Letter to the Editor

Sir:

My Guest Editorial on the future of the Crown in Canada (Autumn 2005) endeavoured to clear away some unnecessary confusions and occasional emotion attending consideration of reform and modernization of our constitutional institutions and processes in their distinctively Canadian aspects today. It is surely not creeping republicanism ("one step away from becoming a republic" as Mr. Guthrie comments in his letter in the Winter issue), however, to suggest now that it would be helpful to everyone – in Ottawa and also in London, if the Canadian Prime Minister, who has effectively chosen our Governor General for the last seventy years and has chosen only Canadian citizens for that office for the last fifty-three years, should, from now on, accept the full political responsibility for those choices, in the bureaucratic formalities as well as in the fact.

The suggestion is not new. It came to notice in 1975 immediately after the Whitlam-Kerr conflict of that year in Australia, when the politically unseemly and embarrassing possibility always existed that the British Government and the Queen might be called upon to intervene in a purely domestic Australian, partisan political conflict and to dismiss a Governor General at the request of a Prime Minister trying to forestall a preemptive political strike against him by the same Governor General.

It was discussed with British officials in London at the time the Trudeau constitutional "Patriation" package, which later became the *Constitution Act of 1982*, was before the British Government and the British Parliament. Everyone agreed there was an awkward gap in the constitutional system which might lead to even more awkward inter-governmental confrontations or exchanges at some future occasion. It might conceivably have arisen in the Canadian minority government scenario of 2004-5, though the main political players here at all times demonstrated enough common-sense and civility and enough respect for the political and constitutional "rules of the game" to ensure its remaining purely academic as an issue. A change could be made, easily enough, by having the Canadian Prime Minister's choice of the Canadian Governor General promulgated by Order-in-Council in Canada. One may confidently suggest that no one in Whitehall, and least of all the Queen, would lose any sleep over it. (It has also been suggested that it would be more in line with democratic constitutionalism to have the Canadian Prime Minister's choice of the Governor General submitted to ratification vote of our House of Commons – perhaps for a two-thirds majority vote to ensure an all-Party consensus).

An interesting recent case in Canada demonstrated, again, how much elemental principles of comity and goodwill in our relations with Great Britain have come to be accepted as necessary modernising forces, not merely at the Cabinet level, but also by other coordinate institutions of government. The case involved the ancient *Act of Settlement* enacted by the Parliament at Westminster in 1701 as a British statute applying not merely to Great Britain itself but equally to the British colonial territories overseas (including present-day Canada). Is it, or should it be, Canadian law today? Reflecting the extreme religious passions and intolerances of its age, immediately after the "Glorious Revolution" of 1688, the *Act of Settlement* anathematises the Roman Catholic church and religion in terms clearly in conflict with the "equality" clauses of the *Canadian Charter of Rights* of 1982. It specifically disqualifies from the succession to the British throne any persons who "shall be reconciled to, or shall hold communion with, the See or Church of Rome, and shall profess the Popish religion, or shall marry a Papist." Asked to rule on the issue of the *Act of Settlement's* constitutionality in Canada today, an Ontario Superior Court judge, responding to a legal complaint from a Canadian citizen rejected the legal challenge though on somewhat technical grounds. These involved the territorial limits of application of the Canadian Charter's "equality" stipulation – that is, as not extending to Great Britain. It is an example of a constitutionally wise and prudent judge consciously and deliberately choosing not to rule on the substance of a law enacted, in some earlier, bygone age, by what is now today a sovereign, independent state in relation to Canada and one with which, for long-time historical reasons, we maintain the warmest of relations. The comity observed by sovereign states with each other, and International Law itself, would enjoin no less, however objectionable that ancient British Imperial law might appear to be to our contemporary multi-cultural Canada.

It may sensibly be left to the British government and the British Parliament to "correct" injustices or absurdities in their ancient laws, if the occasion or need should arise in a concrete case. British constitutional and ecclesiastical lawyers who have discussed the Ontario court ruling in recent months feel that such an occasion will be provided, if not under British law then under the new European law to which Great Britain is now also subject. Is that not the best way to handle issues such as this in the future, without any need for regrets or recriminations, or backward glances and criticisms, as to our rich constitutional-legal legacy from Great Britain and the Empire?

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