The King's Two Bodies and the Canadian Office of the Queen

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In Motard c Procureur général du Canada, *2019 QCCA 1826, the Court of Appeal of Quebec found that rules regarding the succession to the throne are not part of Canada's Constitution and do not pertain to the office of the Queen under section 41(a) of* The Constitution Act, 1982.[1] *The changes to the rules of royal succession effectuated by the United Kingdom Parliament and the Canadian Parliament's assent to the changes did not, therefore, amount to a constitutional amendment for the Court. The Supreme Court has denied permission to appeal the Court of Appeal's decision in* Motard *and the latter accordingly stands as authority on the issue. The result is a discrepancy in the case law on section 41 of the* Constitution Act, 1982. *While the Court of Appeal drew a distinction in* Motard *between the office of the Queen and the rules of eligibility to accede to the throne, the Supreme Court reasoned in the* Supreme Court Act Reference *that both the existence of the Court itself and the conditions of eligibility to accede to its bench fell under the "composition of the Court" in section 41(d) of the Act.*

In this article, it is suggested that a legal-historical constitutional approach to the legal doctrine of the king's two bodies can shed light on the distinction between the rules of succession to the throne and the office of kingship itself. The doctrine of the king's two bodies can support and complement the Court of Appeal of Quebec's underdeveloped conclusion that rules of succession do not pertain to the office of the Queen.

Dans sa décision Motard c. Procureur général du Canada, *2019 QCCA 1826, la Cour d'appel du Québec a tranché que les règles entourant la succession au trône ne font pas partie de la Constitution du Canada et qu'elles ne font pas partie de la charge de la Reine au sens de l'article 41(a) de la* Loi constitutionnelle de 1982. *En conséquence, les changements apportés au Royaume-Uni aux règles concernant la succession royale et le consentement du Parlement canadien à ces changements n'ont pas eu pour effet, aux yeux de la Cour, de modifier la constitution. La Cour suprême du Canada ayant refusé d'autoriser l'appel de la décision de la Cour d'appel dans* Motard, *celle-ci tient donc lieu de précédent sur cette question. Le résultat en est que la jurisprudence sur l'article 41 de la* Loi constitutionnelle de 1982 *est incohérente. Tandis que la Cour d'appel dans* Motard *fait une distinction entre la charge de la Reine et les règles d'éligibilité pour l'accession au trône, la Cour suprême du Canada, dans le* Renvoi sur la Cour suprême, *suggère que tant l'existence de la Cour que les conditions d'éligibilité de ses membres font partie de la « composition de la Cour » au sens de l'article 41(d) de la Loi.*

Cet article suggère qu'une approche constitutionnelle juridico-historique de la doctrine des deux corps du roi permet de jeter un nouvel éclairage sur la distinction entre les règles de succession au trône et la charge royale elle-même. La doctrine des deux corps du roi peut soutenir et compléter les conclusions sous-développées de la Cour d'appel du Québec à l'effet que les règles de succession au trône ne font pas partie de la charge de la Reine.

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1 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

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1. The Constitutional Challenge to the *Succession to the Throne Act, 2013* and the Departure from Existing Case Law

Following a meeting of members of the Commonwealth in Perth in 2011, the "Succession to the Crown Bill" was presented to the United Kingdom Parliament in 2012 to amend the rules of royal succession. The changes included the repeal of the rule of primogeniture in favour of male heirs and the repeal of the prohibition in relation to marriage to persons of the Catholic faith.[2] The United Kingdom, in accordance with the preamble to the *Statute of Westminster, 1931*,[3] asked for Canada's assent to the changes to the rules of succession.[4] Canada's Parliament enacted the *Succession to the Throne Act, 2013*,[5] which was assented to in March 2013. Following the Canadian Parliament's adoption of the *Succession to the Throne Act, 2013*, the United Kingdom Parliament adopted the *Succession to the Crown Act*.[6] A challenge to the constitutionality of the *Succession to the Throne Act, 2013* ensued before the Superior Court and the Court of Appeal of Quebec in *Motard*.[7] The plaintiffs argued that the *Succession to the Throne Act* constituted an improper amendment to the "office of the Queen," contrary to section 41(a) of the *Constitution Act, 1982*.[8] Section 41(a) requires the assent of the federal Parliament and all ten provincial legislatures to amend constitutional laws concerning the office of the Queen. If the plaintiffs were right, a change to the rules of succession would require the country's politicians to amend the Constitution using the section 41 unanimity formula, a prospect still overshadowed by the failures of the Meech Lake and Charlottetown Accords.

2 With regard to the latter, see the Bill of Rights 1688, or *An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown* (UK), 1 W & M, sess 2, c 2.

3 (UK) 22 & 23 Geo V, c 4. The Preamble reads in its relevant part: "And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom". Canada remains a member of Commonwealth.

4 See *Motard c Procureur général du Canada*, 2019 QCCA 1826 [*Motard* QCCA], where the Court of Appeal refers to the constitutional convention enshrined in the Preamble at paras 8, 70.

5 SC 2013, c 6.

6 (UK) 2013, c 20.

7 *Motard c Canada (Procureur général)*, 2016 QCCS 588 [*Motard* QCCS]; *Motard* QCCA, *supra* note 4.

8 *Constitution Act, 1982*, *supra* note 1.

In the Fall of 2019, the Court of Appeal of Quebec rendered its decision in *Motard*, which now stands as authority on the matter, the Supreme Court having dismissed the application for permission to appeal in April 2020.[9] The first issue put to the Quebec Court of Appeal — and the one to which the Court's reasons pertain the most — was whether the rules of royal succession are part of the Constitution of Canada. The Court of Appeal looked to the Supreme Court of Canada's opinions in *New Brunswick Broadcasting Co*,[10] the *Secession Reference*,[11] and the *Remuneration of the Provincial Court Judges Reference*,[12] to conclude that the provisions of the *Bill of Rights, 1689* and of the *Act of Settlement, 1701* — which set out the rules of succession — were not included in the Canadian Constitution. It is only the underlying principles of those two pieces of legislation, the Court said, which are part of the Canadian Constitution. Like the Superior Court before it, the Quebec Court of Appeal agreed with constitutional experts Mark D Walters, Benoît Pelletier, and the late Peter Hogg that the principle of symmetry — found in both the preamble and section 9 of the *Constitution Act, 1867* — applied in Canada such that whoever is King or Queen of the United Kingdom is also King or Queen of Canada.[13]

The Quebec courts' reasoning on the symmetry principle marks a departure from previous case law elsewhere in Canada. The Ontario courts had implied that the principle of symmetry applied to the rules of succession in Canada so that they were the same as the rules of succession in the United Kingdom.[14] To the Quebec courts, by contrast, the rules of succession are solely British: there are no Canadian rules of succession. The principle of symmetry applies only with regard to the identity of the sovereign: the Queen of the United Kingdom is also the Queen of Canada.

The Court of Appeal further opined in *Motard* that the first-instance judge did not err in concluding that the rules of succession to the throne were not incorporated into Canadian law upon Canada's assent to Edward VIII's abdica-

9 *Geneviève Motard, et a. v Procureur général du Canada*, 2020 38986 (SCC).

10 *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLII 153 (SCC), [1993] 1 SCR 319.

11 *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217.

12 *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, 1997 CanLII 317 (SCC), [1997] 3 SCR 3.

13 *Motard* QCCA, *supra* note 4 at para 47.

14 *O'Donohue v Canada*, 2005 CanLII 6369 (ON CA), [2005] OJ No 965 (CA), where the Court endorsed the reasons given by Rouleau J. (as he then was) in *O'Donohue v Canada*, 2003 CanLII 41404 (ON SC), [2003] OJ No 2764 (QL) at para 27; Rouleau J. had opined, in *obiter*, that "it is axiomatic that the rules of succession for the monarchy must be shared and be in symmetry with those of the United Kingdom and other Commonwealth countries".

tion by way of legislation in 1937.[15] In this regard, the Court of Appeal accepted the Superior Court's findings that the Queen's Privy Council for Canada had assented to the abdication by Order in Council in December 1936, pursuant to the preamble of the *Statute of Westminster*.[16] The adoption of a law by the Canadian Parliament in 1937 confirmed Canada's assent.[17] To the Court of Appeal, the reference to section 4 of the *Statute of Westminster* in the 1937 *Act* did not amount to a constitutional amendment incorporating the rules of succession into Canadian law.[18] The 1937 *Act* did not allude to the rules of succession or to their incorporation into Canadian law. Moreover, the Court of Appeal found — accepting Professor Walters' argument[19] — that the rules of succession themselves remained unchanged when Edward VIII abdicated. The rules of succession laid down in the *Act of Settlement* were in fact applied as if Edward VIII had died, with the crown passing on to his younger brother in accordance with the rules set out in the *Act*. The need for Canada to give its assent to the ascension of George VI to the throne was, therefore, superfluous.[20]

The second issue put to the Court of Appeal was whether the changes to the rules of succession amounted to a constitutional amendment. Indeed, section 41(a) of the *Constitution Act, 1982* requires the assent of Parliament and the legislative assemblies of all the provinces for a constitutional amendment to the "office of the Queen" to take place. The Court of Appeal agreed with the Superior Court that "the office of the Queen" in section 41(a) pertains to the powers, status, and role given to the monarch.[21] For the Court of Appeal, as for the Superior Court, the rules of succession to the throne have no bearing whatsoever on such powers, status, and role, and they accordingly do not affect "the office of the Queen."[22] Changes to the rules of succession do not, therefore, amount to amending the Constitution. The Court of Appeal also found that the rules of succession — which allow us to identify the next monarch — are "procedural."[23] These rules, being procedural in nature and allowing us merely

15 In the United Kingdom, the abdication was passed into law by Parliament enacting, in December 1936, *His Majesty's Declaration of Abdication Act 1936* (UK), 1 Edw VIII & Geo VI, c 3. The subsequent Canadian assenting act was enacted in 1937.

16 The Order in Council referred to both the Preamble and s 4 of the *Statute of Westminster 1931*, *supra* note 3: *Motard* QCCA, *supra* note 4 at para 75.

17 *Motard* QCCS, *supra* note 7 at para 144; *Motard* QCCA, *supra* note 4 at para 77.

18 *Motard* QCCA, *supra* note 4 at paras 80-81, 83-86.

19 Mark D Walters, "Succession to the Throne and the Architecture of the Constitution of Canada" in Michel Bédard & Philippe Lagassé, eds, *The Crown and Parliament* (Montréal: Éditions Yvon Blais, 2015) at 278 [Bédard & Lagassé].

20 *Motard* QCCA, *supra* note 4 at paras 86-89.

21 *Motard* QCCS, *supra* note 7 at para 150; *Ibid* at paras 91-92.

22 *Motard* QCCS, *ibid* at para 150; *Motard* QCCA *ibid* at paras 91-92.

23 *Motard* QCCA, *ibid* at para 92.

to identify the next sovereign, are consequently distinguishable from the office of the Queen understood in terms of the monarch's role, powers, and status.

The Quebec courts' distinction between the rules of succession and the office of the Queen itself may appear surprising in light of the Supreme Court of Canada's ruling in the *Supreme Court Act Reference*. In the *Reference*, the Court found that conditions of eligibility to accede to the bench of the highest court in Canada *as well as* the very existence of the Court all formed part of the "composition of the Court" for the purposes of the amending procedure under section 41(d) of the *Constitution Act, 1982*.[24] In short, the Supreme Court of Canada assimilated the existence of the Court with conditions of eligibility to accede to its bench, and treated them as both falling under the notion of "composition of the Court." By contrast, the Court of Appeal in *Motard* expressly rejected the assimilation of the conditions of eligibility to accede the throne with the "office of the Queen" itself.

In short, in the *Supreme Court Act Reference*, the Supreme Court treated the abolition of the Court and its composition as inseparable. The Supreme Court's conflation of the eligibility criteria to occupy one of the nine available seats on the bench with the existence of the institution itself runs counter to the distinction made by the Quebec Court of Appeal in *Motard* between the rules of succession to the throne — which set out the eligibility criteria to become the next monarch — and the office of the monarch itself. Aside from its potential anchorage in the textual difference between section 41(a) and section 41(d) of the *Constitution Act, 1982*, the discrepancy between the Supreme Court's reasons in the *Supreme Court Act Reference* and the Quebec Court of Appeal's reasons in *Motard* can also find support, it will now be argued, in the constitutional doctrine of the king's two bodies.

2. A Legal Historical Constitutional Approach: The King's Two Bodies and Royal Succession in Canada

The argument presented in this article does not pertain to the first issue identified by the Court of Appeal in *Motard* as to whether previous historical and legal events — such as the abdication of Edward VIII — militate or not for the conclusion that Canada had incorporated into Canadian constitutional law the British rules of royal succession to the throne.[25] The argument here

24 *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21 at para 91.

25 On the issue of Edward VIII's abdication and its impact in Canada as to the rules of succession and the notion of crown, see e.g. Philippe Lagassé & James WJ Bowden, "Royal Succession and the

addresses the second issue identified by the Superior Court and the Court of Appeal — whether the rules of succession are part of the "office of the Queen" under section 41(a) of the *Constitution Act, 1982*. In light of the Quebec courts' underdeveloped reasoning on this issue, their departure from recent case law on analogous issues, and the fact that the Court of Appeal's decision now stands as authority, a historical constitutional approach is adopted in this paper to, firstly, complement the Quebec courts' reasoning and, secondly, to demonstrate that that reasoning finds support in the history and evolution of English constitutional ideas.

JWF Allison developed an English historical constitutional approach in the *English Historical Constitution* and defined it as one that looks to continuity of constitutional arrangements from the past — either distant or recent — into the present as well as to the change inherent to those arrangements.[26] Following the historical constitutional approach developed by Allison, my argument is that the distinction between rules (and changes) pertaining to the office of the Queen on the one hand, and rules (and changes) pertaining to the succession to the throne on the other hand, can be justified in light of the constitutional history of the legal doctrine of the king's two bodies.[27]

The doctrine of the king's two bodies features in Plowden's reports of cases in the 16th century, most famously in the case of the *Dutchy of Lancaster*[28] and in *Willion v Berkeley*.[29] Drawing on this history, it will be argued that the doctrine of the two bodies of the king is intertwined in the history of constitutional thinking with the concepts of the king as a natural person and of the office of kingship as an undying office of one person — a corporation sole. That the office of kingship or queenship and the question of which body natural should next occupy that office are distinguishable supports the Quebec courts' view that changes relating to the rules of succession do not pertain to changes to "the office of the Queen" under the Canadian Constitution. Following a historical constitutional approach, it will be demonstrated in this section that duality in conceiving of the king, especially in relation to succession to the throne, is a construct that has known significant continuity in English constitutional

Canadian Crown as a Corporation Sole: A Critique of Canada's Succession to the Throne Act, 2013" (2014) 23:1 Const Forum Const 17 [Lagassé & Bowden]; Bédard & Lagassé, *supra* note 19.

26 JWF Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge: Cambridge University Press, 2007) at 16.

27 The doctrine should have been known as the "Queen's two bodies", as it was developed under Elizabeth I's reign: Marie Axton, *The Queen's Two Bodies: Drama and the Elizabethan Succession* (London: Royal Historical Society, 1977).

28 *The Case of the Dutchy of Lancaster*, 1 Plowden 212 [*Dutchy of Lancaster*].

29 *Willion v Berkley*, 1 Plowden 223.

legal thought since Plowden wrote his reports in the 16th century. The Quebec Court of Appeal's reasons in *Motard* are accordingly just the latest chapter in a tome which jurists have been composing for centuries.

2.1. The King's Two Bodies: Origins and Evolution in Legal Thinking

In the Middle Ages, strong theological influences on legal thinking led to the notion of the realm as a mystical body — a body corporate with the king as the head and his subjects as the members.[30] The recital of Magna Carta, for instance, has been referred to as evidence of this characteristic way in which society was conceived as a whole body: in the long list introducing the text, the king is named first, followed by members of the aristocracy and of the clergy, followed by the people.[31] Another example of the biological metaphor of the realm as a human body can be found in the medieval *Pleas of the Crown*. The corruption or crime of one of subject was perceived as corruption of an organ or member corrupting the whole body.[32] The medieval organic conception of the king as the head of the body politic — the realm as a body corporate — could still be found in the early Tudor era.[33] The medieval concept of society as a body natural can be found, for instance, in a 1521 *dictum* in *R v Buckingham* to the effect that the body politic was like a natural body, kept together by the law, and that the king and the realm were together a body politic.[34] In the *Act of Restraint of Appeals* to Rome, enacted in 1533 in the context of Henry

30 Ernst H Kantorowicz, *The King's Two Bodies, A Study in Medieval Political Theology*, revised ed (Princeton: Princeton University Press, 2016) at 363; Gaines Post, *Studies in Medieval Legal Thought: Public Law and the State, 1100-1322* (Princeton: Princeton University Press, 1964) at 318-19; John Fortescue, *On the Laws and Governance of England*, Shelley Lockwood, ed (Cambridge: Cambridge University Press, 1997) at xxvi "Introduction"; Allison, *supra* note 26 at 47-50. The following paragraphs expand on Marie-France Fortin, "The King's Two Bodies and the Crown a Corporation Sole: Historical Dualities in English Legal Thinking" (2021) History of European Ideas (Taylor & Francis Online), DOI: <10.1080/01916599.2021.1914934>, where I discuss the doctrine of the king's two bodies and its relationship with the concept of crown.

31 See Denis Baranger, *Écrire la constitution non écrite: une introduction au droit politique britannique* (Paris: Presses universitaires de France, 2008) at 54.

32 Allison, *supra* note 26 at 50-51, 55.

33 See Fortin, *supra* note 30. The terms "body politic" first appeared in the Year Books in the year 1478, where they were contrasted with bodies natural. The notion of body politic did not then refer to the realm as a body politic but to specific instances, such as master and fellows of a college or an abbot and convent of an abbey: David J Seipp, "Formalism and Realism in Fifteenth Century English Law: Bodies Corporate and Bodies Natural" in Paul Brand & Joshua Getzler, eds, *Judges Judging in the History of Common Law Civil Law: From Antiquity to Modern Times* (Cambridge: Cambridge University Press, 2012) 37 at 39.

34 See *R v Buckingham*, Port's Notebook, Notes Taken in the Inner Temple and Westminster Hall, note 75 in John Port, *The Notebook of Sir John Port*, ed by JH Baker, The Publications of the Selden Society, vol 102 (London: Selden Society, 1986) at 125.

VIII's reign and the break of England from the Catholic church, it is also the medieval notion of the realm as a body politic of many with the king as the head which can be found.[35] The king as the head of the "body politic" — a corporation aggregate[36] — was still referred to in 1534.[37] After Henry VIII's death and that of his son and daughter (Edward VI and Mary I), Elizabeth I ascended to the throne in 1558. It was during her reign, from 1558 to 1603, that lawyers and judges developed the legal doctrine of the king's two bodies: a body natural and a body politic.[38] To Kantorowicz, who wrote the seminal eponymous study *The King's Two Bodies*, and to Axton, who wrote *The Queen's Two Bodies*, the English, Tudor, legal doctrine of the king's two bodies had no precedent in legal thinking.[39]

An early appearance of an important feature of the English legal doctrine of the king's two bodies — the perfection of the king's body politic — can indeed be traced back to 1485 and the beginning of the reign of Henry VII, the first Tudor king. Prior to becoming king, Henry Tudor had been subjected to an act of attainder by Richard III. After Richard III's fall and the end of the War of the Roses, the question arose whether Henry Tudor, now king Henry VII, was unable to lawfully occupy his functions in Parliament because of the attainder passed during Richard III's reign. Judges found that all previous disabilities were *de facto* voided by Henry VII taking on the royal dignity and becoming king.[40] No act of reversal was needed to repeal the act of attainder. The same was not true, however, of Henry VII's future wife, Elizabeth of York, even though he she was also the daughter of a previous king. Richard III's act

35 "[T]his realm of England is an empire … governed by one supreme head and king having the dignity and royal estate of the imperial crown of the same, unto whom a body politic, compact of all sorts and degrees of people divided in terms and by names of spiritualty and temporalty […]": Paul L Hughes & Robert F Fries, eds, *Crown and Parliament in Tudor-Stuart England: A Documentary Constitutional History, 1485-1714* (New York: GP Putnam's Sons, 1959) at 39.

36 (Trin 1519 – Mich 1520) *King's College, Cambridge v Hekker* (Common Pleas) and (Hil 1522) for the decision in error (King's Bench), in JH Baker, ed, *Year books of Henry VIII: 12-14 Henry VIII, 1520-1523*, The Publications of the Selden Society, vol 119 (London: Selden Society, 2002) at 69, 71-2 (Broke J), 101 (Fyneux CJ).

37 Anonymous note on a case in the Common Pleas, (Mich 1534) in JH Baker, ed, *Reports of Cases from the Time of King Henry VIII*, The Publications of the Selden Society, vol 121 (London: Selden Society, 2004) at 431. This paragraph draws on Marie-France Fortin, *A Historical Constitutional Approach to The King Can Do No Wrong: Revisiting Crown Liability* (Doctoral thesis) (2019) University of Cambridge, DOI: <10.17863/CAM.57613> at 43-44 .

38 The ubiquitous notion throughout Europe of the realm as a body politic has been said to have no connection to the English doctrine of the king's two bodies, which was developed later in the 16th century: Axton, *supra* note 27 at 12.

39 Kantorowicz, *supra* note 30 at 447; Axton, *supra* note 27 at 12. See also Baranger, *supra* note 31 at 197-98.

40 Fortin, *supra* note 37 at 42-45. See (1485) YB (Mich), 1 Hen VII, f.4b, pl.5.

to bastardize the children of Edward IV — including his daughter, Elizabeth of York — had to be reversed by another Act of Parliament.[41] The perfecting effect of the royal dignity did not extend to another person, only to the king himself.

The doctrine of the king's two bodies was later developed by Plowden in his reports of cases from the 16th century, and aspects of the doctrine can be found in the case of *Hill v Grange* of 1555. The issues engendered by the fact that the king's title to the Duchy of Lancaster was separate from his title to the crown[42] culminated in the cases of the *Dutchy of Lancaster* in 1561 and *Willion v Berkley* in 1562, where the doctrine of the king's two bodies was more fully fleshed out. The legal doctrine was then applied again in *Wroth's Case* in 1573.[43]

The doctrine of the king's two bodies made its first appearance in Plowden's report of *Hill v Grange*, dating to 1555. We learn that the "dignity" — the of-

41 (1486) YB (Hil) 1 Hen VII pl.1, f.5b.

42 Prior to the 16th century, the accession to the English throne of Henry Bolingbroke, Duke of Lancaster, to the English throne as Henry IV signalled an early duality in relation to the king's possessions. The Lancastrian kings considered the Duchy of Lancaster to be their own personal possession, distinct from possessions attaching to the Crown: Kantorowicz, *supra* note 30 at 404-05; Helen Castor, *The King, the Crown, and the Duchy of Lancaster: Public Authority and Private Power, 1399-1461* (Oxford: Oxford University Press, 2000). From Henry IV's reign, the issue of the king's right to the Duchy of Lancaster and his dual title as Duke of Lancaster and King of England pervaded the issue of the kings of England's accession to the throne for almost a hundred years, including through the dynastic War of the Roses. It is in the context of the separation of the king's entitlement to the Duchy of Lancaster from his entitlement to the crown that courts gradually attempted to reconcile that factual separation with legal thinking. The king's possessions as Duke and as King were separate, but the king as King and the king as Duke of Lancaster were treated as the same person. Early cases from the 15th century, caused by the separation of the lands and possessions of the Duchy of Lancaster from the crown, are evidence of the first struggles which English jurists faced in attempting to reconcile the king's position both as Duke of Lancaster and as King of England: YB (1405) (Hil) 6 Hen IV, pl.2, f.4b (of 5 Hen IV); *R v Lancaster*, YB (1409) (Hil) 10 Hen IV, pl.5, f.7a; Easter term, 3 Hen 6 Rot. 112; YB (1467) (Pasch) 7 Edw 4, pl.17, f.8a; see also YB (1467) (Trin) 7 Edw IV, pl.2, f.10b. The merger of the person of the Duke with that of the King is a theme that became important in the elaboration of the theory of the king's two bodies in the second half of the 16th century and is recounted by the court in *Dutchy of Lancaster*, *supra* note 28 at 214.

43 Plowden's reports of the cases, especially *Dutchy of Lancaster* and *Willion v Berkley*, may have been influenced by his private views on the succession: Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England, 1450-1642* (Cambridge: Cambridge University Press, 2006) at 109. In addition to writing his reports of cases, Plowden is known for having written a treatise on royal succession. Plowden, a Catholic subject who hoped for the Catholic Scottish Queen Mary of Scots to ascend the English throne occupied by her Protestant cousin Elizabeth I, devised the doctrine of the king's two bodies to support Mary's claim to the throne in his treatise. The doctrine of the king's two bodies allowed Plowden and other supporters of Mary Queen of Scots to bolster her claim to the English throne, as the perfecting effect of the body politic takes away the "defect" of having been born abroad — as was Mary Queen of Scots, born in France.

fice of kingship[44] — is a function that never dies, whereas the king's "body natural" does:

> And King is a name of continuance, which shall always endure as the head and governor of the people (as the law presumes) as long as the people continue … and in this name the King never dies. And therefore the death of him who is the King is in law called the demise of the King, and not the death of the King, because thereby he demises the kingdom to another, and lets another enjoy the function, so that the dignity always continues.[45]

The first sentence of the excerpt above from *Hill v Grange* is evidence that the medieval understanding of the king as the head of the whole realm conceived of as a mystical body corporate was still common among lawyers of the 16th century, even as the distinction between the body natural of the king and the enduring office of the king was being developed. The attribute of immortality was also clearly ascribed to the dignity — the office of the king — by opposition to the king's body natural in *Hill v Grange*: "[the king] as King never dies, although his natural body dies, but the King, in which name it has relation to him, does ever continue."[46] *Hill v Grange* as an early case on the doctrine of the king's two bodies is relevant for the purposes of understanding the limits of the conjunction of the two bodies. Upon the demise of the crown following the king's death or abdication, the dignity — the office of kingship — is instantly removed from the body natural of the previous monarch and vests instantaneously in the next monarch's body natural. There was no mention in *Hill v Grange* of the "body politic" as opposed to the body natural, but the dignity was conceived of as separate from the king's body natural.

The doctrine of the king's two bodies was then more fully explained in the 1561 case of the *Dutchy of Lancaster*. The Court's ruling in *Dutchy of Lancaster* is to the effect that the king cannot avoid his legal obligations. The Court decided in that case that Elizabeth I could not use the infancy of her brother, Edward VI, to avoid being bound by a lease made by the latter when he was not yet of age.[47]

44 There was a distinction in the Middle Ages between dignity and office but the two largely coincided, see Kantorowicz, *supra* note 30 at 384-85.

45 *Hill v Grange* (CP 1556), 1 Plowd 164, at 173, 176.

46 *Ibid*.

47 *Dutchy of Lancaster*, *supra* note 28 at 217: "So that neither the common law, nor the charter (although it be by authority of Parliament) gives authority to the King or his heirs to avoid by reason of nonage such leases as he makes during his nonage."

The outcome of *Dutchy of Lancaster* was that the Queen was held to the lease her brother had made while still underage.[48] A unanimous court found that the lease King Edward VI made during his minority was valid and that Queen Elizabeth I was therefore bound by it. The Queen could not invoke her brother's minority as a ground to annul the lease, the Court held, because the king has two bodies, one natural and the other politic. The king's body politic is perfect and transcends the king's body natural to which it is conjoined in such a manner that the body politic cures all of the body natural's "defects", including minority and insanity. Edward VI's body politic "cured" his body natural of minority, and the lease he entered into was valid because "his body politic, which is annexed to his body natural, takes away the imbecility of his body natural, and draws the body natural, which is the lesser, and all the effects thereof to itself, which is the greater."[49] The dignity — the office of kingship — which featured in *Hill v Grange* was hence associated with the body politic of the king in *Dutchy of Lancaster*. For the purposes of analyzing the Court of Appeal's decision in *Motard*, it is especially important to note that the judges in *Dutchy of Lancaster* understood the body politic as "contain[ing] the office, government, and majesty royal."[50]

As Plowden's report of the case of the *Dutchy of Lancaster* shows, a significant feature of the two bodies doctrine is the notion that the body natural and the body politic of the king are conjoined. The two bodies of the king being conjoined, the effect of the doctrine is that the body politic of the king, being perfect, cures the king's body natural of all incapacities. The crux of the unanimous Court's conclusion in *Dutchy of Lancaster* was that defects of the king's natural body, "shall not blemish or defeat the acts or suits which he does or pursues in his body politic."[51]

48 *Dutchy of Lancaster* marks a departure from the previous position. That the king could claim at leisure that he was underage or, to the contrary, that he was always of age depending on the circumstances is apparent from the Year Books, produced during the Middle Ages until Henry VIII's reign: Sir John Baker, *The Reinvention of Magna Carta 1216-1616* (Cambridge Studies in English Legal History), (Cambridge: Cambridge University Press, 2017) at 6. To claim that the king becomes almost another person when he became king in a manner that ran contrary to the king's interests was not argued by a party opposing the king: Frederick Pollock & FW Maitland, *The History of English Law Before the Time of Edward I*, 2nd, reissued ed, vol 1 (Cambridge: Cambridge University Press, 1968) at 524. *Dutchy of Lancaster* marks an important development as judges resorted to the doctrine of the king's two bodies to rule that Edward VI was always of age because of his body politic, even if that went against the Queen's interests.

49 *Duchy of Lancaster*, *supra* note 28 at 213.

50 *Ibid*.

51 *Dutchy of Lancaster*, *supra* note 28 at 213.

The perfecting effect of the body politic, however, has its limits. A close analysis of the case of the *Dutchy of Lancaster* shows that the Queen's involvement may have had an impact on the judges' recourse to the doctrine of the king's two bodies and the notion of perfection of the body politic.[52] The doctrine of the king's body politic and its element of perfection were perhaps devised to flatter the Queen in a way that would curb her discontent at being held to the lease signed by her young brother, King Edward VI. Notwithstanding what appears to have been royal interference, the judges not only held the Queen to her lease in *Dutchy of Lancaster*, they also applied the doctrine of the king's two bodies to restrict her royal privileges. In this regard, the judges qualified their statement that the body politic "draws the body natural, which is lesser, and all the effects thereof to itself."[53] The restrictions which were developed during the Middle Ages in relation to the way the king could exercise his rights were maintained, even as the doctrine of the two bodies of the king and the notion of his body politic were developed. The king could not avoid restrictions by arguing that things held in his newly found body natural were not subject to the legal requirements and procedures binding the king in his body politic.[54] The more onerous procedural requirements that were imposed on the king as king — in his body politic — also applied in relation to his private possessions, which he held in his body natural. For instance, the judges found that when lands descend to the king in his body natural, they "require the same circumstances and order as the things which he possesses or inherits in the body politic."[55] In other words, the judges found that even private things which belong to the king must be dealt with according to the special formalities which the king is required to meet in relation to crown possessions. Lands inherited by the king in his body natural became subject to the restrictions imposed on the king in his body politic. For example, the prince who saw land passed on to him in his body natural had to act in relation to that land by matter of record once

52 As is implicit from Plowden's reports, the judges had given their opinion in the case of the *Dutchy of Lancaster* to the Queen in November 1561 before it was to be argued again before the Duchy court – by command of the queen – in 1562*: Ibid* at 222.

53 *Ibid* at 214.

54 This paragraph draws on Fortin, *supra* note 37, at 47-54. The judges found in *Dutchy of Lancaster* that the body natural was conjoined with the body politic, so that the course of things possessed by the king in his body natural were changed by the king's body politic. As a result, it was held that formalities and procedures required of things held by the king in his body politic also applied to things held in his body natural: *Ibid* at 213. If, for example, the king had, like any other individual, a right of entry in relation to his private possessions prior to becoming king, he lost that right upon becoming king.

55 Things held by the king privately "shall pass by his letters-patent only without other matter, and without livery of seizin, for he cannot make livery of seizin in his body natural, distinct from the body politic, because they are one same body and not divers": *Ibid* at 213.

he became king.[56] The prince did not, however, have to act in relation to his private possessions according to the more onerous procedures imposed on the monarch until he became king.

The next case of importance in tracing the development of the legal doctrine of the king's two bodies is *Willion v Berkley*. The majority in *Willion v Berkley* opined that the king was bound by an Act of Parliament — *de Donis Conditionalibus* — and could not act contrary to it in granting possession of land. *Willion v Berkley* had been argued in the Spring of 1561 but was decided more than a year later, in June 1562. It is possible that the issue raised in *Willion v Berkley* prompted Queen Elizabeth to become involved in the case of the *Dutchy of Lancaster* by having judges and counsel discuss it before it was adjudicated. Nevertheless, as in *Dutchy of Lancaster* where the Queen was held to her lease, the majority judges in *Willion v Berkley* held the monarch to the law.

Although the pleadings of counsel in *Willion v Berkley* have been referred to when describing the two bodies doctrine in later literature, most notably in Kantorowicz's work, the two judges who wrote for the majority in *Willion v Berkley* — Brown J and Dyer CJ — did not base their reasoning on the doctrine. While they acknowledged the doctrine of the king's two bodies — natural and politic — the two judges relied instead on the paramountcy of the principle that the king is not entitled to do wrong. Kantorowicz, however, relied on counsel's arguments in the case of *Willion v Berkley* to describe the doctrine of the king's two bodies and the same arguments were also cited favourably by Maitland in his seminal article on the Crown as corporation.[57] The defendant's counsel's submissions in *Willion v Berkley* are also evidence that the two bodies of the king were considered to remain separate for the succession to the throne to operate and the body politic to migrate to the next king's body natural. Given their importance in understanding the doctrine and their appearance in subsequent literature, the submissions are reproduced here at length:

> [T]he King has two capacities, for he has two bodies, the one whereof is a body natural, consisting of natural members as every other man has, and in this he is subject to passions and to death as other men are; the other is a body politic … and this body is not subject to passions as the other is, nor to death, for as to this body the King never dies, and his natural death is not called in our law … the death of the King, but the demise of the King, not signifying by the word … that the body politic of the King is dead, but that there is a separation of the two bodies, and that the body politic is trans-

56 *Ibid* at 214.

57 Kantorowicz, *supra* note 30 at 12; FW Maitland, "The Crown as Corporation" in HAL Fisher, ed, *The Collected Papers vol 3* (Cambridge: Cambridge University Press, 1911) 244 at 134-35.

> ferred and conveyed over from the body natural now dead, or now removed from the dignity royal to another body natural. So that it signifies a removal of the body politic of the King of this realm from one body natural to another. But notwithstanding that these two bodies are at one time conjoined together, yet the capacity of the one does not confound that of the other, but they remain distinct capacities.[58]

In *Willion v Berkley*, the body politic of the king is defined as immortal. The attribution of immortality to the body politic of the king by opposition to his body natural in *Willion v Berkley* is a refinement of the two bodies doctrine from *Hill v Grange*, where immortality was attributed to the dignity by opposition to the king's body natural.

The doctrine of the two bodies of the king as including both the conjunction of the two bodies of the king and their separation upon the king's death, thus allowing the body politic to repose in the next king's body natural, was also a feature of *Wroth's Case*.[59] Henry VIII had appointed Wroth to serve his son, Prince Edward, as Usher of the Privy-Chamber. Wroth was dismissed from his services upon Edward becoming King Edward VI and subsequently asked for his annuities. As Plowden reported, the Barons of the Exchequer opined in *Wroth's Case* that unlike a physician tending to the king's body natural, Wroth's services were not solely related to the king's body natural. But Wroth's services had to be performed to a higher degree by more honourable ministers when Edward became king because they related to the king's body politic.[60] When the prince became Edward VI, he left the lower estate of prince and was elevated to the "estate-royal" (or the office) of kingship. Wroth was thereby discharged by law from rendering his services.[61]

These cases reported by Plowden allow one to discern features of the doctrine of the king's two bodies which are relevant to the distinction between rules of succession and the office of kingship. Firstly, although the two bodies of the king are conjoined, they remain distinct: their separation in relation to succession to the throne is a fundamental feature of the doctrine, as *Hill v Grange* shows. Despite their conjunction, the two bodies must remain separate for the body politic to leave the former king's body natural and repose in the next king's body natural.[62] Secondly, in *Dutchy of Lancaster* and in *Wroth's*

58 *Willion v Berkley*, *supra* note 29 at 234.

59 *Sir Thomas Wroth's Case*, 2 Plowden 452 at 457 [*Wroth's Case*].

60 *Ibid* at 456.

61 *Ibid*.

62 The separation of the two bodies must also be maintained for the Dutchy of Lancaster to vest in the king's body natural, separately from the king's body politic and crown lands, as was determined in *Dutchy of Lancaster* and *Willion v Berkley*.

Case, the body politic of the king was closely related to the royal dignity — the office of the king — by opposition to his body natural. Thirdly, as is clear from *Dutchy of Lancaster*, the king's body politic did not have an effect on a prince's body natural or on his rights — particularly in relation to property — prior to his accession to the throne. The two bodies were not conjoined until the former king's death. A prince could, for instance, dispose of his land like an ordinary person. The special and onerous procedures which bound the king in his body politic did not apply to the prince. Likewise, the perfecting effect of the body politic extended only to the *king's* body natural. It did not extend to "cure" King Henry VII's spouse of her status as illegitimate, for instance. Fourthly, the name "King" in an Act referred to the body politic and was understood as including the king's heirs and successors, as *Hill v Grange* demonstrates. A grant made by the king is also made in his politic capacity and "contains the heirs and successors," as was decided in *Wroth's Case*.[63] However, the body politic does not contain the king and their heirs and successors while the king is still alive. The king's heir accedes to the body politic upon the king's death and all acts and grants made during the former king's life are continued, as the body politic now contains the "new" king.[64] Lastly, the body politic was understood as comprising "the office, government, and majesty royal,"[65] a conception of the office of the king which is not dissimilar to the Court of Appeal of Quebec's understanding of the "office of the Queen" in section 41(a) of the *Constitution Act, 1982* as pertaining to the powers, status, and role of the monarch.[66]

2.2. The Survival of the King's Two Bodies in Constitutional Thinking

In the years that followed, the doctrine of the king's two bodies was maintained in English legal thinking. By the end of the 16th century, jurists — including Plowden himself[67] — referred to the king's "capacities," the "king in right of

63 *Wroth's Case*, *supra* note 59 at 458.

64 The office of the king has been described as a "corporation by succession" and a "vertical incorporation": it contains the current holder and previous holders of the crown, see Kantorowicz, *supra* note 30 at 387; JG Allen, "The Office of the Crown" (2018) 77:2 Cambridge LJ 298 at 305-06.

65 *Wroth's Case*, *supra* note 59 at 458.

66 *Motard* QCCS, *supra* note 7 at para 150; *Motard* QCCA, *supra* note 4 at para 92.

67 Reports of arguments made by Plowden himself in 1581 before the King's Bench and the Exchequer show that he appears to have preferred the terms "the king as of his dutchy" to mark a distinction with the king as King. He did not use the terms two bodies, or body natural and body politic: *The Lord Howard and the Town of Walden's Case* (1581) 2 Leonard 162 (King's Bench), 74 ER 444; (1581) 2 Leonard 150 at 150-51, (Exch) (74 ER 434). The opposing solicitor in that case of 1581, although he referred to the two bodies when recounting the ruling in the *Dutchy of Lancaster*, also preferred to use the terms "the king in right of his dutchy" and the "king in right of his crown": (1581) 2 Leonard 162 at 164; (1581) 2 Leonard 150 at 152.

his dutchy," and the king in "right of his crown."[68] Later cases from that period show that the two bodies doctrine had left its distinctive mark on English legal thinking.[69] Judges and counsel resorted to the notions of the queen's capacity in right of her duchy as opposed to her capacity as queen.

The doctrine of the king's two bodies found in Plowden's reports can also be found in major legal treatises over the centuries that followed, including in the work of Edward Coke, Matthew Hale, and William Blackstone. Edward Coke's reports of cases and his seminal *Institutes* of the early 17th century, for example, feature numerous references to the king's two bodies. For instance, the notion that could be found in Plowden's report to the effect that procedural restrictions were imposed by the law on the king in his body politic can also be found in the second part of Coke's *Institutes*.[70] Coke also explained, in line with Plowden's report of the *Dutchy of Lancaster* case, that "a king cannot avoid his charter, albeit he make it when is within age, for in respect of his royall and politique capacity as king, the law adjudgeth him of full age."[71]

Likewise, in the case of *Magdalen College*, Coke referred to Plowden's reports of *Dutchy of Lancaster* and *Willion v Berkley* and the doctrine of the king's two bodies, stating that the queen is a person and has a body politic: "*Rex est persona mixta*."[72] Via reasoning similar to the reasoning of the majority judges in *Willion v Berkley*, Coke concluded that the queen was bound by the act at issue in that case.[73]

In *The King's Prerogatives*, dating to the second half of the 17th century, Matthew Hale explained that the two capacities of the king cannot be sepa-

68 *Le Case de Saffron Walden*, 1586 Moo KB 159 at 162, 167. *Cf*: David Norbrook, "The Emperor's New Body? Richard II, Ernst Kantorowicz, and the Politics of Shakespeare Criticism" (1996) 10:2 Textual Practice 329 at 343-45. See also Lorna Hutson, "Not the King's Two Bodies: Reading the Body Politic in Shakespeare's Henry IV, Parts 1 and 2" in Victoria Kahn & Lorna Hutson, eds, *Rhetoric and Law Early Modern Europe* (New Haven: Yale University Press, 2001) 166.

69 See *The Queen v Bishop of York's Case*, where the judges made a distinction between the capacities of the queen as of her Duchy or as Queen: (1590) 1 Leonard 226, 74 ER 207. The court in the *Bishop of York's Case* also reiterated that the procedural requirements which the king must meet also apply to his private possessions: (1590) 1 Leonard 226 at 227, 74 ER 207 at 208.

70 "The king being a body politique cannot command but by matter of record, for *rex praecipit*, et *lex praecipit* are all one, for the king must command by matter of record according to the law": Edward Coke, *The Second Part of the Institutes of the Laws of England* (London: Printed by M Flesher, 1644) at 186.

71 *Ibid* at ii, "proeme".

72 *The Case of the Master and Fellows of Magdalen College in Cambridge* (1615) 11 Co Rep 66b at 70a.

73 See Marie-France Fortin, "Revisiting the Application of Statutes to the Crown: A Historical Constitutional Approach" (2021) Journal of Commonwealth Law (forthcoming).

rated and that the king's natural capacity is invested with his politic. His explanation of this point did not diverge from Plowden's.[74]

In Blackstone's famous and influential *Commentaries on the Laws of England*,[75] written in the second half of the 18th century, the king's political capacity was "the Crown" and the king's body natural was "the King," although that distinction was not made consistently throughout the *Commentaries*.[76]

Blackstone distinguished the crown understood as the office of kingship from the king as a natural person in explaining the king's ubiquitous presence in his courts of justice: "His majesty, in the eye of the law, is always present in all his courts, though he cannot personally distribute justice. … It is the regal office, and not the royal person, that is always present in court."[77] The king's body politic is present in his courts at all times, and although the king is the font of justice, his judges are entrusted with administering justice in his name. The king, as Coke famously reported having told King James I in *Prohibitions del Roy*, cannot personally adjudicate judicial matters.[78]

Blackstone also alluded to the Tudor understanding of the king's two bodies in his discussion of the prerogative, understood as royal powers and authorities.[79] Blackstone argued that the direct — as opposed to incidental — prerogatives of the king vested in "the king's political person,"[80] his "political character and authority,"[81] his "high political character,"[82] and his "all-perfect and immortal … kingly capacity."[83]

74 However, as was the case with Plowden, Hale was not consistent in distinguishing between the king's body politic understood as the whole realm in the medieval sense or as distinct from his body natural. Baranger has noted that when he wrote of the king as the head of Parliament, Hale used an analogy with the king as the head of the realm, understood as the body politic and therefore as a corporation aggregate – a medieval concept. By contrast, when discussing possessions held by the king in his natural body as opposed to possessions held as king in his body politic, Hale resorted to Plowden's doctrine of the two bodies of the king – which dates to the Tudor era: Baranger, *supra* note 31 at 198. See Matthew Hale, *Sir Matthew Hale's The Prerogatives of the King*, ed by DEC Yale, The Publications of the Selden Society (London: Selden Society, 1976) at 85, 90.

75 William Blackstone, *Commentaries on the Laws of England: A Facsimile of 1st ed of 1765-1769*, vol 1 (Chicago: University of Chicago Press, 1979).

76 Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge: Cambridge University Press, 2012) at 3.

77 Blackstone, *supra* note 75 at 260.

78 12 Co Rep 64 at 64-65.

79 Blackstone, *supra* note 75 at 232-42.

80 *Ibid* at 232.

81 *Ibid* at 233.

82 *Ibid* at 234.

83 *Ibid* at 242. Blackstone also referred to the direct prerogatives of the king as "necessary to secure reverence to his person", which appears to confuse the king's person with his political character. The

Blackstone explained how the doctrine of the king's two bodies ensured continuity of the king's political capacity upon the death of a king in his natural capacity and the succession of the next. In relation to the perpetuity of the king's royal character, Blackstone stated that the law ascribes an absolute immortality to the king "in his political capacity." "The king never dies. Henry, Edward, or George may die; but the king survives them all."[84] Blackstone emphasized how the doctrine of the king's two bodies ensured that there is no interval upon the death of the king "in his natural capacity" — that, upon the king's demise, the "kingship or imperial dignity" vests at once in the heir, who immediately becomes king. Blackstone expressly referred to Plowden in emphasizing that the "disunion" of the king's body natural from his body politic upon the king's death triggers the transfer of the kingdom to the king's successor, "so the royal dignity remains perpetual."[85] Blackstone's reliance on Plowden's explanation of the two bodies doctrine shows that the crown is, like property, passed on to the monarch's heir and successor.[86] In that regard, the effect of a king's abdication was specifically addressed by Blackstone in his comments on James II's abdication. Blackstone's description of the effects of James II's abdication was similar to the demise of the crown following the king's death: "When king James the second invaded the fundamental constitution of the realm, the convention declared an abdication, whereby the throne was rendered vacant, which induced a new settlement of the crown."[87] To Blackstone, the office of kingship remained perpetual, as the crown had to pass on to the next king after the former king's abdication, just as it must be passed on following a king's death.

The rules concerning the identification and eligibility of "successors" to the office of kingship — rules which Blackstone discussed elsewhere in his *Commentaries*[88] — are an issue that is separate from the office of kingship and the powers and authorities identified by Blackstone as attaching to that office.

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confusion of the two bodies of the king in Blackstone's work is not dissimilar, however, to previous cases referred to above where the king's capacities were considered to be distinct in some respect – especially in relation to property – but the person of the king as duke and as king to be merged in the person of the king.

84 *Ibid*.

85 *Ibid*. A similar explanation is given at 189. Contrast Blackstone's claim that there was no *interregnum* on the death of the king following William the Conqueror with Garnett's study of the interregnum period between William II and Henry I and Stephen and Henry II in George Garnett, "The Origins of the Crown" in John Hudson, ed, *The History of English Law. Centenary Essays on "Pollock and Maitland"* (Oxford: Oxford University Press, 1996) at 171.

86 The "dignity" and the "crown" were two distinct notions prior to their confusion in the late 16th century: Kantorowicz, *supra* note 30 at 378, 383-84.

87 Blackstone, *supra* note 75 at 238.

88 *Ibid* at 208-211.

As Blackstone highlights, the king's heirs do not have an "indefeasible right to the throne."[89] The king-in-Parliament may modify the line of succession and a successor other than the king's heir apparent can be chosen, as Blackstone explained, in "so melancholy a case, as that the heir apparent should be a lunatic, an idiot, or otherwise incapable of reigning."[90] Clearly then, the perfecting effect of the king's body politic does not extend to "cure" the natural body of their heir apparent. Blackstone's hypothetical scenario of an heir apparent incapable of reigning also demonstrates that the rules of succession apply not only with regard to the current monarch, but also to the monarch's heirs. To Blackstone, the rules of royal succession allow the identification of the line of succession and allow Parliament to alter the course of that line, when necessary, without also altering the office of kingship. To Blackstone, the king is a corporation sole to ensure perpetuity and to prevent an interregnum upon the king's passing.[91] It is occupied therefore by only one person: the king's body natural.[92] The rules of succession do not, therefore, apply to the body politic. They apply to bodies natural: to the king's body natural, but also to the bodies natural of their heirs and successors.

To sum up, legal treatises and major legal works — including Coke's, Hale's, and Blackstone's — show the continuity in legal thinking of the Tudor legal doctrine of the king's two bodies. The capaciousness of this doctrine allows for the two bodies to remain distinct, so that the king's body politic — the office of kingship, a corporation sole — can be detached from the king's body natural upon his death or upon his abdication and remain perpetual by vesting in the next king's body natural.

2.3. Current State of the Law

Despite its rich history, the legal doctrine of the king's two bodies became less prevalent in English legal thinking over time.[93] Nevertheless, the doctrine

89 *Ibid* at 188.

90 *Ibid*.

91 *Ibid* at 457-58, 469.

92 It is the ambiguous notion of "Crown" and the debate as to its nature as either a corporation sole or aggregate which are now prominent in conceiving of the office of kingship in current constitutional legal thinking. See Fortin, *supra* note 30. On the nature of the Crown as corporation, see Maitland, *supra* note 57.

93 For instance, the doctrine of the two bodies was overlooked in *Attorney General of the Duchy of Lancaster v GE Overton (Farms) Ltd*, [1982] Ch 277, where the Duchy claimed treasure trove on gold coins. The coins were a mix of silver and based metal and were found not to be silver coins and not to attract the prerogative of treasure trove. The question as to whether the feudal privilege of treasure trove of the queen apply to the queen in her private capacity as Duke of Lancaster was not raised. In *Attorney General v British Museum's Trustees*, [1903] 2 Ch 598, it was the Crown – via a museum –

subsists, and legal thinking shows remarkable continuity in relation to the doctrine, which can still be found in significant pieces of legislation and cases.

In the *Crown Proceedings Act*, for instance, section 40(1) states that: "Nothing in this Act shall apply to proceedings by or against, or authorise proceedings in tort to be brought against, His Majesty in His private capacity."[94] Section 38(3) also refers to the king's private capacity as Duke of Lancaster: "Any reference in this Act to His Majesty in His private capacity shall be construed as including a reference to His Majesty in right of His Duchy of Lancaster and to the Duke of Cornwall." In the seminal case of *Town Investments*, references to the king's two bodies can also be found in all their Lordships' opinions. According to Lord Diplock, for example, one must distinguish "the monarch when doing acts of government in his political capacity from the monarch when doing private acts in his personal capacity."[95] To quote Lord Simon of Glaisdale, also writing for the majority:

> [W]hen the Queen is referred to by the symbolic title of "Her Majesty," it is the whole corporation aggregate, the Crown, which is generally indicated. This distinction between "The Queen" and "Her Majesty" reflects the ancient distinction between "the King's two bodies," "natural" and "politic": see *The Case of the Dutchy of Lancaster* (1567) 1 Plowden 212, 213.[96]

Lord Morris of Borth-Y-Gest, dissenting, also referred to the queen's various capacities:

> The expression "the Crown" may sometimes be used to designate Her Majesty in a purely personal capacity. It may sometimes be used to designate Her Majesty in her capacity as Head of the Commonwealth. It may sometimes be used to designate Her Majesty in her capacity as the constitutional Monarch of the United Kingdom.[97]

With respect to current legislation, numerous statutes which are still valid law in the United Kingdom refer to the king's two bodies; indeed, special provisions are made in relation to the Duchy of Lancaster in numerous Acts of Parliament.[98] Moreover, the Queen's consent as Duke of Lancaster and the

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that was found entitled to Celtic gold articles found in Northern Ireland by farmers and it was the "Crown's" prerogative to treasure trove that was invoked. The nature of the king's feudal personal prerogative to treasure trove as opposed to the Crown's was not raised.

94 *Crown Proceedings Act, 1947* (UK), c 44.

95 *Town Investments Ltd v Department of the Environment*, [1978] AC 359 at 381, [1977] UKHL 2.

96 *Ibid* at 400.

97 *Ibid* at 393.

98 See e.g. *High Speed Rail (West Midlands - Crewe)* (UK), 2017-19 sess, HL Bill 193, s 50 "The Crown", "Application of powers to Crown land"; *High Speed Rail (London — West Midlands) Act* (UK) 2017, c 7, s 57 "The Crown", s 57(4)(c) "Application of powers to Crown land, an interest belonging to

Prince of Wales' consent as Duke of Cornwall are understood as being required before any legislation affecting the Duchy of Lancaster or the Duchy of Cornwall can be enacted, in addition to the Queen's royal assent being required for any piece of legislation to become law.[99] The king's two bodies are both still alive, then, in English legal thinking today.

3. Revisiting the Distinction Between Rules of Succession and the Office of the Queen

As demonstrated above, the doctrine of the king's two bodies is a long-standing feature of English legal thinking. Although the doctrine's influence has waned in recent years, the monarch is still conceived of, for example, as having private and political capacities. The doctrine of the king's two bodies may therefore support the Quebec courts' view in *Motard* that rules of succession pertaining to the identity of the next king's body natural — now first-born, regardless of gender at birth — are distinct from the powers and authorities[100] which pertain to the king's body politic, also called the "office of the Queen" in the Canadian Constitution.

Her Majesty in right of the Crown, or s 57(4)(d) an interest belonging to Her Majesty in right of the Duchy of Lancaster"); *Port of London Act 1968* (UK), c xxxii, s 188 "Duchy of Lancaster may sell land to Port Authority. The chancellor and council of the Duchy of Lancaster may sell to the Port Authority any land belonging to Her Majesty in right of the said duchy"; *Administration of Estates Act (Northern Ireland) 1955* (NI), c 24, Part V "Miscellaneous and general", s 47 "Savings … (4) Nothing in this Act in any manner affects or alters the descent or devolution of any property for the time being vested in Her Majesty either in right of the Crown or of the Duchy of Lancaster*"; London County Council (General Powers) Act 1948* (UK), c liii, Part VI General, s 61 "Saving rights of Duchy of Lancaster … His Majesty in Right of His Duchy of Lancaster" and s 62 "Crown rights … His Majesty in Right of His Crown"; *Thames Conservancy Act 1932* (UK), c xxxvii, Part XIII Savings, s 248 "Saving rights of Crown … His Majesty in Right of His Crown". Statutory instruments also draw a distinction between "Her Majesty privately" and "Her Majesty in Right of the Crown": see e.g. *Milk (Partial Cessation of Production) (England and Wales) Scheme 1986/1612* (UK), art 22 "Crown land".

99 Thomas Erskine May, *Erskine May's Treatise on the Law, Privileges, Proceedings, and Usage of Parliament*, 23rd ed by WR McKay (London: LexisNexis UK, 2004) at 708-710; Rodney Brazier, "Legislating about the Monarchy" (2007) 66:1 Cambridge LJ 86 at 94-97. It was found that Prince Charles gave his consent to 12 bills affecting the Duchy of Cornwall: *Prince Charles and the Duchy of Cornwall: The Implications for Planning and Environmental Law*, (2012) 3 Journal of Planning & Environment Law, 223 at 223-225. The issue of the Queen's consent in relation to legislation affecting her even as holder of the crown has also recently resurfaced: Adam Tucker, "The Queen has more power over British law than we ever thought", *The Guardian* (2021), online: <https://www.theguardian.com/commentisfree/2021/feb/08/queen-power-british-law-queens-consent?CMP=Share_iOSApp_Other&fbclid=IwAR2gN8SkGxpwGQV1iz4FlMhtU9qMp0KaNweqiAAA9EkG6ANNNZZiFAalvyA>

100 See Blackstone, *supra* note 75 at 232-42.

The nuanced approach of English judges in elaborating the legal doctrine of the king's two bodies is important for the purposes of understanding how the rules of royal succession can be conceived of as separate from the office of kingship itself. The conjunction of the body politic to the body natural did not entail freeing the king as a private individual from limits imposed upon the king in his body politic. One could therefore argue that rules of succession — which are, in effect, limits on eligibility to accede to the office of kingship — are part of the body politic and that they extend to the king's body natural. But it appears more apt to argue that the rules of succession attach to the king's and their heirs' bodies natural and render them ineligible to occupy the office of kingship if the rules are contravened by the monarch and their heirs as private persons. Conceiving of the rules of succession as attaching to private persons, firstly, would explain how a future monarch is identified as heir apparent during the current monarch's reign. Secondly, it would also explain how a monarch — not unlike Edward VIII — may have to abdicate if she wishes to act contrary to the rules of succession. Thirdly, it would be in line with precedents where the perfecting effect of the body politic did not extend to a monarch's spouse or children. Fourthly, it would align with the conception of the crown as a corporation sole, or an office filled with one person only.

Firstly then, being able to identify the monarch' heirs and particularly the heir apparent allows for predictability and stability, objectives which were perhaps more pressing in centuries past, but which are not without relevance even in the 21st century. In constitutional monarchies, royal assent, for example, must be given for laws to come into force. Confusion as to the identity of the monarch or a vacancy of the throne could bring to a halt the smooth operation of Parliament and government.

Secondly, as follows from the reasoning early in Henry VII's reign and in *Hill v Grange*, the perfecting effect of the king's body politic is not limitless. In light of Plowden's case reports, the perfecting effect of the body politic cannot, for example, extend to "cure" the body natural of the king of its mortality. The perfecting effect of the body politic, likewise, could not extend to "cure" the body natural of a king who — in contravention of the *Bill of Rights* and *the Act of Settlement* — would wish to convert to the Catholic faith.[101] As the Court of Appeal recalled in *Motard*, the *Bill of Rights* and the *Act of Settlement* were enacted by the English Parliament precisely to avoid a repeat of James II's reign

101 Normative views on the rules of succession aside, the office of kingship in the United Kingdom includes the role of head of the Anglican church, a position incompatible with the monarch being Catholic.

and to preclude the accession to the throne of a Catholic prince.[102] The rules of royal succession, like the doctrine of the king's two bodies, pertain to the king's body natural, which is conjoined to the body politic. However, the two bodies remain distinct, and a violation of the rules in the body natural cannot be saved by the perfecting effect of the body politic.

Thirdly, there is another aspect of the doctrine of the two bodies of the king that suggests that the rules of royal succession attach to the king's body natural, as well as to the bodies natural of the king's heirs. As was noted above in relation to the *Dutchy of Lancaster*, the effects of the body politic on the king's rights in relation to his private possessions did not extend to the prince. While more onerous procedures were imposed on the king, the prince could dispose of his possessions like an ordinary individual. As was also noted earlier with regard to Henry VII's accession to the throne, the perfecting effect of the dignity — the office of the king — could not extend to the monarch's spouse or children. The "defects" of a prince or a monarch's spouse or children were not affected by the perfection of the king's body politic. The perfecting effects of the king's body politic accordingly do not extend to the body natural of any other person. Rules regarding the eligibility of a king's heir — a prince or princess — to ascend to the throne apply to them as ordinary persons. According to the rules, an heir converting to Catholicism — or, prior to the 2013 changes to the British rules of royal succession, an heir marrying a Catholic — becomes ineligible to ascend to the throne. The body politic of the king cannot, upon a monarch's death, cure a prince's ineligibility because it cannot move on to that prince's body natural. The body politic must instead repose in the body natural of the next eligible heir to the throne.

There are also substantive limits on the perfecting effect of the body politic. It has been capable of overcoming infancy and insanity since the inception of the doctrine, but not mortality or religious persuasion. The dead and the Catholics are ineligible *per se*, but not minors or — as George III's reign indicates — monarchs struggling with episodes of insanity. If the monarch is underage or suffers from insanity, a regency ensues but the monarch nevertheless keeps the throne. If an heir is ineligible in the eyes of the rules of succession, however, then their accession to the throne cannot be operated by the perfecting effect of the body politic. Parliament must instead intervene and change the rules.

102 *Motard* QCCA, *supra* note 4 at paras 30-35. That condition remains, even after the changes recently effected to the rules of royal succession.

Fourthly, the notion of the crown as a corporation sole, an office of one person only, also implies that the rules of royal succession do not pertain to the king's body politic. The crown's framing as a corporation sole is the product of a long evolution in English legal thinking. The incorporation of the dignity dates back to the Middle Ages and has its origins in canon law, where it was devised as a solution to ensure the continuity of the papal office upon a pope's passing.[103] In the Middle Ages, dignity and crown were two distinct notions but were often confused.[104] The dignity — the office of kingship — was then confused in the 16th century with the Tudor notion of the king's body politic (attributable to Plowden). The understanding of the king's body politic as the crown, a corporation sole, is the result of a further confusion caused by Coke's description of the king as a corporation of one person.[105] The result of that evolution in legal thinking is apparent, notably, in Blackstone's work, discussed above. The dignity understood as the office of kingship — or "the crown" — being a corporation sole entails that it has only one officeholder.[106]

The fact that the office of kingship is conceived as a corporation sole does not mean, however, that the doctrine of the king's two bodies becomes irrelevant. Rules of succession pertain to the king's body natural, as well as to the bodies natural of their heirs. As they apply to the body natural, the rules of succession allow the identification of the king's heirs and successors, and disqualify the current monarch if they act in contravention of the rules. The rules of succession do not apply solely to the natural body of the king, but also to their heirs' bodies natural. Rules of succession *cannot*, therefore, vest in the king's body politic, or the office of kingship, because it is a corporation sole of one person only. If the rules of succession were to vest in the office of kingship, they would apply only in relation to the current officeholder of the crown's body natural, preventing that monarch from breaching the rules. But the rules would not then also apply to the officeholder's heirs. Such an application of the rules would not permit the identification of the current queen's heir apparent, preventing the rules from accomplishing the main purpose for which they were enacted.

In his seminal study of the king's two bodies, Kantorowicz demonstrated that the doctrine involved complex concepts, notably the idea that the two

103 Kantorowicz, *supra* note 30; Allison, *supra* note 26.

104 Kantorowicz, *supra* note 30 at 383-84.

105 *Sutton's Hospital Case*, (1612) 10 Co Rep 23a at 29b. See Fortin, *supra* note 30.

106 For a different analysis on the notion of the Crown as a corporation sole and its impact on the royal succession, see Lagassé & Bowden, *supra* note 25. On the Crown as an office, see Allen, *supra* note 64.

bodies of the king were distinct yet unified.[107] The two bodies were never eternally conjoined: the demise of the king signalled instant migration of the body politic from the deceased king's body natural to the next king's body natural. The king's body politic is conceived of as reposing in the king's body natural, so that there is both conjunction and separation of the two bodies. The duality of the bodies of the king implies the separation of the body natural from the body politic. Yet the two are conjoined, and so the doctrine presents a paradox. The conjunction of the bodies implies a resulting singular entity. But there must be a separation for there to be a duality of bodies: the body natural and the body politic. Crucially, the separation of the two bodies must exist to ensure the continuity of the crown and allow for the migration of the body politic from one body natural to the next upon the king's death or abdication. The separation of the two bodies in relation to the demise of the crown and royal succession has been a constant feature of the doctrine in English legal thinking.

Other observations can be made here based on a historical constitutional approach to the two bodies of the king. Firstly, in the Quebec Superior Court's decision in *Motard*, reference is made to Prime Minister St-Laurent's address to the House of Commons suggesting that the office of the Queen of Canada is not a separate office from the office of the Queen of the United Kingdom:

> Her Majesty is now Queen of Canada but she is the Queen of Canada because she is Queen of the United Kingdom … *It is not a separate office* … it is the sovereign who is recognized as the sovereign of the United Kingdom who is our Sovereign…[108] [Emphasis added].

Prime Minister St-Laurent's observations here are open to critique. Contrary to the Prime Minister's suggestions, the office of the Queen of the United Kingdom and the office of the Queen of Canada are two separate offices.[109] To understand this separation, two alternative views merit consideration. On one view, the Canadian office of queenship is filled, by application of the symmetry principle in the Canadian Constitution, not by the Queen of the United Kingdom but by the same body natural who occupies the office of the Queen of the United Kingdom. The office of the Queen of United Kingdom vests in the current queen's body natural in the same manner that the office of the Queen of Canada vests in her body natural. Elizabeth II's body natural can occupy more than one office, as a historical constitutional approach to the

107 Kantorowicz, *supra* note 30 at 12.

108 Canada, House of Commons Debates, *Hansard*, 21 Parl, 7th Sess, Vol 2 (3 February 1953) at 1566.

109 See *R v Secretary of State for Foreign and Commonwealth Affairs Ex parte Indian Association of Alberta*, [1982] QB 892 at 87, [1982] 2 All ER 118; Lagassé & Bowden, *supra* note 25 at 20.

two bodies doctrine demonstrates. Like her predecessors, she can be Duke of Lancaster and Queen of England — now the United Kingdom — and she can also be Queen of Canada. As Kantorowicz pointed out in his study of the king's two bodies, the office of kingship is a phoenix-like corporation of one person.[110] That undying office of kingship reposes solely in the king. The king's body natural is, in short, an instrument, a receptacle for the office of kingship (also confused in English legal thinking with the king's body politic).[111] The Duke of Lancaster and the Queen of the United Kingdom can be conceived as separate offices, both vesting in a single natural body. By analogy, the office of the Queen of Canada can therefore also, in light of the two bodies doctrine, be conceived of as vesting in the body natural of the queen.

Alternatively, the office of Queen of the United Kingdom could be conceived of as occupying the office of the Queen of Canada. That view was recently offered by Allen[112] and can be said to find support in the case of the *Deane of Fernes*.[113] The Court concluded in that case that there must be a body politic to occupy another body politic.[114] In other words, there must be an eternal body for an eternal office to be filled. Even in that second scenario, the two offices would remain distinct: the office of the Queen of Canada would be conceived of as filled by another office, that of the Queen of the United Kingdom, a body politic. Prime Minister St-Laurent's view that the Queen of Canada is not a separate office from the Queen of the United Kingdom would accordingly still not hold, on this alternative view.[115]

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110 Kantorowicz, *supra* note 30 at 382-401, 443-445.

111 *Ibid* at 443-445. On the confusion between the office of kingship, the body politic, and the crown, see Fortin *supra* note 30.

112 To Allen, the "Queen", the "Crown" and the "Duke of Lancaster" should all be conceived as offices understood as corporate personalities. While the office of the Queen is filled by a human being, Elizabeth Windsor, Allen further suggests that the offices of the Crown and of the Duke of Lancaster should be understood as "stacked" on the office of the Queen. As a result, it is not the body natural of Elizabeth Windsor who occupies the office of the Queen of Commonwealth countries such as Australia and Canada, but the office of Queen of the United Kingdom: Allen, *supra* note 64 at 306-307, 311. To British courts, the situation is different for non self-governing colonies, in relation to which the queen exercises her prerogative "in the interests of her undivided realm, including both the United Kingdom and the colony": *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*, [2008] 4 All ER 1055 at para 47, [2008] UKHL 61 (Lord Hoffmann).

113 *Le Case del Deane & Chapter de Fernes, sive De Capitulariter Congregatis*, (1607) Dav 42, 123 (80 ER 529), (Courts of the King in Ireland). See Fortin, *supra* note 30.

114 Although the court referred to ecclesiastical offices in its reasons.

115 Both interpretations would follow the United Kingdom courts' opinion that the Crown is separate and divisible for each self-governing dominion or province or territory of the Commonwealth – the Crown in right of Canada is separate from the Crown in right of the United Kingdom. See *R v Secretary of State for Foreign and Commonwealth Affairs, Ex parte Indian Association of Alberta* [1982] QB 892, [1982] 2 All ER 118.

In sum, then, the legal doctrine of the king's two bodies is a long-standing feature of English constitutional thinking, but it also has important and ongoing repercussions for Canadian constitutional law. The doctrine has implication for the distinction between the Court of Appeal's reasoning in *Motard* — that rules of succession do not form part of "the office of the Queen" — and the Supreme Court's finding in the *Supreme Court Act Reference* — that the existence of the Court and conditions of eligibility to accede to its bench both fall under section 41(d). The historical constitutional approach to the doctrine of the king's two bodies allows one to underpin the difference between the throne (section 41(a)) and the Supreme Court's bench (section 41(d)). As has been explained in this article, issues of continuity upon the crown's demise have been resolved by the immortality of the king's body politic. Rules of succession have been devised to ensure governmental stability via an immediate transition of the body politic from one monarch's body natural to the next. As the king never dies, all functions of government are preserved and continue seamlessly. By contrast, judges acceding to the bench join an institution which does not share the same historical evolution and imperatives of continuity as the office of the king. While the throne is occupied by the king's body natural, the bench of the king's courts is no longer occupied by the king personally. Although the king is still in theory the fountain of justice, and is always present in his courts, the ubiquity of this presence is ensured only by the king's immortal body politic. The judicial bench, therefore, differs from the throne understood as the office of kingship. The enduring flow of the administration of justice is ensured by the permanence of the king as the font of justice. The king's presence in his courts is perennial because it is the king's body politic which is ubiquitous. Issues of continuity and succession in relation to the king and the crown therefore do not arise in relation to judges and the courts, including the Supreme Court of Canada. As the facts of the *Supreme Court Act Reference* show, the disruption in the occupancy of the Supreme Court's bench does not raise the same concerns which have historically been tied to the office of the king.