, *British Parliamentary Democracy*, 3d ed. (Boston: Houghton Mifflin Co., 1971) at 17; C. Vincenzi, *Crown Powers, Subject and Citizens* (London and Washington: Pinter, 1998) at 74.

³¹ Thus, prior to 1965, the Queen exercised real discretion, at least regarding Conservative leaders. Since 1965 when both the Labour Party and the Conservative Party made provisions for replacement of leaders for whatever reasons, the monarch waits until selection of new party leader upon whom she calls to form a government and become the Prime Minister. See Bogdanor, *supra* note 24 at 84. Currently in Great Britain, the Queen has no discretion even to appoint an interim Prime Minister when the Labour Party is in power because Labour Party rules stipulate that if there is a vacancy in the office of the party leader while the party is in government, the cabinet appoints a minister as interim leader until a new leader is chosen. See R. Brazier, *Constitutional Practice*, 2d ed. (Oxford: Clarendon Press, 1994) at 12 n.20. It is possible that in the case of the death of a Conservative Prime Minister in Great Britain, the Queen could still have some discretion in selecting an interim Prime Minister until the party selected a new leader.

While in Britain, the parties restricted the practical exercise of the royal prerogative,³² a similar diminution of prerogative powers has taken place in Canada. However, the restriction occurred earlier, with 1896 marking the turning point at which the governing party in Canada asserted its right to select its own leader.³³ Prior to that year, Canada had followed the British model and the parties deferred to the wishes of the Governor General in selecting a new leader for the country and for the party.³⁴

It is still debated within Canada whether the Governor General may ever exercise prerogative powers and act without the advice of ministers. Conventional wisdom maintains that the 1926 King-Byng affair, which saw the Governor General refuse the Prime Minister's request for a dissolution of parliament, establishes the convention that the Governor General cannot refuse to act on the advice of the Prime Minister.³⁵ However, others contest this view, taking a more narrow interpretation of the King-Byng affair and asserting that it established a convention only that a *foreign* Governor General could not refuse the advice of government, implying that a Canadian Governor General could do so.³⁶ While Canadian commentators continue to debate the existence and the scope of prerogative powers,³⁷ other Commonwealth scholars have declared them effectively dead.³⁸ Whether the Governor General

³² See Courtney, *The Selection of National Party Leaders in Canada*, *supra* note 25 at 8-9.

³³ *Ibid.* at 39; J.C. Courtney, *Do Conventions Matter? Choosing National Party Leaders in Canada* (Montreal & Kingston: McGill-Queen's University Press, 1995) at 6 [hereinafter Courtney, *Do Conventions Matter?*].

³⁴ See Courtney, *The Selection of National Party Leaders in Canada*, *supra* note 25 at 31-32 (noting that the Governor General consulted with party leaders but still maintained some latitude of discretion).

³⁵ See McWhinney, *Canada and the Constitution*, *supra* note 4 at 130.

³⁶ See *ibid.* See also Heard, *supra* note 13 at 34-40 (on refusal of advice).

³⁷ See e.g. E. Forsey, "The Courts and the Conventions of the Constitution," *supra* note 5; E. McWhinney, "Comment" (1957) 35 Can. Bar. Rev. 92; J.R. Mallory, "Letter to the Editor" (1957) 35 Can. Bar. Rev. 242; E. Forsey, "Letter to the Editor" (1957) 35 Can. Bar. Rev. 368; E. McWhinney, "Letter to the Editor" (1957) 35 Can. Bar. Rev. 369. In the *Patriation Reference*, *supra* note 10 at 83, the Supreme Court appeared to recognize that some prerogative powers could be exercised without ministerial advice ("Most of the powers of the Crown under the prerogative are exercised only upon the advice of the Prime Minister or the cabinet") [emphasis added].

³⁸ See S. Encel, *Cabinet Government in Australia*, 2d ed. (Melbourne: Melbourne University Press, 1974) at 22 (stating that apart from Canada, the principle of Crown discretion has long been a lost cause); G. Carpenter, "Prerogative Powers — an anachronism?" (1989) *Comparative and International L. J. of South Africa* 190. But see F.M. Brookfield, "The reconstituted office of Governor-General" 1985 *New Zealand L. J.* 256 at 258-59 (arguing that the Governor General's prerogative powers may be resorted to by the Crown to save the country from apprehended constitutional chaos). Writing a year

retains discretion to appoint a Prime Minister in the case of a sudden vacancy in that office will be evaluated in detail below.

The Lack of Relevant Precedents

While no Prime Minister has died in office last century, two did in the 19th century. When Sir John A. Macdonald died on June 6, 1891, he left no obvious successor.³⁹ After consulting with Conservative party leaders, the Governor General called upon Sir John Abbott on June 15, 1891 to form a new government and the fourth Ministry in our nation's history was sworn into office the next day.⁴⁰ Just over two years later, Sir John Thompson, who had succeeded Abbott as Prime Minister on December 5, 1892, died suddenly while visiting Windsor Castle on December 12, 1894. The Governor General refused to call upon Thompson's most obvious successor, Sir Charles Tupper, because of his personal aversion to Tupper.⁴¹ Instead, acting almost immediately, the Governor General called upon Sir Mackenzie Bowell to form a government the day after Thompson's death.⁴² In so choosing Bowell, the Governor General foisted his choice on the party and on the country. Bowell held power for 16 months before he was turfed out of office by his own party and Tupper became Prime Minister.⁴³

These historical precedents are no longer applicable to modern Canada because the Governor General no longer wields the power that the position had in the 1890s. Political parties are much more central to Canadian politics today. The Thompson succession neatly presents the Catch-22 position that a modern day Governor

before the constitutional crisis in his country which would see the Governor General dismiss the Prime Minister, Encel states, "Canadian political scientists and constitutional lawyers are prone to assert the need for the vice-regal prerogative much more than are their Australian counterparts. This may reflect the absence of an effective labour party in Canada, a history of demagogic premiers and prime ministers ("chieftains"), and greater opportunities for political jobbery in making appointments to official positions." Encel, *supra* at 21.

³⁹ Courtney, *The Selection of National Party Leaders in Canada*, *supra* note 25 at 34.

⁴⁰ See *Guide to Canadian Ministries*, *supra* note 7 at 22; Courtney, *Selection of National Party Leaders in Canada*, *supra* note 25 at 34.

⁴¹ See R.M. Punnett, *The Prime Minister in Canadian Government and Politics* (Toronto: Macmillan, 1977) at 33; Courtney, *Selection of National Party Leaders in Canada*, *supra* note 25 at 37.

⁴² *Guide to Canadian Ministries*, *supra* note 7 at 30. The Ministry assumed office on December 21, 1894.

⁴³ See Courtney, *Selection of National Party Leaders in Canada*, *supra* note 25 at 37-39; G. Donaldson, *Eighteen Men: The Prime Ministers of Canada* (Toronto: Doubleday, 1985) at 52-57.

General would face in the case of the sudden death of a Prime Minister in office. On the one hand, a Governor General who acts quickly to put a government in place preempts the party's choice of leader and undermines the principle of democratic accountability that has become a hallmark of Canadian democracy. On the other hand, a Governor General who waits for a party to select a new leader may violate his constitutional duty to ensure that a Prime Minister is always in place.⁴⁴ Moreover, the existence of a gap, a temporary power vacuum in national leadership, may have the potential to wreak real damage on the country. One can only speculate on the fright that would result if the Prime Minister were to die during a referendum campaign with the concomitant plummeting of the Canadian dollar.⁴⁵ Stuck between a rock and a hard place, what is a Governor General to do?

There is No Plan

In a word, our government has no succession plan. The Privy Council Office which is responsible for the machinery and continuity of government, has no contingency plan.⁴⁶ Nor does it appear that the construction of a plan is in the works by anyone in Ottawa. When asked, the Privy Council Office returns to the traditional role of the Governor General to select the Prime Minister.⁴⁷ The Canadian people would probably be shocked if their Prime Minister followed John Major's recent lead to rise in the House of Commons and tell the nation that no plan existed for dealing with the death of a Prime Minister in office.⁴⁸

The Case for Governor General Discretion

Professor Mallory's is the classic statement on the power of the Governor General to appoint the Prime Minister: "the governor acts on his own authority and with

⁴⁴ See Mallory, *The Structure of Canadian Government*, *supra* note 15 at 49-50.

⁴⁵ Heads of State of other countries have not escaped criticism for their attempts to involve themselves in internal party politics. See B. Tsur, "Weizman denied meddling in elections" *Jerusalem Post* (31 December 1998) online: <<http://www.jpost.com/News/Article-5.html>> (last visited December 31, 1998) (reporting that Israel's President had interfered in the electoral process by trying to influence two party leaders to run together so as not to divide the Left).

⁴⁶ Letter from N. Jauvin, Assistant Secretary to the Cabinet (Machinery of Government) (Privy Council Office) to Adam Dodek (7 February 1996); Letter from David C. Elder, Assistant Secretary to the Cabinet (Machinery of Government) (Privy Council Office) to Adam Dodek (8 December 1998).

⁴⁷ *Ibid.*

⁴⁸ See Brazier, *supra* note 31 at 76 and n.41.

complete freedom in finding a Prime Minister who can govern and who is capable of claiming the allegiance of a body of disciplined followers within the legislature.”⁴⁹ Those who believe that life still breathes through the corridors of Rideau Hall begin by noting that the Governor General is responsible for seeing that the country is never without a Prime Minister:⁵⁰ “The right and the duty to find a Prime Minister if that office becomes vacant is the most important single function of the Governor General.”⁵¹ Scholars recognize that the Governor General’s choice is effectively constrained so long as the governing party has a leader. Our problem exists because the party rules do not directly address the contingency under study. Thus, while it may be “the constitutional duty of the Governor General to take the initiative in finding a Prime Minister if the one in office dies or becomes incapable of performing his duties,”⁵² the question remains whether the Governor General pre-emptly party leaders or waits for them. Some scholars seem to suggest that the Governor General maintains an active and independent role and selects a new leader who should then be confirmed by party leaders.⁵³ Indeed, the question is asked, “[w]hy should not a Canadian Governor General who is both a Canadian citizen and also effectively appointed by the government of Canada exercise the reserve, discretionary, prerogative powers conferred upon him by the BNA Act (sections 50 and 54-7)?”⁵⁴ Moreover, it is argued that the Governor General has a personal and independent role to play as part of a system of checks and balances, and that the Governor General should exercise the office’s legal powers if in his or her own constitutional judgment the need so arises.⁵⁵

⁴⁹ J.R. Mallory, “The Royal Prerogative in Canada: The Selection of Successors to Mr. Duplessis and Mr. Sauvé” (1960) 26 Can. J. of Economy and Political Science 314 at 314.

⁵⁰ See J. Monet, *The Canadian Crown* (Toronto/Vancouver: Clarke, Irwin & Co., 1979) at 53; R.I. Cheffins & R.N. Tucker, *The Constitutional Process in Canada*, 2d ed. (Toronto: McGraw-Hill Ryerson, 1976) at 84.

⁵¹ Mallory, *supra* note 15 at 49-50.

⁵² *Ibid.*

⁵³ See *ibid.* at 51 (stating that it is the Governor General’s task under the Constitution to find a successor and that he is entitled to the full support of the party leaders in his choice). See also Punnett, *supra* note 42 at 33-34 (stating that the Governor General might have to be involved in the selection of a new leader until a party convention is held).

⁵⁴ McWhinney, *Canada and the Constitution*, *supra* note 4 at 130. Professor McWhinney answers his own question in the affirmative. See *ibid.* at 130-31.

⁵⁵ See *ibid.* at 130. E. Forsey, “No ‘figurehead’ — Governor-General’s Duties and Powers clear” *The Citizen* (23 January 1974) at 6 (stating that Governor General would play a part in deciding who should be the Prime Minister).

The case for continued Governor General discretion is most forcefully articulated by scholars such as Professors Mallory and Ward, who take very seriously the Governor General's constitutional duty to ensure that there is always a Prime Minister and a responsible cabinet in office.⁵⁶ According to Professor Ward, upon the sudden death or resignation of the Prime Minister, it is the Governor General's task to take the initiative and "pursue the matter unceasingly until a new prime minister is in office."⁵⁷ Naturally, the Governor General would consult with party leaders,⁵⁸ but in the end the decision would be the Governor's alone. For these scholars, the bottom line is that, just because the Governor General has not been called upon to assume this duty since 1894, there is no reason to assume that the power has somehow declined or disappeared in the interim.⁵⁹

Professor Mallory champions the flexibility of the Canadian model in contrast to the rigidity of automatic succession, as best exemplified by the American Constitution.⁶⁰ Taking "pot shots" at the American vice presidency is a relatively low cost exercise. However, Professor Mallory's concerns are not well taken. To begin, the Governor General is no longer in a position "to pick the best man" for the job and has not been, at least since 1894 when the Conservative Party asserted its right to select its leader, rather than accept the Governor General's choice for party leader/Prime Minister.⁶¹ Certainly, the Governor General has not been able "to pick

⁵⁶ "The right and the duty to find a Prime Minister if that office becomes vacant is the most important single function of the Governor General." Mallory, *The Structure of Canadian Government*, *supra* note 15 at 49-50.

⁵⁷ N. Ward, *Dawson's The Government of Canada*, 6th ed. (Toronto: University of Toronto Press, 1987) at 183. See also Mallory, *The Structure of Canadian Government*, *supra* note 25 at 49-50.

⁵⁸ Ward, *supra* note 57 at 183.

⁵⁹ *Ibid.* at 184. See also McWhinney, *Canada and the Constitution*, *supra* note 4 at 130 (stating that most of the arguments for the alleged disappearance of the reserve discretionary powers of the Governor General stem from examples that no longer seem applicable to the current Canadian situation. For example, McWhinney asserts that the 1926 King-Byng affair should be more correctly viewed as confirming a convention that a non-Canadian Governor General could no longer resist the advice of the Canadian government, rather than standing for the proposition that the Governor General cannot, even in limited circumstances, disregard the advice of the government and exercise his or her own independent constitutional judgment).

⁶⁰ See Mallory, *supra* note 15 at 50.

⁶¹ See Courtney, *Selection of National Party Leaders in Canada*, *supra* note 25 at 39. As Professor Courtney explains, in 1896 the Conservative Party was weak and divided under Prime Minister Bowell and reached a crisis point when seven ministers resigned, demonstrating their lack of confidence in Bowell and their desire to have Sir Charles Tupper lead the party (and the country). Bowell attempted to resign but the Governor General, Lord Aberdeen, was determined not to call upon Sir Charles. Bowell

the best man” since formal leadership election mechanisms were established by the parties, for the Liberals in 1919 and the Conservatives in 1927. The idea of the monarch “choosing the right man” laboured on in Great Britain until 1965, but it is an idea whose time has passed.

Moreover, concern expressed over the quality of American Vice Presidents, emphasizing how they are often chosen to “balance the ticket” rather than for the leadership qualities,⁶² is also misplaced. An American Vice President who becomes President serves the portion remaining of the President's term, whether that is 3 years⁶³ or a few months.⁶⁴ An interim Prime Minister would not serve out the balance of the government's term of office (unless elected to do so by the party selection machinery); rather she or he would shepherd the country for several months while the governing party conducted its leadership selection process. The Canadian people would not have a Prime Minister foisted upon them for several years who did not lead the governing party in the prior election campaign. In all likelihood, the new

again attempted to resign, without success and a stalemate ensued which was broken through a face-saving compromise whereby Bowell would retain the premiership until the end of the parliamentary session (some four months away) during which time Tupper would enter the House of Commons and assume effective control of the party and then be named Bowell's successor as Prime Minister. This turn of events leads Courtney to term 1896 “a key year in Canadian party politics, in so far as the governing party asserted with some success a claim to choose its own leader (even though he may not, in fact, become prime minister) independent of vice-regal wishes.” *Ibid.* The Governor General did in fact call upon Tupper when Bowell stepped down. *Ibid.* at 40. However, Tupper's tenure was short lived, lasting May 1, 1896 to July 8, 1896. See *Guide to Canadian Ministries*, *supra* note 7 at 36. In the end, Lord Aberdeen probably felt vindicated in his obstinacy. Strictly speaking, the Prime Minister need not be a party leader to lead a Ministry, so long as she or he has the support of the Legislature. It is possible that a national leader could exist who is “above” party politics and may be called upon to lead the nation, such as was the case in Great Britain in 1940 with Winston Churchill. To be precise, the convention requires the Governor General to appoint a person as Prime Minister who has the support of the Legislature. See *Patriation Reference*, *supra* note 10 at 82-83. “[I]n practice this means in most cases the leader of the political party which has won a majority of seats at a general election.” *Ibid.* I am indebted to Professor Courtney for pointing this out to me.

⁶² See Mallory, *supra* note 15 at 50.

⁶³ As was the case when President Franklin Delano Roosevelt died in July 1945 and Harry Truman served out the balance of his term until the Presidential election of November 1948 (which re-elected Truman). See online: “The Presidents of the United States,” <<http://www.whitehouse.gov/WH/glimpse/presidents/html/presidents.html>> (last visited February 4, 1999).

⁶⁴ The shortest balance remaining in a term assumed by a Vice President appears to be more than one year, the time remaining left in John F. Kennedy's term of office when he was assassinated in November 1963 with an election a year away. See online: “The Presidents of the United States,” <<http://www.whitehouse.gov/WH/glimpse/presidents/html/presidents.html>> (last visited February 4, 1999).

leader/Prime Minister, whether or not that person was the same person as the interim leader/Prime Minister, would feel compelled “to go to the people” and seek a fresh mandate within a few months time.⁶⁵

The case for continued Governor General discretion contains empirical and normative arguments. Empirically, there is no question that our Constitution assigns the Governor General the responsibility, indeed the duty, to appoint the Prime Minister. The debate concerns how the Governor General should assume this responsibility and whether any discretion should be exercised. As discussed above, the powers and the discretion of the Governor General have diminished considerably since 1896. In the next section, I offer a normative argument, based on a present-day understanding of the operation of the Canadian Constitution, as to why the Governor General should no longer exercise discretion in appointing a Prime Minister when a sudden vacancy arises.

Our Constitution for the Next Century

I have described the process of devolution of power from the Governor General to elected officials over the last century. In effect, a very strong constitutional convention now exists that the Governor General must call upon the leader of the party who controls a majority in the House of Commons. The core problem in a succession crisis is the vacancy in the governing party's leadership — with no leader, the Governor General has no one to turn to. Empirically, numerous constitutional conventions guide any understanding of the operation of succession in Canada. Normatively, I submit that there are various constitutional principles which should guide decision makers, particularly the Governor General and the governing party, in a succession crisis.

An understanding of how succession should operate must be guided by the current understanding of “the democracy principle.” On several occasions, the Supreme Court has recognized this principle as one of the normative underpinnings

⁶⁵ I realize that it is possible that the new leader who would become Prime Minister would be a person who by definition (since the party leader is deceased) did not lead the party in the prior election. Hypothetically, this person could serve out the balance of the deceased leader's mandate. However, it is arguable that a convention has developed whereby a new party leader who becomes Prime Minister must, within a reasonable time after his or her ascendancy to the premiership, call a national election to seek a mandate from the people for his or her leadership as did Pierre Trudeau in 1968, John Turner in 1984 and Kim Campbell in 1993. See “Capital Confidential” *Macleans* (8 February 1999) 12.

that guide the exercise of constitutional authority in this country.⁶⁶ “[T]he democracy principle can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently our elected representatives under it, have always operated.”⁶⁷ The democracy principle mandates that the powers of the state be exercised in accordance with the wishes of the electorate.⁶⁸

Although the Court has not fleshed out a complete understanding of democracy under the Canadian Constitution, it has acknowledged an evolutionary process of Canadian democracy which has seen the country move towards more effective representation: “[O]ur constitutional history demonstrates that our governing institutions have adapted and changed to reflect changing social and political values.”⁶⁹ Moreover, it has stated that the legal framework of the Constitution should be operated “in accordance with the prevailing constitutional values or principles of the period.”⁷⁰ Various “prevailing principles” can be identified which should inform the exercise of the Governor General’s prerogative power.

Recent political events demonstrate a continuing process of evolution in Canada towards greater openness and participation in politics. The trend is manifestly away from the closed-room elite decision-making that the Governor General’s selection of a Prime Minister after an incumbent’s death would surely be. The successful constitutional reform in 1982 was brought about through unprecedented public participation in government and through testimony before Joint Committee of the House of Commons that bestowed popular legitimacy on the patriation process.⁷¹ Conversely, the failure of the Meech Lake Accord has been attributed to the revival of executive federalism and government’s failure to involve Canadians in the

⁶⁶ See *Patriation Reference*, *supra* note 10 at 84; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 32, 161 D.L.R. (4th) 385 at 403 (hereinafter *Quebec Secession Reference* cited to D.L.R.). Although the legal effect of these constitutional principles remains murky, it is clear that they have normative appeal as to how our constitution should operate. See *ibid.* at 411 (the constitutional principles are invested with a powerful normative force and are binding upon both courts and governments). I restrict my argument to one as to how the Governor General should exercise authority rather than asserting that he or she is compelled to exercise this power in a particular manner.

⁶⁷ *Quebec Secession Reference*, *supra* note 66 at 414.

⁶⁸ *Patriation Reference*, *supra* note 10 at 84.

⁶⁹ *Quebec Secession Reference*, *supra* note 66 at 414.

⁷⁰ *Patriation Reference*, *supra* note 10 at 84.

⁷¹ See P. Russell, *Constitutional Odyssey* (Toronto: University of Toronto Press, 1992) at 115.

constitutional process.⁷² Learning this lesson, the government involved many non-governmental groups in the Charlottetown Round and eventually held a national referendum on that Accord. High profile public inquiries into tainted blood, military malfeasance in Somalia and the APEC Conference are further indications of the public demand for transparency and accountability in governmental action. At the same time, political parties are continuing down the path of democratization⁷³ with both the Progressive Conservative Party and the Reform Party now holding direct, membership wide, voting for their leaders. The trend is toward greater openness, responsibility and participation in Canadian politics. It is in light of these developments that the Governor General's role must be evaluated.

As the Governor General's powers have diminished, the office has become more politicized, strongly militating against a role for the Governor General in times of crisis. Canada's first Governors General were appointees from Westminster. Although they were political appointees, our first Governors General were independent of or "above" Canadian party politics. Certainly, no Governor General in Canada's first fifty years was in any way beholden to Canadian politicians for his appointment. This situation changed after the King-Byng crisis in 1926. After the Imperial Conference that followed in the aftermath, the British agreed that all future Governors General would be appointed upon the advice of the dominion governments. From 1926 until 1952, Canadian Prime Ministers selected Governors General from a list of British candidates submitted to them from London.⁷⁴ Eventually the process evolved from consultation, in the appointment of the Governor General to selection of the Governor General by the Prime Minister, with the official appointment being made by the Queen.

While the Canadianization of the Governor General's office began with the King-Byng crisis in 1926, it would take another 25 years until a Canadian occupied the office, with the appointment of Vincent Massey in 1952. The first truly Canadian Governors General were non-partisan; they were diplomats and soldiers. Vincent Massey (1952-57) was a diplomat and businessman who was an acknowledged leader in cultural and educational affairs. He had a previous brush with politics, but

⁷² See e.g. P. Monahan, *Meech Lake: The Inside Story* (Toronto: University of Toronto Press, 1991) at 6.

⁷³ See generally Courtney, *Do Conventions Matter?*, *supra* note 33 at 233 *et seq.*

⁷⁴ See Heard, *supra* note 13 at 17.

it was sufficiently unsuccessful and distant as to be overlooked.⁷⁵ Mr. Massey was followed by General Georges Vanier (1959-67) who was a professional diplomat and a soldier with a reputation for integrity.⁷⁶ Although Roland Michener (1967-74) was a former Speaker of the House of Commons under the Conservatives, his appointment by Liberal Prime Minister Lester B. Pearson as High Commissioner to India was considered sufficient to nullify his political affiliation.⁷⁷ The tenure of Jules Léger (1974-79), a career diplomat and civil servant marked the end of non-partisan appointments to Rideau Hall.⁷⁸

The wholesale politicization of the Governor General's office was initiated by Pierre Trudeau. In 1979, Mr. Trudeau appointed former NDP premier of Manitoba Edward Schreyer (1979-84) to the post. At first glance, the appointment of an NDP premier by a Liberal Prime Minister has the hallmarks of a non-partisan appointment. Yet it appears that Mr. Schreyer was appointed to the post less because of his prior service to the country than because of Trudeau's belief that Schreyer could be helpful in a projected national unity campaign.⁷⁹ Mr. Trudeau's appointment of Mr. Schreyer inaugurated the practice of appointing politicians to Rideau Hall. The appointment of Jeanne Sauv  (1984-90), a former Liberal cabinet minister and distinguished Speaker of the House, continued the tradition.⁸⁰ Mr. Mulroney carried on where Mr. Trudeau left off, taking partisanship a step further by appointing Raymond Hnatyshyn (1990-95) to Rideau Hall.⁸¹ Upon his assumption of the

⁷⁵ See F. MacKinnon, *The Crown in Canada* (Calgary: McClelland & Stewart, 1976) at 95.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ See J. Gray, "How the honour lost its glory" *The Globe and Mail* (24 November 1994) A21. Whatever Mr. Trudeau's hopes were for the role that Mr. Schreyer would play as Governor General during a national unity campaign, they backfired. In a remarkable statement while he was still in office, Mr. Schreyer expressed his willingness to use the powers of the Governor General's office to prevent Mr. Trudeau from embarking upon unilateral patriation of the Constitution. See "Schreyer Would Have Blocked Forced Patriation" *The Globe and Mail* (22 January 1982) 8.

⁸⁰ The former Liberal politician did not escape run-ins with Conservative Prime Minister Brian Mulroney who was elected to office during her tenure. See S.E. Woods, *Her Excellency Jeanne Sauv * (Toronto: Macmillan, 1986) at 217-19 (describing the clash between Sauv  and Mulroney over the Shamrock Summit in Quebec City).

⁸¹ A loyal Mulroney supporter and former Justice Minister who lost his seat in the 1988 election, Mr. Hnatyshyn was considered an ineffectual minister. See E. Nielsen, *The House is Not a Home* (Toronto: Macmillan, 1989) at 309 (evaluation by former Deputy Prime Minister and cabinet colleague of Mr. Hnatyshyn); *The Mulroney Team* (Don Mills, Ont.: Corpus Information Services, 1984) at 39. On Mr.

premiership, Jean Chrétien reinforced the notion of the Governor General's job as a political plum with his appointment of longtime supporter, Liberal MP and cabinet minister Roméo LeBlanc (1995-) to the post. Mr. LeBlanc's appointment marked the first time in Canadian history that open criticism was voiced regarding the Prime Minister's selection for Governor General.⁸²

As the Governor General's position has become more politicized, converted into a patronage reward for loyal party leaders, its legitimacy as an office capable of exercising independent political judgment in times of crisis has been undermined. Paradoxically, the office had more legitimacy in terms of the exercise of independent judgment before it became "Canadianized" and its occupants were not beholden to the Prime Minister for their appointment. The appointment process makes the notion that the Governor General might play a non-partisan role untenable.⁸³ It simply cannot be said that a Governor General laden with political baggage could maintain "the most conscientious disinterestedness and impartiality toward Canadian political affairs,"⁸⁴ especially when it comes to a matter at the heart of party politics, the accession to the party and national leadership.⁸⁵ The appointment of Adrienne

Hnatyshyn's problems as Minister of Energy, Mines and Resources in the short-lived ministry of Joe Clark, See J. Simpson, *Discipline of Power: The Conservative Interlude and the Liberal Restoration* (Toronto: Personal Library, Publishers, 1980) at 136-37.

⁸² See S. Delacourt, "LeBlanc named governor-general Manning calls choice 'unwise'" *The Globe and Mail* (23 November 1994) A1; "Manning: The office is in decline" *The Globe and Mail* (25 November 1994) A23; R. M. Lee, "A lapdog in Rideau Hall, a return to cronyism in the House" *The Globe and Mail* (26 November 1994) D2; W. Thorsell, "Patronage appointments have no place in 'new politics'" *The Globe and Mail* (26 November 1994) D6.

⁸³ See D.E. Smith, *The Invisible Crown: The First Principle of Canadian Government* (Toronto: University of Toronto Press, 1995) at 60.

⁸⁴ Ward, *supra* note 57 at 191.

⁸⁵ Various proposals have been made for the depoliticization of the office of the Governor General. See e.g. Ward, *supra* note 57 at 193 (suggesting that the risk of particular appointments would be reduced by consulting the opposition); D. Blundell, "Some reflections upon the office of Governor-General in New Zealand" (1980) 10 Victoria U. of Wellington L. R. 197 at 205 (same); "The last act of patriation" *The Globe and Mail* (23 November 1994) A22 (suggesting that upon the death or abdication of the Queen, a Governor General elected by the 150 or so Companions of the Order of Canada replace her as a head of state). Outside of Canada, the suggestion has been made that an available Prince of Wales could be appointed Governor General. See C. Howard, *Australian Federal Constitutional Law*, 3d ed. (Sydney: The Law Book Co. Ltd., 1985) at 115 (Australia); D. Blundell, *supra* (New Zealand). This position would be untenable in Canada for various reasons. A non-Canadian Governor General would be perceived as a step back in Canadian independence. Moreover, the installation of a member of the British royal family would be anathema to many Canadians not of British heritage and could serve to exacerbate tensions with Quebec.

Clarkson as Governor General in 1999 was widely welcomed as a non-political appointment.⁸⁶

Most of the scholarship arguing for the retention of gubernatorial discretion in appointing a new Prime Minister to replace a deceased one is dated in light of the strength of the prevailing convention that the Governor General must select the person chosen by the party as its leader.⁸⁷ It is simply inconceivable that the parties would permit the Governor General to select a new (as opposed to an interim) party leader and eschew the party selection process.⁸⁸ Thus, the assertion that the Governor General is entitled to the full support of party leaders in his or her selection of Prime Minister⁸⁹ is false. Rather, the party leaders are entitled to the full support of the Governor General in their choice of an interim leader/Prime Minister. The only issue is whether the Governor General has any discretion in appointing an *interim* Prime Minister. Professor Hogg appears to waver on this issue. On the one hand, he states that it is certain that the government party would want to choose its successor and the Governor General would be obliged to follow that choice.⁹⁰ However, he also accepts the possibility of the Governor General appointing a caretaker Prime Minister until the party made its choice. However, he states that even here, the party would likely want to designate the interim Prime Minister.⁹¹ Andrew Heard captures the issue in asserting that the Governor General would only have a role if the party failed to make a choice; but in such a scenario no rules exist to guide the governor's choice.⁹² It is to the construction of possible rules that we now turn.

⁸⁶See "A Strong Nationalist for Governor General" *The Toronto Star* (9 Sept. 1999); "Choosing a Canadian" *The Globe and Mail* (9 Sept. 1999) A14; G. Fraser, "Reaction generally positive to Clarkson appointment" *The Globe and Mail* (9 Sept. 1999) A2; but see "A governor-general for half the country" *National Post* (9 Sept. 1999). It is still too early to tell whether the Clarkson appointment is simply a patronage interregnum or the beginning of the rehabilitation of Rideau Hall. On my hopes for the rehabilitation of the governor-general, see Adam M. Dodek, "When the governor-general mattered" *Ottawa Citizen* (6 April 1999).

⁸⁷ See Heard, *supra* note 13 at 25.

⁸⁸ See Hogg, *supra* note 2 at 259. Professor Hogg states that the assertion that the Governor General retains prerogative powers on the scale of those exercised in 1896 is simply wrong. "It would be intolerable to Canadians if the Queen or the Governor General were actually to exercise significant governmental power." *Ibid.* at 260.

⁸⁹ See Mallory, *supra* note 15 at 51.

⁹⁰ See Hogg, *supra* note 2 at 259.

⁹¹ *Ibid.*

⁹² Heard, *supra* note 13 at 25.

Models of Succession in Canada

It should now be clear that the core of the Canadian succession problem lies in the period of uncertainty between the death of the Prime Minister and the election of a new party leader by the party electoral machinery, some several months down the road. There is no question that once the party selects its leader, the Governor General has no discretion and must summon this person to Rideau Hall. The problem is what happens in the interim. Because this “interim” is a matter of months and not days or even weeks,⁹³ the selection of the interim leader/Prime Minister is important to the constitution and to the country. Indeed, a so-called “interim Prime Minister” could end up leading the country for a longer period than some of our Prime Ministers have done.⁹⁴ This section will identify and evaluate various alternative methods of selection of an interim Prime Minister until the party electoral machinery has run its course.

Cabinet Vote — The Quebec Model

The first alternative is what I will call “the Quebec model of succession.” Under this model, the cabinet of a deceased Prime Minister selects one of its own to ascend to the Prime Ministership. This was the model of succession under Union Nationale governments in Quebec upon the death of Maurice Duplessis and his successor Paul Sauvé.⁹⁵ When Mr. Duplessis died, Mr. Sauvé emerged as successor and the cabinet ministers recommended his selection to the Lt. Governor who then called upon Mr. Sauvé to form a new government.⁹⁶ When Mr. Sauvé died approximately 100 days later, no clear successor existed and a bitter internal dispute erupted which threatened to split the party. The cabinet again selected a successor, imposed its

⁹³The British process for replacing a leader is much quicker than Canada’s. See Brazier, *supra* note 31 at 10-11 (describing process of leadership selection as taking 2-3 weeks).

⁹⁴ *i.e.* Sir Charles Tupper (May 1, 1896 - July 8, 1896) (69 days); Arthur Meighen (June 29, 1926 - September 25, 1926) (88 days); John Turner (June 30, 1984 - September 17, 1984) (80 days); and Kim Campbell (June 25, 1993 - November 4, 1993) (129 days). See *Guide to Canadian Ministries, supra* note 7 at 35 (Tupper), 77 (Meighen) and National Archives, “The Prime Ministers of Canada: Biographical Notes, http://www.archives.ca/www/com/english/pm/biographical_notes.html (last visited February 4, 1999).

⁹⁵ The model also applied on the death of Premier Johnson in 1968. See Hogg, *supra* note 2 at 259 n. 63.

⁹⁶ See J.R. Mallory, “The Royal Prerogative in Canada: The Selection of Successors to Mr. Duplessis and Mr. Sauvé” (1960) 26 *Can. J. of Economics and Political Science* 314 at 315-16 [hereinafter “The Royal Prerogative in Canada”].

choice on the caucus and once again petitioned the Lt. Governor to appoint its designate, Mr. Barrette, as the so-called “party's choice” for Premier.⁹⁷

The “Quebec model” has its admirers both in Canada⁹⁸ and abroad;⁹⁹ however, it suffers various conceptual and practical infirmities. First, as a matter of law, the cabinet ceases to exist upon the death of the Prime Minister (or Premier).¹⁰⁰ Under our system of responsible government, a Government or Ministry exists only so long as there is a Prime Minister, because only the Prime Minister can offer advice to the Governor General.¹⁰¹ Therefore, the cabinet cannot meet unless there is a Prime Minister. The Prime Minister need not be present at a cabinet meeting, but must be alive in order to give the cabinet “constitutional life.”¹⁰² Thus, despite the apparent widespread belief that the cabinet has a “constitutional duty” to choose a successor, such a position is constitutionally untenable.¹⁰³

As a matter of practical politics, the Quebec model only works if there is a clear successor, as was the case when Mr. Sauvé succeeded Mr. Duplessis. When no obvious successor exists, as was the case when Mr. Barrette succeeded Mr. Sauvé, the Quebec model fails. Having a deeply divided cabinet choose a successor runs the risk of fracturing the government and the party by installing a leader who may not truly have the confidence of the caucus.¹⁰⁴

⁹⁷ See *ibid.* at 317-18.

⁹⁸ Professor Hogg has suggested it as means of selecting an interim Prime Minister. See Hogg, *supra* note 2 at 259.

⁹⁹ It is the policy of the British Labour Party, See Labour Party, Standing Order 5(3)(a) contained in *Brazier*, *supra* note 31 at 309. It is also the Israeli way, enshrined in Israel's Basic Law: The Government. See A.M. Dodek, *supra* note 6 at 62, 66. Caucus selection also was used in South Africa in 1989 after the ouster of P.W. Botha, with F.W. de Klerk emerging as the new leader of the National Party by a vote of 69 to 61. See T.R.H. Davenport, *South Africa: A Modern History*, 4th ed. (Toronto: University of Toronto Press, 1991) at 443.

¹⁰⁰ See Heard, *supra* note 13 at 49.

¹⁰¹ See *ibid.*

¹⁰² See Mallory, “The Royal Prerogative in Canada” *supra* note 95 at 316.

¹⁰³ See *ibid.* (describing the belief expressed in the press at the time regarding the cabinet's duty); a former senior official in the Mulroney government confided in me that he believed in the event of the Prime Minister's death, the cabinet would choose a successor).

¹⁰⁴ See MacKinnon, *supra* note 75 at 125. What I have termed the “Quebec model” is the constitutionally prescribed mode of succession upon a vacancy in the office of the Prime Minister in Israel. This was the operative procedure when Prime Minister Rabin was assassinated in November 1996 and the cabinet chose Foreign Minister Shimon Peres as his successor. As I have argued, this model of succession

The Quebec model appears to envision the selection of a permanent successor rather than an interim leader of the party. This was certainly the way it operated in the succession events of 1959-60 in Quebec.¹⁰⁵ Such a prospect creates the possibility that the mandated selection process for a new leader would be a pro forma exercise. Eschewing the formal party electoral process in favour of the closed-door selection of a leader is simply no longer tenable in Canada because the principles of openness and participation have become important values which governments and parties flaunt at great risk to themselves.¹⁰⁶

Caucus Vote — The Liberal Opposition Model

Another alternative is for the government caucus to select a new leader, whose name would then be submitted to the Governor General.¹⁰⁷ We might term this “the Liberal Opposition model” because it was the process used by the Liberal Party between 1873 and 1901 to select its leaders while it laboured in opposition.¹⁰⁸ Since the first national leadership was held by the Liberal Party in 1919,¹⁰⁹ caucus selection has been a fact in Canada, at least in national politics.¹¹⁰ However, in Great Britain, this model was mooted when British Prime Minister Harold Wilson was ill and his colleagues thought that he might die imminently. A contingency plan was hatched whereby if the Prime Minister were to die, the Labour MPs would have caucused

worked well in that instance only because Mr. Peres was the obvious successor to Mr. Rabin, just as Mr. Sauvé was the obvious successor to Mr. Duplessis. Significant strain would be placed on the Israeli system if the cabinet had to find a successor when there no obvious candidate existed. See generally Dodek, *supra* note 6 at 61-62.

¹⁰⁵ It is also the way it operated in practice in the succession after the death of Prime Minister Rabin in Israel. The night of Mr. Rabin's assassination, Mr. Peres' cabinet colleagues selected him as the Acting Prime Minister. Then the Labour Party selected him as their candidate to form a new Government. Then the President called upon Mr. Peres to form a new government and he became Prime Minister, losing the “acting” title. See Dodek, *supra* note 6 at 62-64.

¹⁰⁶ See generally Courtney, *Do Conventions Matter?*, *supra* note 33 at 7 (“The move from caucus to convention introduced and then nurtured a democratic and representational ethic in Canadian politics from which clearly there could be no turning back.”).

¹⁰⁷ On this suggestion, see E. Forsey, “The Courts and the Conventions of the Constitution” *supra* note 5 at 20.

¹⁰⁸ See Courtney, *Selection of National Party Leaders in Canada*, *supra* note 25 at 44-51, 53.

¹⁰⁹ See *ibid.* at 59.

¹¹⁰ This process has been used, as well, in provincial politics, most recently when the government caucus in New Brunswick appointed an interim premier to replace Frank McKenna upon his sudden resignation. See “Interim Premier Vows to Stay Course in New Brunswick” *Times Colonist* (9 October 1997) A13.

and voted until they selected a new leader. The Queen had apparently approved of this plan.¹¹¹

The "Liberal Opposition" model has the virtue of being more democratic than other possibilities such as the Quebec model or Governor General discretion. It has the potential to work well as was demonstrated in the smooth transition of power after the sudden resignation of New Brunswick Premier Frank McKenna in 1997.¹¹² It has the virtue of providing an interim leader with broad-based party support to lead the nation. However, the key problem with this model is that it relies on the serendipity of circumstances: it works well when a consensus exists on an interim leader in an ordinary situation, especially when the party is in opposition.¹¹³ But, this model is untested and unpredictable. Its use might prove to be imprudent if a Prime Minister had to be replaced at a critical juncture.

Party Executive

The next model is the current model for replacement of a party leader who has vacated office for any reason: selection of an interim leader by the party executive. This model appears to have the virtue of speed in selection since, in the modern age of teleconferencing, party executives can caucus quickly. However, several concerns exist. First, this model appears to be best suited for the selection of a caretaker party leader rather than a caretaker Prime Minister. This model suffers some of the same major deficiencies as Governor General discretion: it is undemocratic, unpredictable, uncertain and lacks transparency. Basically, it is a continuation of closed-door backroom politics by party elites. As such, this model offends current notions of how our Constitution should operate. No compelling reason exists to tolerate the continuation of the party elite decision-making in this crucial area, especially when a better solution exists.

Other Proposals

We could envision a model of succession whereby a particular ministry is designated whose office holder would automatically become the interim Prime Minister. We

¹¹¹ See Brazier, *supra* note 31 at 12 n. 23.

¹¹² See "Interim Premier Vows to Stay Course in New Brunswick" *supra* note 110 at A13.

¹¹³ As was the case when the Tory caucus selected Elsie Wayne as interim leader after the resignation of Jean Charest. See G. Fraser, "Conservatives set sights on Reform" *The Globe and Mail* (2 April 1998) A5.

could look to the Minister of Finance or External Affairs to stand in for an absent or vacant premier. However, this proposal does not make sense for Canada. In this country, some cabinet ministries are undoubtedly more important than others, but the personality of the office holder, the minister's relationship with the Prime Minister and the happenstance of politics combine to determine the profile and influence of the department. Canadian Prime Ministers do not tend to step into 24 Sussex Drive from any one particular portfolio, rather they have emerged from various backgrounds.¹¹⁴

It has been suggested in Great Britain that it would be preferable to develop a convention that a cabinet minister who could not possibly be a leadership contender ought to preside over the government during the period between death of the Prime Minister and selection of a successor.¹¹⁵ This selection may make sense in the British context but it raises numerous problems in Canada. First, there is an obvious difficulty in determining with certainty that a particular politician would not be a leadership candidate. Canadian parties tend to recycle their leaders so that selecting a party "elder statesman" who may be a former leader or Prime Minister (such as Joe Clark) may not be a solution. Second, because Canadian political leaders emerge from different posts, it would be impossible to designate a cabinet portfolio whose office holder could not be a leadership candidate. This suggestion would have to rely on the declarations of the potential caretaker Prime Minister excluding himself or herself from a leadership convention.

Finally, the suggestion for a non-partisan caretaker may have a certain virtue in Great Britain where the party leader selection process takes a few weeks; but here that virtue is overshadowed by the uncertainties of determining who this person would be and the greater power that the person would hold as Prime Minister for a period of months, not weeks or days. A self-declared non-contender may still raise

¹¹⁴ Canadian Prime Ministers have held various portfolios before becoming first minister: Lester Pearson (External Affairs); Pierre Trudeau (Parliamentary Secretary, Justice); Joe Clark (no ministerial experience); John Turner (Parliamentary Secretary, Registrar General, Solicitor General, Finance, Justice, Consumer and Corporate Affairs); Brian Mulroney (no ministerial experience); Kim Campbell (Indian Affairs and Northern Development, Justice, Defence); and Jean Chrétien (Indian Affairs and Northern Development, National Revenue, President of the Treasury Board, Industry, Trade and Commerce, Finance, Justice, Deputy Prime Minister, etc.). See *Guide to Canadian Ministries*, *supra* note 7 at 238 (Mr. Chrétien), 239 (Mr. Clark), 292 (Mr. Pearson), 307 (Mr. Trudeau), 308 (Mr. Turner) and *Prime Ministers of Canada*, <<http://cnet.unb.ca/achn/pme/jamcb.htm>> (last visited February 4, 1999); *Premiers Ministres/Prime Ministers* <http://www.rescol.ca/collections/discours/pm/> (last visited February 4, 1999).

¹¹⁵ Bogdanor, *supra* note 24 at 89 (suggesting the Lord Chancellor for such a job).

doubts among her or his colleagues who are angling for the leadership position. Moreover, because of the length of time that this person would hold the reins of power, it is likely that factions within the government party would fight hard to install their man or woman in a position of power during a leadership battle.

The nineteenth-century British constitutional scholar Walter Bagehot proposed the idea that the House of Commons elect the Prime Minister in much the same way as it elects the Speaker. Under Bagehot's proposal, whenever a vacancy occurs in the premiership, the members of the House may nominate one of their members to become the Prime Minister. After an interval of ten days or two weeks, the House would meet and vote until a Prime Minister was selected.¹¹⁶ This proposal could be adapted for use only in crisis and with the interval between nomination and selection truncated so as to minimize any gap. Bagehot's proposal would effect a radical shift from the cabinet, party membership and the backrooms to the floor of the House of Commons. It has the indisputable virtues of openness and taking Parliament seriously. However, Bagehot's proposal is more *a propos* the 19th century than the 21st. In Bagehot's time, party affiliations were much looser. In Canada today, parties usually come to the floor of the House of Commons as a unified front. The debate and decision-making occurs in caucus or cabinet. No party would support a proposed reform that threatened to take power out of the hands of the party and share it with other members of the House. As a practical matter, the selection of a party leader/Prime Minister would be made in caucus, the party whip would impose party discipline and the House of Commons would then confirm the caucus selection. It is inconceivable that a government party would allow the names of more than one of its members to be mooted on the floor of a House vote, because such an occurrence would create the possibility of the election of a Prime Minister from the opposition benches who would not be able to command the support of a majority of the members of the House.

Developing a Canadian Model of Succession

The Canadian Constitution has developed in a very Burkean manner throughout our history, adapting to reflect the needs and changes in Canadian politics. One of the more recent changes in our Constitution has been the development of the office of the Deputy Prime Minister. This office has no standing in law and carries no statutory or formal duties. Basically, the designation of "Deputy Prime Minister" is strictly an honorary title conferred at the discretion of the Prime Minister on a

¹¹⁶ See W. Bagehot, *The English Constitution* (Brighton: Sussex Academic Press, 1997) at 37.

member of the Cabinet. However, since Pierre Trudeau designated Allan MacEachen as his deputy in 1977, the position has become a constant in Canadian politics with the exception of the short-lived Conservative government of 1979-80. The Deputy Prime Minister may hold another portfolio, as did Mr. MacEachen (1977-79, 1980-84)¹¹⁷ under Mr. Trudeau, as Jean Chrétien (1984)¹¹⁸ under Prime Minister Turner, Erik Nielsen (1984-86)¹¹⁹ and Don Mazankowski (1986-93)¹²⁰ under Prime Minister Mulroney, Jean Charest (1993)¹²¹ under Prime Minister Kim Campbell, and Sheila Copps (1993-97)¹²² under Prime Minister Chrétien. Alternatively, the Deputy Prime Minister may be the sole designation of the office holder as has been the case with Herb Gray (1997-) under Prime Minister Chrétien.¹²³ In any case, one of the responsibilities of the Deputy Prime Minister, perhaps the only one that can be identified with certainty, is to act for the Prime Minister in his or her absence. An Order-in-Council sets out a list of ministers to act for the Prime Minister if he or she is absent from the National Capital region or otherwise unable to perform the functions of the office.¹²⁴ As discussed, the Order-in-Council is not operative when

¹¹⁷ Mr. MacEachen was President of the Privy Council from 1977-79 during which time he was also the Government Leader in the House. See Simpson, *supra* note 81 at 10. During 1980-82, he was the Minister of Finance and from 1982-84, he was Secretary of State for External Affairs. See *Guide to Canadian Ministries*, *supra* note 7 at 203-04; E. Lumley, ed., *Canadian Who's Who 1998* (Toronto: University of Toronto Press, 1998) at 774.

¹¹⁸ Mr. Chrétien was also Minister of State for External Affairs in Mr. Turner's short-lived government. See National Archives of Canada, *Prime Ministers Biographical Notes: Chretien*, <<http://www.archives.ca/www/com/english/pm/Chretien.html>> (last visited February 4, 1999); Lumley, *supra* note 116 at 225.

¹¹⁹ During this time, Mr. Nielsen served as President of the Privy Council, Defence Minister, and acting Minister of Fisheries. See Nielsen, *supra* note 81 at 292; Lumley, *supra* note 116 at 930.

¹²⁰ See Lumley, *supra* note 116.

¹²¹ Mr. Charest was also the Minister of Industry, Science and Technology and Minister of Consumer and Corporate Affairs in the short-lived Ministry of Kim Campbell. See *ibid.* at 236; H. Branswell, "PM Takes Pains to Please Charest" *Winnipeg Free Press* (26 June 1993).

¹²² Ms. Copps served as Environment Minister (1993-96) and then Heritage Minister (1996-97) while she was Deputy Prime Minister. See "Chretien's Cabinet" *Winnipeg Free Press* (5 November 1993); *The Globe and Mail* (26 January 1996) A1; Lumley, *supra* note 116 at 260.

¹²³ See Lumley, *supra* note 116. Letter from Deputy Prime Minister Herb Gray to Adam Dodek (4 December 1998).

¹²⁴ See e.g. P.C. 1998-2065 (November 23, 1998); P.C. 1997-812 (June 11, 1997); P.C. 1996-1544 (October 4, 1996); and P.C. 1996-126 (January 25, 1996).

the Prime Minister dies or suddenly vacates the office and the *acting prime minister* cannot continue as an *interim prime minister*.¹²⁵

However, the foundation for the establishment of a convention that the Deputy Prime Minister should accede to the premiership upon a sudden vacancy in that office has already been laid with the allocation of responsibility to the deputy in the Prime Minister's absence. Since its inception in 1977, the Deputy Prime Minister has become a mainstay in Canadian governments. Moreover, this model has operated with relative smoothness in Australia with the deaths of Prime Ministers in 1939, 1945 and 1967.¹²⁶ In each case, the Deputy Prime Minister became the interim Prime Minister until the party selected a new leader.¹²⁷ The Deputy Prime Minister is well suited to assume the temporary stewardship of the party and the country until a successor is chosen. Concerns raised that the deputy may not be able to command the support that the deceased leader did,¹²⁸ will be ironed out at a leadership convention. The deputy will have legitimacy by virtue of being the choice of the former Prime Minister. In the unlikely absence of a Deputy Prime Minister,¹²⁹ the Governor General should turn to the minister next in order of precedence after the deceased Prime Minister¹³⁰ on the grounds that the order of precedence is essentially a ranking of the cabinet made by the Prime Minister. While this suggestion has been criticized for introducing "a needless rigidity into a constitutional practice which now possesses a commendable flexibility,"¹³¹ it offers a predictable and temporary

¹²⁵ This is because the government dies with the Prime Minister. See *supra* note 13 and accompanying text.

¹²⁶ See Winterton, *supra* note 6 at 38-40; Bogdanor, *supra* note 24 at 85.

¹²⁷ What differentiates the Australian situation from the Canadian, is that in two of the above cases, the government was composed of a coalition of parties with the senior partner holding the premiership and the junior partner the deputy premiership. It has been suggested that it is not suitable for the junior partner in a coalition to hold the premiership even on a temporary basis. See Winterton, *supra* note 6 at 38-40 (suggesting that the deputy leader of the senior partner in the coalition is a better choice). As Canada has not seen coalition governments in several decades, this problem can be bypassed for now.

¹²⁸ See Mackinnon, *supra* note 75 at 126.

¹²⁹ Since the position was inaugurated in 1977, the only time a Ministry was without a Deputy Prime Minister was during the brief tenure of Prime Minister Clark from 1979-80. I would submit that the position is becoming more firmly embedded in the Canadian Constitution as time passes, as evidenced by the fact that Mr. Gray holds no other portfolios other than the deputy premiership.

¹³⁰ This suggestion was made by Professor McWhinney two decades before the appointment of the first Deputy Prime Minister in Canada. See E. McWhinney, "Comment" *supra* note 37 at 95.

¹³¹ J.R. Mallory, "Comment" (1957) 35 Can. Bar. Rev. 242 at 242.

solution to a potentially volatile situation while the governing party selects a true successor.

Turning to practical matters, what must be done in order to implement this proposal? The groundwork has been laid with the established convention that the Governor General will only select the party leader to become Prime Minister. The Canadian problem exists solely because of the possibility of a gap in party leadership during a critical moment. Thus, the responsibility for the solution to this quandary lies with the parties, not with the Privy Council Office. The parties could address the situation in one of two ways. The most simple and direct manner of plugging the hole would be for the parties to amend their rules to state that if a party leader who is Prime Minister vacates office before a new leader is chosen, the Deputy Prime Minister becomes interim leader of the party (and therefore interim Prime Minister) until a new leader is selected. Alternatively, the parties could decide to institutionalize the position of deputy party leader in their constitutions and appoint this person to succeed to the party leadership on an interim basis until a new leader is selected. Although some parties are moving in the direction of institutionalizing the position of deputy leaders, the position is too new and untested to provide a solution to our problem at present.

This simple proposal will ensure that the country is not left without a captain for any period. Until the parties implement such changes, the Governor General's office should issue a public statement as to what course of action it would take if a sudden vacancy should occur in the premiership. It should state without hesitation that it will ask the Deputy Prime Minister to assume caretaker responsibility for the government as an interim Prime Minister until the party selects a new leader. Such a move would put the ball squarely in the parties' court. Under existing party rules, if the Governor General would ask the Deputy Prime Minister to lead the country on an interim basis, the party executives would have the option of either confirming the Deputy Prime Minister in this role or installing a different person as the interim Prime Minister until the party electoral machinery produced a new leader and Prime Minister.

Conclusion

It could happen. In fact, it probably will. Sometime this century a Canadian Prime Minister may die in office and politicians and pundits will scramble because no one will have a clue what to do. Do we really want to speculate on what would happen if the Prime Minister were to expire during the next Quebec referendum? We simply

cannot afford to tolerate the current state of uncertainty that surrounds the replacement of a deceased Prime Minister.

As we head into the next millennium, we as legal academics should broaden our understanding of constitutional law and recognize that the Prime Minister is now at the heart of our Constitution. Succession is a constitutional issue, an important one. It is frightening to realize that no one — not the Governor General, not the Privy Council Office, not the political parties and certainly not members of the academy — can state for certain what would happen were our Prime Minister to die in office. This uncertainty is intolerable because it is curable. The position of the Deputy Prime Minister has matured under our Constitution and it is ready and able to assume the responsibility of keeping the fire burning in 24 Sussex Drive while the governing party chooses a new leader for itself and for the nation.