THE ROYAL PREROGATIVE AND EQUALITY RIGHTS: CAN MEDIEVAL CLASSISM COEXIST WITH SECTION 15 OF THE CHARTER?

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The author considers whether the prerogative priority of the Crown in the collection of debts of equal degree is inconsistent with the guarantee of equality found in section 15 of the Canadian Charter of Rights and Freedoms "Charter." *He concludes that the Crown prerogative of priority is not consistent with section 15 and that such prerogative is not a reasonable limit in a free and democratic society under section 1 of the Charter.*

The author first investigates the origins of the Crown prerogative in general and then the prerogative of priority in particular. The author then proceeds to apply the Charter *to the prerogative of priority. The author submits that the purpose of the prerogative priority is to recognize the medieval concept of the personal pre-eminence and superiority of the Queen over her subjects and that such a purpose is inimical to the values promoted by the guarantee of equality found in section 15 of the* Charter.

L'auteur se demande si la prérogative de priorité de la Couronne dans le recouvrement des créances de degré égal respecte la garantie d'égalité que contient l'art. 15 de la Charte des droits et libertés. Sa conclusion est négative et il estime qu'une telle prérogative ne constitue pas une limite raisonnable dans une société libre et démocratique, aux termes de l'art. 1 de la Charte.

L'auteur étudie d'abord les origines de la prérogative de la Couronne, puis la prérogative de la priorité plus particulièrement. Il l'examine ensuite à la lumière de la Charte. L'auteur déclare que l'objet de la prérogative de priorité était de reconnaître la notion médiévale de prééminence et supériorité personnelle de la Reine sur ses sujets, et qu'un tel objet est contraire aux valeurs promues par la garantie d'égalité énoncée dans l'art. 15 de la Charte.

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I. INTRODUCTION

Section 15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*") in broad and comprehensive language guarantees to individuals in Canada the right to equality. Like the four points of a compass, the four equality rights guaranteed in section 15 represent the full range of meaning which can be given to the concept of equality. Every perspective is included.

Historically, one of the most important aspects of the principle of equality has been the proposition that there should be equality between governed and governor. This conviction led Thomas Jefferson to include these words in the *Declaration of Independence*:

> We take these truths to be self-evident. That all men are created equal. That they are endowed by the Creator with certain inalienable rights; that amongst these are Life, Liberty, and the Pursuit of Happiness. That to secure these rights Governments are instituted among men, deriving their just powers from the consent of the governed.

Jefferson's statement that "all men *are* created equal" was indeed revolutionary. The principle of equality was foreign to a world of kings and subjects, to societies made up of titled classes and lower classes. Royalist lawyers writing a century earlier would have acknowledged that "By the Law of Nature all things *were* common and all persons equal."[1] The emphasis, however, was on the word "were." They believed that when society organized, "the Law of Nations ... brought in Kings and Rulers [and] took away equality of persons."[2]

Jurists in the thirteenth century thought that equality was inconsistent with authority: "Subjects cannot be the equals of the ruler, because he would thereby lose his rule, since equal can have no authority over equal."[3] Society has changed over the last seven hundred years. Authority in Canada today is based upon equality. The principle of equality is an important part of the right to vote and hold elected office guaranteed in

1. J. Davies *The Questions Concerning Impositions* 29 (1656).
2. *Ibid.*
3. *Bracton on the Laws and Customs of England*, vol 2, trans. S. Thorne (Cambridge, Mass.: Harvard University Press, 1968) at 33.

section 3 of the *Charter*.[4] For Thomas Jefferson, the idea that "all men are created equal" led to the further "truths" that they were entitled to life, liberty and the pursuit of happiness and that a just government only governed with the consent of the people.

The principle of equality is an important part of the ideal free and democratic society referred to in section 1 of the *Charter*. Equality is a necessary foundation for freedom and democracy.[5] Section 15 of the *Charter* directs lawmakers, both legislators and judges, to closely scrutinize inequality within society. Section 1, read in conjunction with section 52, then requires the abandonment of all laws which create inequality and are not demonstrably reasonable in a free and democratic society.

This article will review the origin of the Crown prerogative in general and the prerogative of priority in particular. It will then consider the statutory modifications to the Crown prerogative of priority, commencing with the great charter, *Magna Carta*, and concluding with another charter, the *Canadian Charter of Rights and Freedoms*. It will be the thesis of this article that the Crown prerogative of priority is inconsistent with section 15 of the *Charter* and that the priority, originally justified on the basis of the superior dignity or worth of the Crown, cannot now be justified in a free and democratic society which places such a high value on the principle that all are equal.

II. THE CROWN IN THE CONSTITUTION OF CANADA

Notwithstanding the extensive legal powers given to the Queen under the Constitution of Canada, the Queen has little or no personal role in the actual government of Canada. There are two reasons for this. The first is that, by virtue of section 12 of the *Constitution Act, 1867*, the Governor-General represents the Queen in Canada and performs most of the functions of the Queen.[6] Second, as a matter of constitutional convention, the Queen does not, even in England, independently exercise the legal powers, including the prerogative powers, allowed to her under the common law.

While it is true that the Queen, in practice, has little personal power or authority, the common law continues, in theory, to vest extensive powers and privileges in her hands. Some of the most extensive powers and privileges of the Queen are her prerogative powers and immunities. The ministers of the Crown can only exercise the prerogative powers in the name of the Queen by relying upon the ancient legal theories or legal fictions which lie at the heart of our parliamentary form of government. When exercising the prerogative, the ministers of the Crown do not rely upon a democratically bestowed

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4. *Dixon* v. *British Columbia*, [1989] 4 W.W.R. 393 at 405-07 (B.C.C.A.) ("equality of voting power is fundamental to the Canadian concept of democracy").

5. K. Fogarty, *Equality Rights and their Limitations in the Charter* (Toronto: Carswell, 1987) at 1; A. de Tocqueville, *Democracy in America* 10th ed., vol 1 (Paris: Gallimard, 1966) at 41 ("It has been said that equality is the foundation on which all rights are based.").

6. The Crown is also represented in each province by the Lieutenant-Governor of the province by virtue of section 12 of the *Constitution Act, 1867*.

power but, rather, upon a monarchically assumed privilege.[7] The powers of the monarch, developed and exercised at a time when England was under a true monarchy, are used today in a democracy by a popularly elected government in the name of the monarch. Canada has the substance of a democracy but the form of a monarchy.

The present status of the Crown is accurately described by Professor Hogg in his book *Liability of the Crown*:

> What is meant by "the Crown"? "The crown as an object is a piece of jewelled headgear under guard in the Tower of London. But it symbolizes the powers of government which were formerly wielded by the wearer of the crown". Although we now have a "constitutional monarchy," in which the role of the Queen (and of her representatives in the Commonwealth countries) has become almost entirely formal, the term "the Crown" has persisted as the name for the executive branch (but not the legislative branch) of government. Executive power is actually exercised by the Prime Minister and the other Ministers who direct the work of the civil servants in the various government departments. This structure is accurately and commonly described as "the government" or "the administration " or "the executive," but lawyers usually use the term "the Crown."[8]

Today the prerogatives of the Crown are exercised by the Prime Minister and other ministers of the Queen. While the prerogatives of the Queen are exercised in her name, she is rarely consulted. Under the Canadian Constitution, the concept of responsible government has been accepted by convention. The principles of responsible government permit the ministers of the Crown to exercise Crown prerogatives but also impose responsibility upon such ministers for the exercise of the extraordinary powers and privileges which make up the prerogatives.[9] The Queen herself is not a part of the process.

The Queen's participation in government and the exercise of Crown prerogatives is usually in name only. In his *Inquiry into the Rise and Growth of The Royal Prerogative in England*, John Allen highlighted the nature of this legal fiction, fundamental to the form of government adopted by Canada:

> [I]n the contemplation of law, the sovereignty and undivided power of the state are in the King.
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> It is not my intention to dispute the truth or reality of this view of the constitution of England. However hazardous it may appear to make the rule and government of a great nation depend on the life and health of a single individual, subject to all the casualties and infirmities of human nature; however extravagant it may seem to attribute to one member of the community, as chief and representative of the commonwealth, the entire power and authority of the whole; there cannot be a doubt that such is the

7. W. Stubbs, *The Constitutional History of England*, vol. 2, 4th ed. (New York: Barnes & Noble Inc., 1897) at 541.
8. P. Hogg, *Liability of the Crown*, 2nd ed. (Toronto: Carswell, 1989) at 9.
9. *Halsbury's Laws of England*, vol. 8, 4th ed. (London: Butterworths, 1974) at 599.

> constitution of England, as laid down most strongly and emphatically in the works of lawyers, and in the homilies of churchmen.
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> But though these doctrines are in practice harmless, the wonder is not the less how they were first invented, and through what means they found admission into the law of England, so justly celebrated for its regard to the property and liberties of the people. The subject, though curious, seems to me to have attracted less attention from those who have traced the process of our constitution, than its importance as an historical question deserves.
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> The King has been invested by law and religion with a character at once despotic and divine. His office has been deemed sacred as a delegation from Heaven, and the sacredness of his office has been communicated to his person. In law, his prerogative has been held to be the same with that claimed or possessed by the Roman Emperors.[10]

With the advent of the *Charter*, the origin of the Crown prerogatives, including the prerogative of priority, has become more than just an important historical question. Before applying the *Charter* to the prerogative of priority, it will be necessary to understand the purpose for the presence of that prerogative in the common law. Therefore, this article will explore the nature and the origin of the prerogative of priority before applying the *Charter* to that prerogative as it exists today.

III. THE NATURE OF THE CROWN PREROGATIVE

A. THE PREROGATIVE DEFINED

Most authorities refer to volume one of *Commentaries on the Laws of England*[11] by William Blackstone as the starting point for any discussion of the Crown prerogative: "By the word prerogative we usually understand that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity."[12]

The *Dictionary of English Law* defines the prerogative as "those exceptional powers, pre-eminences and privileges which the law gives to the Crown."[13] The law was even

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10. J. Allen, *Inquiry into the Rise and Growth of The Royal Prerogative in England* (New York: Burt Franklin, 1849) at 6-8 & 24. See also F. MacKinnon, *The Crown in Canada* (Calgary: McClelland and Stewart West, 1976) at 15-16, 69, 75, 78 & 88 where it is asserted that political reality has replaced legal reality and that the Queen merely "lends her name" to Canada.
11. W. Blackstone, *Commentaries on the Laws of England*, vol. 1, 15th ed. (London: A. Strahan, Law Printer, 1809).
12. *Ibid.* at 239.
13. E. Jowitt, *The Dictionary of English Law*, vol. 2, 4th ed. by C. Walsh (London: Sweet and Maxwell Ltd., 1959) at 1390.

more concise at the time of Edward I. At that time the term was personified in the saying "the king is prerogative."[14]

In *Attorney General* v. *De Keyser's Royal Hotel*[15] the House of Lords turned to Professor A.V. Dicey for assistance in defining the royal prerogative. Lord Dunedin wrote that: "The prerogative is defined by a learned constitutional writer as 'The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown.'" Professor Dicey's definition of the prerogative has also been adopted by the Supreme Court of Canada.[16] In *The Queen* v. *Operation Dismantle*[17] the Federal Court of Appeal expanded upon professor Dicey's definition:

> It is well known that, historically, the royal prerogative is what has been left to the King from the wide discretionary powers he enjoyed at the time he governed as an absolute monarch, powers which the great statutes of the constitutional history of England — among which those expressly referred to by the learned Judge in his decision, the Bill of Rights 1688, 1 Will. & Mar. Sess. 2 c. 2 and the Act of Settlement 1700, 12 & 13 Will. 3 c. 2 — were aiming at defining and containing by proceeding to solemn declarations of the fundamental laws of England. The idea that certain privileges, freedoms and powers remained directly associated with the dignity and responsibility of the Crown persisted even after the royal authority had become totally subject to the supremacy of Parliament, except that these royal prerogatives were then seen as arising out of the common law and their content, not defined a priori, became subject to the will of the elected representatives of the people, free to intervene at any time to clarify or limit their extent.

While definitions set forth by the courts and writers over the years are useful in helping to understand the nature of the prerogative, Holdsworth was probably most accurate when he said that it is impossible to define the prerogative completely by any theory:

> It has been very truly said that, in the Middle Ages, the royal prerogative often appears to be simply some advantage over the subject which the law gives to the king when their rights conflict.
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> ...
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> In fact, the prerogative is the oldest part of the constitution, and the law which centers around it bears upon it the marks of all the varied phases through which the constitution has passed. It is this fact which gives to it its "peculiar import," and makes it impossible to define it completely "by any theory of executive functions."[18]

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14. F. Pollock & F. Maitland, *The History of English Law Before the Time of Edward I*, vol. 1, 2nd ed. (London: Cambridge University Press, 1968) at 512.
15. [1920] A.C. 508 at 526 (H.L.).
16. *Reference Re the Effect of the Exercise of the Royal Prerogative of Mercy upon Deportation Proceedings*, [1933] S.C.R. 269 at 272-73.
17. [1983] 1 F.C. 745 at 779 (A.D.).
18. W. Holdsworth, *A History of English Law*, vol. 3, 5th ed. (London: Methuen, 1942) at 329 & 459.

B. ORIGIN OF THE CROWN PREROGATIVE

As the Crown prerogative is part of the common law, an understanding of the history of the prerogative will be necessary when considering the purpose or effect of any particular prerogative power. Evatt said that "One consequence which follows from the fact that the Prerogatives of the King are part of the common law is that the history of the Prerogatives in general and of any particular power sought to be exercised may, and probably will, become of the utmost importance."[19]

When applying the *Charter* to a prerogative of the Crown, analysis of the history of the prerogative becomes of even greater importance. An understanding of the history of a prerogative is essential to the determination of the "purpose" of the prerogative, one of the questions which must be answered under *Charter* analysis.[20] Therefore, an inquiry into the origin of the prerogative and the prerogative of priority in particular, will be conducted prior to subjecting the prerogative of priority to the rigors of section 15 of the *Charter*.

Before the emergence of parliamentary sovereignty, the Crown held an almost complete range of governmental powers by virtue of the royal prerogative.[21] Anson alluded to this pre-parliamentary origin when he described the prerogatives as: "the ancient customary powers of the Crown."[22] *Halsbury's* contains a similar statement: "[I]t is the residue of royal authority left over from a time before it was effectually controlled by law."[23]

The various powers, privileges and pre-eminences which make up the prerogative can be divided into two groups arising out of three main sources during various periods of English history. Blackstone identified the two groups as the "direct" and the "incidental":

> The direct are such positive and substantial parts of the royal character and authority, as are rooted in and spring from the king's political person, ... But such prerogatives as are incidental bear always a relation to something else, distinct from the king's person; and are indeed only exceptions, in favour of the crown, to those general rules established for the rest of the community.[24]

Professor Phillips referred to Blackstone's indirect prerogatives as the "personal" and Blackstone's direct prerogatives as the "political" prerogatives of the Crown: "It is still possible to distinguish between personal and political prerogatives, that is, between those

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19. H. Evatt, *The Royal Prerogative* (Melbourne: The Law Book Company Ltd., 1987) at 14.
20. *The Queen* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295, 331-36. See discussion on pages 23, 24 & 37-41 below.
21. Australia, *Report from the Senate Standing Committee on Constitutional and Legal Affairs: Priority of Crown Debts* (Canberra: Australian Government Publishing Services, 1978) (Chair: Senator A. Missen) at 10 [hereinafter *Australian Senate Report*].
22. W. Anson *The Law and Custom of the Constitution, Part II, The Crown*, 2nd ed. (London: Henry Frowde, 1896) at 2.
23. *Supra*, note 9 at 583.
24. Blackstone, *supra*, note 11 at 239-240.

which the Queen has as a person and those which she has as Head of State."[25] The personal prerogatives of the Queen grew out of the "personal relation of superiority and subjection" between Queen or King and subject which derived "from the pre-legal status of kingship."[26] The personal "sanctity" of the person of the Queen and the Queen's personal rights which flowed from that sanctity came from a "source and were distinct" from the rights of the Queen in her public capacity.[27] Because of the incidental prerogatives, the Queen was treated as an "abnormal person" in relation to the ordinary laws of the land.[28]

IV. ORIGIN OF THE CROWN PRIORITY

A. MEDIEVAL ORIGINS

Blackstone referred to the incidental prerogatives as "exceptions, in favour of the crown, to those general rules that are established for the rest of the community."[29] Holdsworth said that they were "the survivals of an obsolete form of political society."[30] One of the exceptions that has survived is the rule that Crown debts are to be paid in priority to other debts of equal degree.[31] To understand how this rule developed, reference may usefully be made to the medieval political system: "[T]he feudal rights of the Crown are mere incidents of the prerogatives; they add, here and there, features which can be only explained when we conceive of the king as being in relation to the kingdom what the lord was to the manor."[32]

As Blackstone described the prerogative of priority as one of the "incidental" prerogatives, it is logical to commence an inquiry into the history of such prerogative with the feudal system, a system of property ownership in which feudal "incidents" played an important role.

At the heart of the feudal system was the homage done by a man to his lord. According to Glanvill, a man could do several homages to different lords for the different fees held of those lords; but there had to be a chief homage, accompanied by an oath of allegiance. This chief homage was to be done to the lord of whom he held his chief

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25. O. Phillips and P. Jackson, *O. Hood Phillips Constitutional and Administrative Law*, 7th ed. (London: Sweet and Maxwell, 1987) at 266.
26. F. Wormuth *The Royal Prerogative 1603-1649* (London: Kennikat Press, 1939) at 21.
27. *Ibid.* at 52.
28. W. Moore "Liability for Acts of Public Servants" (1907) 23 L.Q. Rev. 12 at 14. See also Bracton, *supra*, note 3 at 33 (subjects cannot have equal status with the king since equal can have no authority over equal). For a review of other classification schemes see Evatt, *supra*, note 19 at 29-31.
29. *Supra*, note 11 at 240.
30. *Supra*, note 18 at 468-69.
31. Blackstone, *supra*, note 11 at 240; Holdsworth, *supra*, note 18 at 459.
32. Anson, *supra*, note 25 at 5.

tenement, commonly called his "liege lord."[33] Homage was to be done in the following form: "[H]e who is to do homage shall become the man of his lord, swearing to bear him faith of the tenement for which he does his homage, and to preserve his earthly honour in all things, saving the faith owed to the lord king and his heirs."[34] In *Calvin's Case*[35] Coke described in great detail the faith owed to the king:

> Ligeance is a true and faithful obedience of the subject due to his Sovereign. This ligeance and obedience is an incident inseparable to every subject: for as soon as he is born he oweth by birth-right ligeance and obedience to his Sovereign. ... [L]igeance is the mutual bond and obligation between the King and his subjects, whereby subjects are called his liege subjects, because they are bound to obey and serve him; and he is called their liege lord, because he should maintain and defend them.[36]

The "nature of the ceremony and the implications of homage" clearly denoted a personal relationship between Crown and subject.[37]

Legal theory in the twelfth and thirteenth centuries held that the Crown had no equal within its realm. According to *Bracton on the Laws and Customs of England*, a treatise originally prepared in the latter half of the thirteenth century, "Subjects cannot be the equals of the ruler, because he would thereby lose his rule, since equal can have no authority over equal."[38] This view was concurred with by Glanvill when he wrote: "[T]he lord king can have no equal, much less a superior."[39]

It is in this context that the priority of the Crown first arose. Although there is no definitive statement on the subject, Justice Kingsmill Moore of the Irish High Court concluded that the priority originated with the King's Exchequer to assist in the collection of his personal income:

> It is somewhat more than a plausible conjecture that the king's prerogative of prior payment was introduced by his judges and officials as a useful piece of adjectival law to help a usually impoverished monarch in the collection of his personal income, and that, if any rashly curious person had questioned the legality of the privilege it would have been easy to cloak the high-handed element in such a procedure by reasoning which showed that it was inherent in the king's ownership of the machinery of justice and justifiable by his supereminent position as paramount overlord.[40]

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33. *A treatise on the laws and customs of the realm of England commonly called Glanvill*, trans. G. Hall (London: Thomas Nelson, 1965) at 104 [hereinafter *Glanvill*].
34. *Ibid.* See also Allen, *supra*, note 10 at 69-72.
35. Co. Rep., Part VII 431.
36. *Ibid.* at 434.
37. Morris "Introduction" in J. Willard and W. Morris, ed., *The English Government at Work, 1327-1336* (Cambridge, Mass.: Medieval Academy of America, 1940) at 8-9.
38. Bracton, *supra*, note 3 at 33.
39. Glanvill, *supra*, note 33 at 84.
40. *Re Irish Employers Mutual Insurance Association*, [1955] I.R. 176 at 204 [hereinafter *Irish Employers*].

The common law courts later referred to this "justification" with the words *detur digniori* ("let it be given to the worthier").[41] Anne Hardy's conclusions in her book on the Crown priority are similar to those of Justice Kingsmill Moore:

> Included as part of the royal prerogative is the proposition that "[w]here the Crown's right and that of a subject meet at one and the same time, that of the Crown is in general preferred, the rule being 'detur digniori' " or "let it be given to the worthier." It is apparently from this general right that the rule has arisen that, in a competition between debts of equal degree owed to the government and to a subject, the claim of the Crown is entitled to preference. The Crown has traditionally been permitted to enforce this right by use of a prerogative remedy, the writ of extent.[42]

B. ROLE OF THE EXCHEQUER IN THE DEVELOPMENT OF THE PREROGATIVE OF PRIORITY

Notwithstanding the reverence the law afforded to the monarch, the actual circumstances under which the King governed were not always so favourable. Under the medieval political system the King was expected "to live of his own." This meant that, except in time of war, the King was to personally carry the cost of governing. The King had no standing army, no police and no large, paid bureaucracy, because he could not afford them.[43]

Because of the precarious state of the King's finances, the King was forced to fully exploit his judicial and feudal income in order to remain solvent. The King relied on the Exchequer to collect his feudal income.[44] William McKechnie described the manner in which the Exchequer exercised its authority during the reign of Henry I (1100 - 1135) as follows:

> [A]t the Exchequer, as organized by the King and his minister, the Sheriff of each county twice a year, at Easter and at Michaelmas, rendered account of every payment that had passed through his hands. His balance was adjusted before all the great officers of the King's household, who subjected his accounts to close scrutiny.[45]

In *History and Antiquities of the Exchequer of the Kings of England*, Thomas Madox confirmed that the "Exchequer was a Court greatly concerned in the Conservation of the

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41. *Woodward* v. *Fox* (1691), 2 Ventris 267 at 268; *Irish Employers*, *supra*, note 40 at 207; Halsbury's, *supra*, note 9 at 666-67; J. Chitty, *Prerogatives of the Crown* (London: J. Butterworth, 1820) at 381. ("*Detur digniori* is the rule in the case of a concurrence of titles between the King and the subject").
42. A. Hardy *Crown Priority in Insolvency* (Toronto: Carswell, 1986) at 2.
43. C. Ogilvie, *The King's Government and the Common Law 1471 - 1641* (Oxford: Blackwell, 1958) at 3-4.
44. Morris, *supra*, note 37 at 5.
45. W. McKechnie, *Magna Carta: A Commentary on the Great Charter of King John*, 2nd ed. (New York: Burt Franklin, 1914) at 9.

Prerogatives as well as the Revenue of the Crown."[46] In *Dialogus de Scaccario - The Course of the Exchequer*, by Richard fitz Nigel, (originally completed approximately 1179) an early form of the priority is identified in instructions from the Exchequer to the Crown's sheriffs.[47] The sheriff was required to account for any insolvent debtors of the Crown by way of affidavit. The sheriff was warned not to "accept any sum lawfully due to himself from any debtor who has not paid the King. For it is improbable that the Sheriff should have failed to find chattels sufficient to pay the debt to the King in possession of a man who, willingly or not, has paid the Sheriff his personal demands."[48] The editor of the *Dialogus* advised by way of footnote to this passage that: "The king subsequently acquired priority over all creditors."[49] Based on this record of the development of the prerogative of priority, it is safe to conclude that the priority in favour of the Crown did not develop as an essential part of the executive function of the Crown but, rather, as an incidental or personal prerogative to aid in the collection of feudal incidents and other income of the Crown.

C. THE DEVELOPMENT OF ROYAL PRIORITY IN FRANCE

It is useful to compare and contrast the development of the priority in favour of the Crown in England with the development of the priority in favour of the king in France. A review of French law lends credence to the theory that the general priority of the Crown in England developed from a more restricted priority relating only to sheriffs as officers of the Exchequer. It appears that originally the priority in favour of the English Crown only applied to the sheriff, the officer of the Crown in charge of collecting the Crown's revenues.[50] Subsequently, of course, the Crown acquired priority over all creditors through the good will of the barons of the Exchequer. French civil law originally gave to the king of France a priority in respect of only those debts due from "comptables."[51] The word "comptables" is a "technical term of French law denoting officers who receive and are accountable for the King's revenues."[52] French comptables were the equivalent of the English sheriffs who collected royal revenues. Unlike the history of the prerogative of priority in England, the priority of the French king for debts due from his comptables was not extended to other crown debtors. Even during the reign of Louis XIV, the priority was restricted to comptables alone.[53]

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46. T. Madox, *History and Antiquities of the Exchequer of the Kings of England*, 2nd ed. (New York: A.M. Kelley, 1969) at 23.
47. R. fitz Nigel, *Dialogus de Scaccario - The Course of the Exchequer*, trans. C. Johnson (New York: Clarendon Press, 1983) at 112-114.
48. *Ibid.* at 114.
49. *Ibid.* see also Madox, *supra*, note 46, Chapter XXIII, Part VII.
50. *Ibid.*
51. *Exchange Bank of Canada* v. *The Queen*, 11 A.C. 157 at 164 (P.C.) (Que.).
52. *Ibid.* at 165.
53. *Ibid.* at 164-65.

D. JUDICIAL TREATISE ON THE ORIGIN AND NATURE OF THE CROWN PRIORITY[54]

The most thorough and complete judicial discussion of the history of the prerogative of prior payment was conducted by Justice Kingsmill Moore in *Re Irish Employers Mutual Insurance Association*.[55] In that case Justice Kingsmill Moore reviewed the development of the prerogative of prior payment from the earliest period of legal history to the twentieth century and accepted the proposition that:

> The Common law prerogative of prior payment of his debts belonged to the king, not because he was the supreme executive authority, but because of the personal pre-eminence over all subjects which attached to him at common law, on the principle expressed in the phrase "*detur digniori*".[56]

Based on his study of British constitutional history, Justice Kingsmill Moore came to the following conclusions regarding the origin and nature of the prerogative:

> 1. The prerogative originated in a period when modern conceptions of the nature of sovereignty and government had not yet arisen. The structure of society was still feudal; property law was built on a feudal skeleton; loyalty was an essentially personal matter; the king was looked on more as a feudal overlord than as the embodiment of national power and aspiration; and the royal revenues, feudal by nature, were regarded as the king's personal possession, which could be spent by him according to his personal desires and without restriction by ministerial or parliamentary interference.
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> 2. When it was sought eventually to find a legal principle on which to base this prerogative the principle was derived from cases which were concerned with feudal incidents and the feudal law of property.
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> 3. ... The prerogative was an appanage of property and of the royal nature, not of executive power.[57]

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54. *Irish Employers*, *supra*, note 40 at 98 (Because the subject had not been fully dealt with in any text-book Justice Kingsmill Moore chose to summarize his investigations into history and constitutional law and practice respecting the Crown priority, investigations "which lead into regions not often explored by modern practicing lawyers.")

55. *Ibid.* at 176; and see *Halsbury's*, *supra*, note 9 at 667 and *Montreal Trust Company* v. *Tottrup* (1990), 82 Alta. L.R. 2d 340 (Q.B.). See also R. Charney "Crown Prerogatives: Where Are They Now" prepared for the Law Reform Commission of Canada (Aug. 1983) (available in Law Reform Commission of Canada Library) ("There has been no comprehensive examination of the Crown prerogative since Chitty wrote his treatise over 160 years ago.").

56. *Irish Employers*, *supra*, note 40 at 199. See also L. Ehrlich "Proceedings Against the Crown (1216-1377)" (1974) 6 *Oxford Studies in Social and Legal History* 1 at 11-12 (legal justification lies in the character of King as sovereign).

57. *Irish Employers*, *supra*, note 40 at 215.

Justice Kingsmill Moore's comments have not been challenged by any commonwealth court. His analysis and his conclusions are compelling. He provides a succinct explanation of both the origin and the nature of the prerogative of priority. His conclusions with respect to the prerogative of priority led him to the decision that such a prerogative was inconsistent with the Irish Constitution and, therefore, of no force or effect in modern Ireland. The conclusions set forth in this article with respect to the nature and origin of the prerogative of priority mirror those of Justice Kingsmill Moore.

In the next part of this article the same question will be addressed in the context of the Canadian Constitution. It will consider whether a prerogative based not on the Crown's executive power, but, rather, on the Crown's "royal nature" can survive the advent of Section 15 of the *Charter*.

V. THE PREROGATIVE OF PRIORITY AND SECTION 15 OF THE *CHARTER*

A. THE CROWN PREROGATIVE OF PRIORITY IS INCONSISTENT WITH SECTION 15 OF THE *CHARTER*

1. The Importance of April 17, 1985

In 1066 William the Conqueror imposed upon England a system of law described today as medieval or feudal. The medieval political system was based upon the premise of fundamental inequality among human beings. During the middle ages there was both a class structure and a political hierarchy. At the top was the King. Below the King were various lords, vassals and other less privileged members of society. The history of the British Constitution since 1066 has been the record of the quest of the subjects of the Crown to attain the equality the medieval system of law and their monarchs have denied them. In 1215 the barons demanded and obtained from King John a charter, Magna Carta, setting limits on the power of the King and granting to the barons the right to enforce Magna Carta. Among other things, Magna Carta gave the barons the right, in effect, to govern in the event the King violated his charter.[58] It was a small but important step towards equality. In 1628 and 1688 limits were again placed on the prerogative of the Crown. "The Petition of Right embodied Coke's concept of 'due process of law'."[59] The Bill of Rights, along with the Act of Settlement (1700), gave statutory support to the principle of the rule of law and the idea that Kings and Queens were subject to the laws of England.

The principle of the rule of law has not always been understood or accepted by law makers. James I thought it treason to affirm that he was "under the law."[60] However, the Chief Justice at that time, Lord Coke, advised the King that such had been the law

58. W. McKechnie, *supra*, note 45 at 465-477.
59. Lord Denning, (London: Butterworths, 1982) at 272.
60. *Ibid.* at 311-312.

since the time of Bracton.[61] The preamble to the *Charter* declares that Canada is founded on principles which recognize the same conviction: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."

The basic components of the rule of law were explained by the Supreme Court of Canada in *Re Manitoba Language Rights*:[62]

> The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power.
>
> ...
>
> Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life.[63]

These principles, as part of the "rule of law," are woven into the fabric of the Canadian Constitution:

> The constitutional status of the rule of law is beyond question. The preamble to the Constitution Act, 1982 states:
>
> > Whereas Canada is founded upon principles that recognize the supremacy of God and the *rule of law*. (Emphasis added.)
>
> . . .
>
> Additional to the inclusion of the rule of law in the preambles of the Constitution Acts of 1867 and 1982, the principle is clearly implicit in the very nature of a Constitution. . . . The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law. While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution.[64]

The rule of law, however, is no more than the base upon which the constitutional guarantee of equality rights may be erected. By itself, the rule of law provides nothing but procedural protection.[65] The constitutional journey towards full equality within

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61. *Ibid.* ("Thus wrote Bracton, 'The King is under no man, but under God and the law.'").
62. [1985] 1 S.C.R. 721 at 747-52.
63. *Ibid.* at 748-49.
64. *Ibid.* at 750-51.
65. J. Stone, *The Province and Function of Law* (Sydney: Associated General Publications Ltd., 1946). See also *The Queen* v. *Beauregard*, [1986] 2 S.C.R. 56 at 107 (Supreme Court of Canada not bound by the Dicey test of equality nor prevented from taking a more egalitarian approach under section

society was not complete, in so far as Canada is concerned, until April 17, 1985 when section 15 of the *Constitution Act, 1982* came into effect. Section 15 of the *Charter* affixed muscle to the procedural skeleton of the rule of law.

2. The Crown Is Subject to Section 15 of the *Charter*

Section 32(1)(a) of the *Constitution Act, 1982* provides that the "*Charter* applies to the Parliament and Government of Canada." By virtue of section 17 of the *Constitution Act, 1867*, the Queen, the Senate and the House of Commons constitute the Parliament of Canada. The prerogatives of the Queen exercised in her name by cabinet are subject to the demands of the *Charter*. Justice Wilson highlighted this in *Operation Dismantle* v. *The Queen*.[66] It follows that the principles of equality enshrined in section 15 of the *Charter* are applicable to the Crown's prerogative. For the first time since 1066 the Crown and the subject are to be equal before and under the law. There is no doubt that the Queen is given many powers as head of state which are not given to the subject. However, those powers are governmental powers to be used for governmental purposes by the Queen as notional chief executive officer of the nation. Any powers given to the Queen by the common law or by statute for other than governmental purposes will be subject to the demands of section 15 and the principle of equal treatment embodied in that section of the *Charter*.

3. General Approach to the *Charter*

The proper analytical approach to the *Charter* was succinctly stated by Justice McIntyre in *Andrews* v. *Law Society of British Columbia*: "It is for the citizen to establish that his or her *Charter* right has been infringed and for the state to justify the infringement."[67] The Supreme Court of Canada has required the party complaining of a *Charter* violation to first prove that a particular section of the *Charter* has been infringed. The onus then shifts to the government to justify the infringement under section 1 of the *Charter*. "Both purpose and effect are relevant" when considering whether a law is consistent with the *Charter*. In *The Queen* v. *Big M Drug Mart* Justice Dickson said that "either an unconstitutional purpose or an unconstitutional effect can invalidate legislation."[68] First the purpose, then the effect of an impugned law will be considered. This will "allow courts to dispose of cases where the object is clearly improper, without enquiring into .... actual impact."[69]

1(b) of the Canadian Bill of Rights).

66. [1985] 1 S.C.R. 441 at 463-64.

67. [1989] 1 S.C.R. 143 at 178.

68. [1985] 1 S.C.R. 295 at 331.

69. *Ibid.* at 332.

If either the purpose[70] or the effect of a law is inconsistent with a Charter right or freedom, the law must run the gauntlet of section 1 of the *Charter*. The test to determine whether a limit on a *Charter* right or freedom is reasonable in a free and democratic society was set out in *The Queen* v. *Oakes*.[71] The *Oakes* test was reaffirmed as the proper test in the context of section 15 by Justice Wilson in *Andrews* v. *Law Society of British Columbia*.[72]

4. Section 15(1) Test

The Supreme Court of Canada has refused to interpret section 15 of the *Charter* as mandating equality for the sake of equality. A party complaining of a violation of section 15 must establish the fact that there has been unequal treatment and, further, that such unequal treatment is discriminatory. Justice Cory highlighted this two part test in *Rudolph Wolff & Co.* v. *Canada*:[73]

> The manner in which a court must approach an alleged infringement of s. 15(1) was set forth by McIntyre J. in *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143. He made it clear that one complaining of the violation of s. 15 must show "not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory."

In *The Queen* v. *Turpin*,[74] Justice Wilson said that the test required a court "to determine 1) whether the distinction created by the impugned legislation results in a violation of one of the equality rights and, if so, 2) whether that distinction is discriminatory in its purpose or effect."

The purposive approach to the interpretation and application of section 15 of the *Charter* has led the Supreme Court of Canada to focus on enumerated and analogous grounds of discrimination when answering the question of whether a "distinction is discriminatory in its purpose or effect."[75] Under the "enumerated and analogous grounds" approach the Supreme Court of Canada has focused on "personal characteristics" when determining whether a law is discriminatory. The court has asked "whether there is discrimination on grounds relating to the personal characteristics of the individual or group" complaining of a violation of section 15.[76] "This approach is not surprising considering the fact that every type of discrimination listed in section 15(1) involves a

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70. It is the original purpose of the law which must be analyzed. The purpose for the law's continued existence will rarely, if ever, be relevant. See *ibid.* at 334-36 & 353.
71. [1986] 1 S.C.R. 103.
72. *Ibid.* at 153-55.
73. [1990] 1 S.C.R. 695, 700-701.
74. [1989] 1 S.C.R. 1296 at 1334.
75. *Ibid.* at 1332, 1334. See also *Brochner* v. *MacDonald*, [1989] 6 W.W.R. 257 at 258 (Alta. C.A.).
76. *The Queen* v. *Turpin*, *supra*, note 74 at 1331.

personal characteristic of the victim."[77] The enumerated and analogous grounds approach has, however, been the subject of some academic criticism.[78]

In order to identify the type of discrimination section 15 was intended to prevent, it is necessary to understand the purpose of that section. In *Andrews* v. *Law Society of British Columbia* Justice McIntyre explained the purpose of section 15:

> It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in a knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component.[79]

Justice McIntyre concluded that the enumerated grounds in section 15(1) were not exhaustive but served the useful purpose of highlighting some of the most socially destructive forms of discrimination.[80]

Section 15 celebrates the values the rule of law represents.[81] According to Justice McIntyre, the goal of section 15 is "to approach the ideal of full equality before and under the law."[82] In *The Queen* v. *Turpin*, Justice Wilson also focused on the rule of law as one of the important values section 15 was intended to uphold:

> [T]he guarantee of equality before the law is designed to advance the value that all persons be subject to the equal demands and burdens of the law and not suffer any greater disability in the substance and application of the law than others. This value has historically been associated with the requirements of the rule of law that persons be subject to the law impartially applied and administered.[83]

5. Purpose of the Crown Priority Conflicts With Section 15

(a) Proper to Compare Subject With Crown When Crown Acting in Nongovernmental Capacity

The first question which must be answered is whether the Crown priority violates one of the equality rights set forth in section 15. Does the prerogative priority treat the Crown and subject unequally? There is no doubt that it does. However, Justice Cory, in

77. D. Gibson, *The Law of the Charter: Equality Rights* (Calgary: Carswell, 1990) at 159.
78. *Ibid.* at 143-161; T. Wakeling and G. Chipeur "An Analysis of Section 15 of the Charter After the First Two Years or How Section 15 Has Survived the Terrible Twos" (1987) 25 Alta L. Rev. 407 at 428-31 .
79. [1989] 1 S.C.R. 143 at 171.
80. *Ibid.* at 175.
81. See J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University, 1971) at 237 and see discussion on pages 14 and 15 above.
82. *Andrews* v. *Law Society of British Columbia*, *supra*, note 79 at 165.
83. *Supra*, note 74 at 1329.

Rudolph Wolff & Co. v. *Canada*,[84] highlighted another important consideration which must be taken into account when applying section 15 to the Crown. Not every action of the Crown need run the section 15 gauntlet. A comparison of the Queen and a subject under section 15 will only be just and appropriate, if at all, where the Queen is not acting in her governmental capacity; for example, where "the Crown's activities are indistinguishable from those of any other litigant engaged in a commercial activity."[85] When the Queen is acting in her "governmental capacity" she "is simply not an individual with whom a comparison can be made to determine whether a s. 15(1) violation has occurred."[86] Justice Cory did not find it necessary for the purposes of that case "to consider the further conclusions of Henry J. [the motions court judge] that the Crown can never be compared with individuals under s. 15(1) of the *Charter* in the context of any statute governing the relationship between the Crown and the subject in civil proceedings."[87]

Because of Justice Cory's distinction between governmental and non-governmental activities of the Queen, it becomes very important to determine whether the Queen is acting in her governmental capacity when she exercises a particular prerogative. While there is no doubt that the Queen is acting in her governmental capacity when she exercises her direct prerogatives, it is equally clear that she is not acting in such governmental capacity when she exercises her incidental prerogatives. The fact the Queen is using her prerogative priority for governmental purposes does not change the capacity in which she must exercise such prerogative. The incidental prerogatives were given to the Queen because of her personal status and she must exercise them in her personal capacity, not her governmental capacity. The incidental prerogatives, which include the prerogative of priority, are generally comparable to the activities of a private person. In connection with incidental prerogatives, Maitland said that there is "hardly a power for which an analogy cannot be found elsewhere."[88] Holdsworth supported this view with the statement, which he attributed to Coke, that the prerogative may be defined as "exceptions in favour of the Crown to those general rules that are established for the rest of the Community."[89]

As an incidental prerogative of the Crown, the prerogative of priority is subject to section 15 of the *Charter*. The Queen is not acting in her capacity as chief executive officer of the nation when relying upon incidental prerogatives such as the prerogative of priority. Rather, she is relying upon her common law right as royalty to take precedence over her subjects.

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84. *Supra*, note 73.
85. *Ibid.* at 702.
86. *Ibid.* at 701.
87. *Ibid.* There is nothing in the legislative history of section 15 which would assist the courts when considering this issue. See A. Bayefsky *Canada's Constitution Act, 1982 and Amendments: A Documentary History* (Toronto: McGraw-Hill, 1989).
88. Holdsworth, *supra*, note 18 at 460.
89. *Ibid.* at 460; Holdsworth *A History of English Law*, vol. 10, 5th ed. (London: Methuen, 1942) at 342.

The distinction between the direct and incidental prerogatives of the Crown is also important to the interpretation and application of other parts of the Constitution of Canada. For example, the effect of section 129 of the *Constitution Act, 1867* is to subject the incidental prerogatives to the civil law of Quebec as it stood on July 1, 1867 and as validly amended by competent legislation of the Parliament of Canada under section 91 or the legislature of Quebec under section 92, subsection 92(13) in particular.[90] The direct prerogatives of the British monarch were not affected by Quebec civil law.[91] Justice L'Heureux-Dubé explained the reason for this divergent treatment in *Laurentide Motels* v. *Beauport*:

> The Quebec Act of 1774 sealed the fate of the two major legal systems that would govern the law applicable in Quebec: French civil law as it stood before 1760 with its subsequent amendments in Quebec for everything relating to property and civil rights, and the common law as it stood in England at that time, and as subsequently amended, for what related to public law.[92]

Justice L'Heureux-Dubé went on to cite with approval Walton's clear explanation of which prerogatives are available to the Crown in Quebec:

> Walton, The Scope and Interpretation of the Civil Code of Lower Canada (1980), writes (at p. 54):
>
> > In regard to the position of the sovereign and the prerogatives of the crown we have to distinguish between rights which are properly speaking constitutional and rights of a pecuniary nature which belong to the crown.
> >
> > The former group of rights belong to the public law of the Empire and since the Cession are governed by the laws of England.
> >
> > The latter group belong to the private law and are regulated in this Province by the French civil law.
> >
> > This distinction is expressed by old writers in dividing the prerogatives of the crown into major and minor.[93]

The direct or executive prerogatives are part of the Constitution of Canada by virtue of section 9 of the *Constitution Act, 1867* read in conjunction with the preamble thereto.[94] They would not be affected by a determination that the incidental pecuniary prerogatives of the Crown, in whole or in part, are inconsistent with the *Charter*.

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90. *Laurentide Motels* v. *Beauport*, [1989] 1 S.C.R. 705 at 737-38 & 788.
91. *Exchange Bank* v. *The Queen* (1886), 11 A.C. 157 at 159 (P.C.) (Crown priority being an incidental and not direct privilege of the Crown it is subject to Quebec civil law).
92. *Supra*, note 90 at 737.
93. *Ibid.* at 788.
94. W. McConnell, *Commentary on the British North America Act* (Toronto: MacMillan of Canada, 1977) at 29-33.

As has been explained, there is no reason the Crown cannot be compared to a common person in the context of the exercise of an incidental prerogative of the Crown. Nonetheless, beginning with *Kurolak* v. *Saskatchewan*,[95] a line of cases has held that the Crown cannot be compared with a common person for the purposes of section 15 because the Crown is not and cannot be an individual.[96] However, *Kurolak* is not a compelling decision because of the circular reasoning employed by the Saskatchewan Court of Queen's Bench. The court held that section 15(1) did not apply to the Crown because "the Crown is not equal to others," a conclusion which begs the question raised. *Kurolak* and the other cases in this line of authority cannot be squared with precedent. In *The Queen* v. *Bank of Nova Scotia*[97] Justice Strong stated that it is settled beyond controversy that "Her Majesty the Queen is, in her own royal person, the Head of" the government of Canada. The Queen is a person, an individual. When the medieval writers spoke of the monarch, they spoke of a person, not a theoretical entity.[98] The same principles of law apply today. In *Quebec* v. *Labrecque*[99] Justice Beetz confirmed that under the Canadian system of law the Queen is a physical person. Under the Canadian Constitution the Queen is, in theory, both the chief executive officer of Canada, personifying the state and exercising the direct prerogatives, and, at the same time, a physical person, exercising the incidental prerogatives.

Based on Justice Cory's decision in *Rudolph Wolff & Co.* v. *Canada*[100] no question of inequality of treatment between the Queen and subject will arise in the context of the creation of tax laws by Parliament. Parliament may specify both the manner in which the tax is to be calculated and the manner in which the Queen as representative of the government of Canada may collect such tax. No complaint under section 15 of the *Charter* could be raised if Parliament gave the Queen acting in her capacity as representative of the government of Canada a priority over other creditors for taxes owing to the Queen. However, Parliament has not enacted such a priority. The Queen may not shield one of her incidental or nongovernmental prerogatives from the effect of the *Charter* and, in particular, the rule of section 15 of the *Charter* by using such nongovernmental prerogatives for an executive or governmental purpose.[101] The Queen may not hide the incidental prerogatives behind the direct prerogatives. If she could, then the prerogative of priority, an incidental prerogative, could be exercised in Quebec, but

95. [1986] 4 W.W.R. 323 (Sask. Q.B.).

96. See *Sebastian* v. *Saskatchewan* (1987), 31 C.R.R. 350 at 353; *The Queen* v. *Stoddart* (1987), 20 O.A.C. 365 (C.A.); *Wright* v. *Canada*, [1988] 1 C.T.C. 107 at 109 (Ont. Div. Ct.); *Trainor Surveys (1974) Ltd.* v. *New Brunswick*, [1990] 35 F.T.R. 228 (Fed. .T.D.).

97. [1985] 11 S.C.R. 1 at 19.

98. Bracton, *supra*, note 3 at 33.

99. [1980] 2 S.C.R. 1057 at 1082-83.

100. *Supra*, note 73. See also *Dywidag Systems International, Canada Ltd.* v. *Zutphen Brothers Construction Ltd.*, [1990] 1 S.C.R. 705.

101. See however, *Montreal Trust Company* v. *Tottrup*, *supra*, note 55 at 33-34. In *Tottrup* the court acknowledged that Parliament had not legislated but nevertheless upheld the priority on the basis of the governmental purpose for which the prerogative was exercised.

the Supreme Court of Canada has not accepted such a proposition.[102] A clear division has been made in Quebec between the Queen's public law and private law prerogatives. This division is also significant for all of Canada for the purposes of the *Charter*. The incidental prerogatives will only be available to the Queen as representative of the government of Canada if and to the extent such incidental prerogatives are consistent with the values and principles of the *Charter*.

The Queen acts on behalf of the government except in her personal and nongovernmental capacity when she asserts an incidental prerogative such as the prerogative of priority. Therefore, a comparison of the treatment afforded the Queen under the prerogative with that afforded the subject is "just and appropriate."[103]

(b) The Prerogative of Priority Violates Equality Rights in Section 15(1) of the *Charter*

The first part of the Supreme Court's two-part section 15 test is a determination of whether the distinction created by the impugned law results in a violation of one of the equality rights set forth in section 15 of the *Charter*.[104] The Crown prerogative of priority in purpose and in effect violates all four equality rights. Equality before the law is violated when the common law allows the Queen to stand above the ordinary law which applies to all others in Canada. In *The Queen* v. *Eldorado Nuclear*[105] Justice Dickson indicated that the prerogatives enjoyed by the Crown seem "to conflict with basic notions of equality before the law."[106] Equality under the law is violated for the same reason, the common law gives the Queen priority over all other creditors with claims of equal degree with the claims of the Crown. Equal protection of the law is denied when the subject is not given equal opportunity with the Queen in the collection of debts. Equal benefit of the law is also denied. The law gives to the Queen a benefit not allowed to any other individual, the right to have her claims paid first.

In *The Queen* v. *Turpin*, Justice Wilson turned to *The Queen* v. *Drybones*[107] for assistance in defining the right to equality before the law found in section 15 of the *Charter*: " '[E]quality before the law' ... means at least that no individual or group of individuals is to be treated more harshly than another under that law."[108] The prerogative of priority has just such a harsh effect on subjects who have claims of equal degree with the Crown. Under the common law prior to the *Charter* creditors with claims

102. See *Exchange Bank of Canada* v. *The Queen*, *supra*, note 91 at 157 and *Laurentide Motels* v. *Beauport*, *supra*, note 90.

103. See *Rudolph Wolff & Co.* v. *Canada*, *supra*, note 73 at 702.

104. See A. Bayefsky, "Defining Equality Rights" in A. Bayefsky & M. Eberts eds., *Equality Rights and The Canadian Charter of Rights and Freedoms* (Agincourt, Ont.: Carswell, 1985) at 1-25.

105. [1983] 2 S.C.R. 551.

106. *Ibid.* at 558. See also Chitty, *supra*, note 41 at 261-62 and S. de Smith *Constitutional and Administrative Law*, 5th ed. (Haromsworth, Eng.: Penguin, 1985) at 146-47.

107. [1970] S.C.R. 282 at 297.

108. *The Queen* v. *Turpin*, *supra*, note 74 at 1329.

of equal degree with those of the Crown were not entitled to any payment on such debts until the Crown's claims were satisfied in full.[109]

(c) Purpose of Prerogative of Priority Is Discriminatory

(i) Prerogative Priority as a Product of Medieval Society

The second part of the Supreme Court's two part test is a determination of whether the distinction in question is discriminatory in its purpose or effect. While governments may at times find it advisable to discriminate on the basis of one of the grounds set forth in Section 15 of the *Charter*, it is not often that a legislature is improperly used by one part of society to discriminate against an individual or group of individuals in society. The Lord's Day Act passed by Parliament in 1907 is an example of such improper legislative action.[110] The purpose of the common law rule of Crown priority is inconsistent with the principles of equality enshrined in section 15 of the *Charter*. It is a law with a purpose inimical to the *Charter*.

The prerogative of priority along with the other incidental prerogatives of the Crown were developed in a society founded upon the presupposition of inequality among persons. The prerogative of priority was intended to recognize and perpetuate inequality between the Crown and the subject. A priority in favour of the King was justified on the basis of the legal theory that "The King [had] no equal within his realm [and] subjects [could] not be the equals of the ruler."[111]

John Reeves was of the view that the King was able to aggrandize power and position because of the medieval theory of subjugation and submission accepted in England at the time the incidental prerogatives developed:

> Besides the uncertain condition of our legal polity, other causes, rooted in the constitution of the government, contributed to arm the king with extraordinary powers. The strict feudal submission of a vassal to his liege lord encouraged the notion of an entire obedience in all things to the king, who being supreme over all the lords in his kingdom, was, of course, to surpass them in the petty prerogatives which they themselves claimed within their own demesnes. These various causes concurring with the immense

109. *Household Realty* v. *Canada*, [1980] 1 S.C.R. 423 at 426.

110. *The Queen* v. *Big M Drug Mart*, *supra*, note 68 at 351 (enforcement of religious observance of day of rest of one particular religion not a legitimate object of government). See also *Takahashi* v. *Fish and Game Commission*, 68 Sup. Ct. 1138 at 1144 (1948) (California state law barring those ineligible for citizenship from securing commercial fishing licenses was direct outgrowth of antagonism toward persons of Japanese ancestry. Cursory examination of background of statute demonstrated that it was designed solely to discriminate against such persons in a manner inconsistent with the concept of equal protection of the laws.).

111. Bracton, *supra*, note 3 at 33.

authority possessed by the first Norman king, enabled this race of monarchs to assume prerogatives, and exercise acts of sovereignty, to the last degree oppressive and tyrannical.[112]

(ii) Medieval Courts Gave Priority to the "Worthier"

Other than a line of cases out of the courts of Ireland, there has been little judicial consideration of the origin and justification of the English Crown's prerogative of priority. Justice Gavan Duffy, in considering the claim of prerogative priority asserted by the government of Ireland, concluded that the claims of the Crown were preferred at common law "not because he was the executive authority, but by reason of the pre-eminence which he enjoyed at common law over all persons, on the principle expressed in the phrase *detur digniori*."[113] The same proposition was accepted by Justice Kingsmill Moore in the later Irish case of *Re Irish Employers Mutual Insurance Association*.[114] In that case Justice Kingsmill Moore postulated that the prerogative originated as a means of helping "a usually impoverished monarch in the collection of his personal income," noting that it would have been justifiable by "his supereminent position as paramount overlord."[115]

The feudal concept of *detur digniori* is the antithesis of the principle of equality enshrined in section 15. Even the royalist writers at the height of the prerogative recognized the inequality their theories created.[116] A law premised on inequality among persons and intended to perpetuate such inequality cannot be reconciled with section 15 of the *Charter*. Such a law has an unconstitutional purpose; a purpose destructive to the values section 15 was enacted to preserve and promote.

A law arising out of the medieval political system and based on the inequality among persons inherent in that system cannot pass the purpose test set out in *The Queen* v. *Big M Drug Mart*[117] and reiterated in *The Queen* v. *Oakes*.[118] The prerogative of priority is in direct conflict with the purpose of section 15 highlighted by Justice McIntyre in *Andrews* v. *Law Society of British Columbia*: "[t]he promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[119] The prerogative of priority is based on the idea that the Queen is deserving of more respect than other human beings and, therefore, the unequal benefit of the law. That concept is not acceptable in a modern free and democratic society.

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112. J. Reeves, *History of English Law From the Time of the Saxons to the End of the Reign of Philip and Mary*, 2d ed. (London: Brooke, 1787) at 206.
113. *Re P.C., an Arranging Debtor*, [1939] I.R. 306 at 314.
114. *Supra*, note 40 at 199.
115. *Ibid.* See also discussion on pages 9-10.
116. J. Davies, *The Questions Concerning Impositions*, *supra*, note 1 at 29. See also M. Judson, *The Crisis of the Constitution: An Essay in Political Thought in England, 1603-1645* (New York: Octagon Books, 1964) at 167.
117. *Supra*, note 110, (a law will be struck down if it possesses an unconstitutional purpose).
118. *Supra*, note 71 at 138.
119. *Supra*, note 67 at 171.

(iii) Discrimination in Favour of Advantaged Majority or Minority Prohibited by Section 15 of the *Charter*

The discrimination inherent in this common law prerogative of the Queen is apparent. The more difficult question is whether it is proper to compare the subject with the Crown when considering the constitutional validity of the prerogative of priority under section 15. This question arises because the Queen is exercising an indirect or personal prerogative, rather than a direct or governmental prerogative, when she asserts her right to priority. Justice Cory left this question open in *Rudolph Wolff & Co.* v. *Canada.*[120]

The fact that the Queen now only acts on the advice of the government and allows the government to act in her name is irrelevant to this question of whether the Queen's personal prerogatives are subject to section 15 of the *Charter*. The law only recognizes the Queen; it knows no other legal entity under the Canadian Constitution. There is no reference to the prime minister, the premiers or their cabinets in the *Constitution Act, 1867*, which refers only to the Queen in connection with the executive power.[121] The common law originally gave the prerogative of priority to the Queen in her personal capacity, not to her government. The *Constitution Act, 1867* did not modify the common law relating to the Crown prerogative, the purpose remains the same, to recognize the superior dignity of the Queen as expressed in the latin phrase *detur digniori*. If the government wishes to assert a different purpose for a priority in the collection of debts it must legislate such priority for such different purpose.

In legal theory,[122] the Crown prerogative of priority favours the Queen *in persona* at the expense of one or more of her subjects. The discrimination inherent in the prerogative of priority affects each subject individually but is based on a personal characteristic shared in common by all, none are royalty and, therefore, none are, according to the common law, worthy of the respect, honour and privileges bestowed upon the Queen. Because the subjects of the Crown are in the majority, it might be argued that they have the political system at their disposal and need not rely on the *Charter* to correct this inequality. Should a complaint of discrimination under section 15 be dismissed because the discrimination does not adversely affect a "discrete and insular minority?" Gwen Brodsky and Shelagh Day say yes. They write that:

> It is essential that the courts be available as guardians of *Charter* rights for those excluded groups that need it the most. Our proposal is that section 15 should be available for substantive equality claims by

120. *Supra*, note 73. See discussion on pages 18 & 19 above.

121. MacKinnon, *supra*, note 10 at 16.

122. Most references in our legal system to the Queen are references to the Queen in theory. Only rarely is the Queen an active participant as an individual in government. Nevertheless, the law only knows the person of the Queen. While the law may distinguish her as chief executive of various jurisdictions, it is the Queen herself as sovereign with whom the law deals, not the government on whose behalf her name and powers are used. If it were otherwise the government would not have her incidental prerogatives, which are personal to her, at its disposal.

> disadvantaged groups, and that members of advantaged groups who are disadvantaged only by virtue of their individual circumstances ought not to be able to bring substantive equality claims. This is based on three considerations:
>
> - members of advantaged groups are by definition not substantively disadvantaged;
> - the democratic process is more accessible to members of advantaged groups; and
> - the resources of both disadvantaged groups and the courts are limited.
>
> This would not mean that members of advantaged groups would be completely without equality rights, however. The process rights component of section 15 should be recognized and available to all. But it should be developed in a limited way to protect rights traditionally associated with the rule of law, such as access to the courts.[123]

Professor Gibson disagrees. He has expressed the view that it would be better to "dispose" of that "unhelpful expression."[124] He is of the opinion that under the limitations of a "discrete and insular minority" test, "the promise of section 15 would be cruelly crushed."[125]

One can sympathize with the desire of distinct and insular minorities to have their concerns "receive very serious consideration."[126] However, the premise underlying the "discrete and insular minority" test is not valid.[127] It is not analytically necessary to take away rights from one group in order to guarantee rights to another. Two wrongs do not make a right. It is possible and desirable to provide the equal benefit of the guarantee of "equal benefit of the law."

There are several other reasons for rejecting the identification of discrete and insular minorities as an aid to the interpretation and application of section 15 of the *Charter*. First, the phrase is apt to be misused by judges to avoid their responsibility to seriously analyze discrimination under section 1 of the *Charter*. Second, the scope of section 15 is narrowed rather than broadened by reference to that phrase. This is inconsistent with the generous approach to *Charter* interpretation articulated by the Supreme Court of Canada.[128] Third, the identification of a minority as "discrete and insular" will not aid in achieving the purpose of section 15, the prevention of discrimination by government. Fourth, as highlighted by Professor Gibson, the phrase is misleading in the use of the term

123. G. Brodsky and S. Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at 197.
124. Gibson, *supra*, note 77 at 150.
125. *Ibid.* at 152.
126. Brodsky and Day, *supra*, note 122 at 197.
127. Gibson, *supra*, note 77 at 150-52.
128. See *The Queen* v. *Big M Drug Mart*, *supra*, note 68 at 344. For a contrary view see D. Wentzell, "The *Charter* Equality Guarantee and the Crown Priority" (1987) 35 Can. Tax J. 416 at 419 ("If the equality rights are to retain their integrity, the types of distinctions that are characterized as prohibited discrimination must be examined carefully and expanded only cautiously.").

"minorities": "'Minorities' is misleading, since if applied to sex discrimination it would restrict *Charter* protection to males, who are less numerous than females in Canada."[129]

Justice Wilson's comments in *The Queen* v. *Turpin*[130] may serve to alleviate some of the concern that the phrase will be used to narrow the application of section 15. After noting that persons accused of one of the crimes listed in section 427 of the *Criminal Code* in all provinces except Alberta were not a "discrete and insular minority," Justice Wilson went on to say that "This categorization is not an end in itself but merely one of the analytical tools which are of assistance in determining whether the interest advanced by a particular claimant is the kind of interest s. 15 of the *Charter* is designed to protect."[131]

Notwithstanding this concession, Justice Wilson's reliance on the phrase in the context of section 15 is open to criticism. A focus on discrete and insular minorities under section 15(1) would be analytically inconsistent with section 15 of the *Charter*. If section 15(1) was intended to only operate in favour of minorities then section 15(2) would be redundant. Any law which benefitted minorities would be unlikely to violate section 15(1), particularly if the purpose of such law was to ameliorate conditions of disadvantage. Section 15(2) clearly suggests that discrimination in favour of an individual or group, whether a minority or majority, is precluded by section 15(1) unless it has as a purpose the amelioration of conditions of disadvantage suffered by, that minority or majority. It is only logical to conclude that section 15(1) proscribes "discrimination against anyone, high or low, majority or minority, influential or voiceless."[132]

The identification of discrete and insular minorities will be useful only for the purpose of determining whether a particular ground of discrimination is within the scope of section 15. It will not be helpful for the purpose of deciding who may or may not seek the protection of section 15. Justice Powell, in *Regents of University of California* v. *Bakke*,[133] thought that this was the proper approach under the equal protection clause of the United States Constitution:

> [P]etitioner argues that the court below erred in applying strict scrutiny to the special admissions program because white males, such as respondent, are not a "discrete and insular minority" requiring extraordinary protection from the majoritarian political process. Carolene Products Co., supra, at 152-153, n 4, 82 L Ed 1234, 58 S Ct 778. This rationale, however, has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreetness and insularity constitute necessary preconditions to a holding that a particular classification is invidious.

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129. Gibson, *supra*, note 123 at 159.

130. *Supra*, note 74 at 1333.

131. *Ibid.*

132. Gibson, *supra*, note 124 at 153 & n. 169a. Professor Gibson cited the remarks of Justice Powell in *Regents of University of California* v. *Bakke* (1978), 438 U.S. 265, 57 L. Ed. 2d 750 in support of this statement.

133. *Supra*, note 132.

Once it is determined that there is an adverse distinction based upon a type of discrimination section 15(1) was intended to prevent, it matters not that the party discriminated against is in the majority for the purposes of that particular ground of discrimination. The Lord's Day Act struck down in *The Queen* v. *Big M Drug Mart*[134] would not have been any more acceptable in Canadian society if that law had mandated the observance of the day of rest of a minority, Saturday, rather than that of the majority, Sunday.

(b) The Effect of the Prerogative of Priority is Discriminatory

If a court is satisfied that a law has an unconstitutional purpose, the court need not go on to consider whether the effects of the law are unconstitutional.[135] Such an exercise will usually be redundant. In *The Queen* v. *Big M Drug Mart* Justice Dickson said that he "would find it difficult to conceive of legislation with an unconstitutional purpose, where the effects would not also be unconstitutional."[136] This is the case with respect to the prerogative of priority. The effect of the Crown priority is to deny creditors of Crown debtors equality before and under the law and to deny them the equal protection and benefit of the law as guaranteed in section 15 of the *Charter*.

The discrimination inherent in the Crown prerogative is in substance no different than the discrimination at issue in *Andrews* v. *Law Society of British Columbia*:

> [A] rule which bars an entire class of persons from certain forms of employment solely on the ground that they are not Canadian citizens violates the equality rights of that class. ... [I]t discriminates against them on the ground of their personal characteristics, i.e., their non-citizen status.[137]

The prerogative of priority is a common law rule which bars an entire class of persons (subjects of the Crown) from the right to enforce their claims against a Crown debtor until the Crown has been paid in full, solely on the grounds of the circumstances of their status in society. It discriminates against them on the basis of their personal characteristics, their non-royal status (they were not born into the family of the King or Queen).[138] The evils of discrimination based on status are vividly illustrated by the caste system in India, a system very similar to that which existed in medieval England. The destructive nature

134. *Supra*, note 68 at 295.
135. *Ibid.* at 331-32.
136. *Ibid.* at 333.
137. *Supra*, note 79 at 151.
138. See *The Act of Succession* (U.K) 1700 12 & 13 William III, c. 2 ("the crown and regal government of the said kingdoms of England, France and Ireland and of the dominions thereunto belonging with the royal state and dignity of the said realms and all honours stiles titles regalities prerogatives powers jurisdictions and authorities to the same belonging and appertaining shall be remain and continue to the said most excellent Sophia and the heirs of her body being protestants"). The same discrimination would exist if a priority were enacted in favour of Prime Minister Mulroney, his children and their descendants.

of the caste system is apparent from the following Reuter news service report published in The Edmonton Journal on June 29, 1990:

> A low-caste bridegroom from India's Taj Mahal town of Agra wanted to ride to his wedding on horseback, and that led to seven people dying and 50 being reported missing, a local member of parliament said Thursday.
>
> Police in Agra, 200 km south of Delhi, said they had arrested 200 people and were keeping four ghettos for Harijans — the untouchables at the bottom of the Hindu caste hierarchy — under curfew after the wedding sparked a caste war.
>
> "It's not the first time," said Ramji Lal Suman, a Harijan member of parliament for the area. "It's always happening."
>
> "The Jats (the caste of small landowners) thought it would lower their dignity. They think a Scheduled Caste (Harijan) person riding on a horse is getting above his station."
>
> Bridegroom Ram Deen, 15, eventually rode to nearby Panwari village in a police jeep to marry 13-year-old Mundra.[139]

The discrimination between royalty and commoner inherent in the incidental prerogatives is similar to the discrimination held to be unconstitutional in *Glowczeski* v. *Canada*.[140] In *Glowczeski* Justice Muldoon of the Federal Court, Trial Division, held that denial of bail based on military rank was inconsistent with section 15 equality rights. Under the Queen's Regulations and Orders bail is allowed for warrant officers and commissioned officers. However, no provision is made in the Queen's Regulations and Orders for bail for members of the military up to and including sergeant. Justice Muldoon was of the opinion that such discrimination between classes could not withstand scrutiny under section 15:

> [B]y denying bail, in effect, [to] members of rank up to and including sergeant, but in making provision for bail after conviction for warrant officers and commissioned officers, the very system of military discipline, in this aspect, violates s. 15(1) of the *Charter*. The Supreme Court of Canada held in *Andrews* v. *Law Society of British Columbia* ... that a:
>
> > ... rule which bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status ... would ... infringe s. 15 equality rights.
>
> So is a regime which bars an entire class of military and naval personnel from the right to reasonable bail after conviction, pending appeal or judicial review, while according such right to another class of

139. "Bridegroom's Ride Spurs Deadly Caste Battle in India" *The Edmonton Journal* (29 June 1990) D15.
140. (1989), 41 C.R.R. 217 (F.C.T.D.).

personnel even though both have been convicted of offenses under the *National Defense Act* and/or the Q.R. & O.[141]

B. PRELIMINARY VIEWS ON THE CONSTITUTIONAL VALIDITY OF THE CROWN PREROGATIVE OF PRIORITY

A number of judges have commented on the validity of the prerogative priority in light of the *Canadian Bill of Rights* and the *Charter*. The earliest are those of Justice Keirstead in *Gandy & Allison Ltd.* v. *Erectors and Constructors Ltd.*[142] Justice Keirstead was of "the opinion that the provisions of the *Bill of Rights* do not repeal or alter the prerogative right of the Crown to preference in payment." He rejected the argument that "something is being claimed for the Crown higher than the justice which is distributed among subjects of the Crown, and that this is repugnant to the doctrine and principle involved in the *Bill of Rights*."[143] Justice Keirstead's decision is of little precedential value as he offered no legal justification or reasoning in support of his conclusion that the Crown prerogative was not in conflict with the *Canadian Bill of Rights*. In any case, *Bill of Rights* case law will be largely irrelevant for the purposes of the guarantee of equality set forth in the *Charter*. In *The Queen* v. *Turpin*[144] Justice Wilson refused to import into the *Charter* the reasoning followed by the Supreme Court of Canada in connection with the guarantee of equality found in the *Bill of Rights*. She said that: "The guarantee of equality before the law must be interpreted in its *Charter* context which may involve entirely different considerations from the comparable provision in the *Canadian Bill of Rights*."[145] She was also of the view that analysis in *Bill of Rights* cases would not be very useful in *Charter* cases because of "[t]he existence of s. 1 of the *Charter* and the demands it places on the state to justify limitation on rights[,] a distinctive feature of the *Charter* not found in the *Canadian Bill of Rights*."[146]

The prerogative priority has been challenged on the basis of section 15 of the *Charter* in at least two different legal actions. The first was *Wright* v. *Canada*.[147] In that case, Ontario District Court Judge Killeen held that the prerogative priority was inconsistent with section 15 of the *Charter*. He declared that the claim of the Crown for priority was of no force or effect. Justice Killeen did not think that the use of the word "individual" in section 15 excluded the Crown from the reach of that section. He said:

> [S]urely a purposive and liberal interpretation of the section does not lead to the necessary conclusion that the Crown — whether federal or provincial — is not bound by the burdens of the section when the Crown

141. *Ibid.* at 222-23.
142. (1963), 43 D.L.R. (2d) 461 at 472 (N.B. Co. Ct.).
143. *Ibid.*
144. *Supra*, note 74 at 1326.
145. *Ibid.*
146. *Ibid.*
147. [1986] 2 C.T.C. 409 (Ont. D.C.).

> law or action collides with an individual's rights under the section. The answer, I would have thought to the seeming conundrum is provided by section 32 of the *Charter*....
>
> This section provides that the *Charter* — all of the *Charter* — applies, inter alia, to both federal and provincial governments.[148]

After concluding that the Crown priority violated section 15, Justice Killeen went on to consider whether the prerogative was nonetheless justified under section 1 of the *Charter*. In considering the effect of section 1, he applied the criteria set forth in *The Queen* v. *Oakes*. After reviewing the test described by Chief Justice Dickson in that case, he concluded as follows:

> In applying these criteria to the instant case, I note, preliminarily, that Crown counsel elected to tender no socio-economic evidence before me to demonstrate that the objective of the Crown priority related to concern of a "pressing and substantial" character. Mr. Vita simply based his position on logical argumentation and reasoning that the priority buttressed the integrity of the federal tax-collecting procedures and was in the public interest.
>
> To me, the Crown argument smacks of an invitation to accept the Crown priority as an act of faith. It must be remembered, I believe, that the doctrine of Crown prerogative developed in a feudal society when the King was monarch in fact as well as theory. While the doctrine was carried over into later eras when constitutionalism and democratic government displaced a pure monarchial system, I cannot conclude that an ancient doctrine, or any of its aspects, can be any longer justified against the commands of the *Charter* by reference to a vague argument that the integrity of our federal tax-collecting system is vitally at stake. In support of arguments like that I would like to see some concrete evidence showing the past importance of the Crown priority within the tax-collecting structure of the federal government and, as well, why, in the current era, the federal government could not enact more narrowly tailored and less intrusive statutory provisions which could achieve the same objective as the Crown priority but which would be much more rational, less arbitrary and infinitely fairer.
>
> In short, I am unpersuaded on Mr. Vita's argument that the Crown priority raises a legitimate state concern of the "pressing and substantial" kind delineated under Chief Justice Dickson's first criterion.
>
> Equally, I conclude that it cannot meet the rigorous demands within the three-aspect second criterion. The Crown prerogative, and its priority component, can hardly be called a "carefully designed" measure. It is rather, a common-law rule which flowed from the autocratic powers of the monarchy. Even assuming, arguendo that this priority claim is rationally related to the objective identified by the Crown, it clearly is not crafted to impair "as little as possible" the right or freedom in question. And, finally, I see no proportionality between the "effects" of the priority and the alleged "sufficiently important" objective.[149]

148. *Ibid.* at 416.
149. *Ibid.* at 418-19.

The Crown appealed Justice Killeen's decision to the Divisional Court of Ontario. However, before the decision of the Divisional Court of Ontario was released in December 1987, the Federal Court, Trial Division, released a decision in January 1987 upholding the Crown prerogative. In *Lennox Industries (Canada)* v. *The Queen*[150] Justice Reed refused to declare the prerogative priority invalid under section 15 of the *Charter*:

> I cannot classify the Crown as being similarly situated to the plaintiff. I do not think the Crown's priority claim in this case is a distinction or inequality to which section 15 was meant to apply. The situation might be different if the Crown were operating in a commercial or trade capacity and had incurred the debts on the same basis as the private citizen. But in the collection of income tax the Crown is not acting as a private person would, it is acting in its governmental capacity.[151]

If it were true that the Queen is not acting as a private person when she collects income tax by way of writ of execution then the comments of Justice Reed would no doubt be justified on the basis of the principle set forth by Justice Cory in *Rudolph Wolff & Co.* v. *Canada*.[152] Justice Reed posed the right question but provided the wrong answer when she asked whether the Crown was "acting as a private person would?"[153] The question is whether the Queen is acting as a private person would in proceeding to enforce her debts by way of writ of execution. The answer clearly is yes! The Queen as debtor is in the same position as a private individual and in fact acts as a private person would. The Queen must rely upon a writ of execution (whether writ of *fieri fascias* or *extendi fascias* is of no consequence) to collect all debts (tax, commercial or otherwise) owing to her. A priority in favour of the Queen could only escape scrutiny under section 15 of the *Charter* if the tax legislation itself granted the Queen a right of priority in execution because of the Queen's status as government tax collector.[154] The Queen may not argue that a law with an unconstitutional purpose is nevertheless constitutional because there is now a constitutional purpose for its continued existence.[155] The Queen may not legitimize her unconstitutional nongovernmental powers by using them for governmental purposes.

The answer to the above question would be different if the question was modified to read: is the Crown acting as a private citizen in legislating with respect to taxes or the collection of taxes? The creation of legislation, the declaration of war and the calling of elections are all without analogy in the private sphere. The subject cannot complain

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150. [1987] 1 C.T.C. 171 (F.C.T.D.).

151. *Ibid.* at 174. See also *Montreal Trust Company* v. *Tottrup*, *supra*, note 55 (in both imposition and collection of taxes Crown is acting governmentally).

152. Justice Cooke adopted just this position in *Montreal Trust Company* v. *Tottrup*, *supra*, note 55 at 362.

153. *Lennox Industries (Canada)* v. *The Queen*, *supra*, note 150 at 179.

154. See however *Montreal Trust Company* v. *Tottrup*, *supra*, note 55 at 362 (Crown acting in governmental capacity when collecting taxes through use of writ of execution).

155. *The Queen* v. *Big M Drug Mart*, *supra*, note 68 at 353 (Lord's Day Act passed for unconstitutional religious purpose and not justified on the basis of current potential secular purpose).

because only the Crown or the government can carry out these and similar "governmental" functions.

The Ontario Divisional Court reversed the decision of Justice Killeen in *Wright* v. *Canada*.[156] Writing on behalf of the majority, Justice Austin allowed the appeal because "the learned judge ... erred in concluding that the Crown was an 'individual' for the purposes of section 15 of the *Charter*."[157] The trial judge did not, however, base his decision on the proposition that the Crown was an "individual", though such a conclusion is not insupportable. The decision was instead based on section 32 of the *Charter* which subjects the Crown to all of the *Charter*, including section 15.[158]

Justice Austin's reasoning on this point has been subject to harsh criticism by legal commentators. Professor Gibson has written:

> Reference should be made, however, to an odd line of cases that appears to have confused the question of who is *bound* by section 15 with that of who is *protected* by the section. In *Wright* v. *Canada (Attorney General)* for example, a claim *against* the Crown, attacking the Crown's prerogative priority among creditors as a contravention of section 15(1) of the *Charter*, was dismissed on the ground that the Crown is not "an individual," and is accordingly not affected by equality rights under the *Charter*. This seems clearly mistaken, since the question of whether the Crown is an "individual" would only be relevant vis-à-vis section 15(1) if the Crown were claiming *protection* of the *Charter*. The Crown's *obligations* under the *Charter* are determined by section 32(1), which subjects all "government" (of which the Crown is unquestionably a part) to *Charter* control.[159]

The first judge to consider the constitutional validity of the prerogative of priority after *Rudolph Wolff & Co.* v. *The Queen* was Justice Cooke of the Court of Queen's Bench of Alberta.[160] In *Montreal Trust Company* v. *Tottrup* Justice Cooke allowed the federal Crown to assert its prerogative of priority in an application for payment of funds out of court. While he allowed the Crown priority for amounts owing under the Income Tax Act, he did agree "that the Crown prerogative of prior payment is based on the feudal concept of *detur digniori* (let it be given to the worthier)" and that such prerogative was subject to the *Charter*.[161] Justice Cooke analyzed the decision of Justice Cory in *Rudolph Wolff & Co.* v. *The Queen* and concluded that Justice Cory's decision was consistent with the argument that the incidental prerogatives "which spring from the concept of the superiority of the Crown as a person" could be "inconsistent with the purpose of section 15 of the *Charter*."[162]

156. *Wright* v. *Canada*, [1988] 1 C.T.C. 107 (Ont. Div. Ct.).
157. *Ibid.* at 109.
158. *Supra*, note 147 at 416.
159. Gibson, *supra*, note 77 at 55-56.
160. *Montreal Trust Company* v. *Tottrup*, *supra*, note 55.
161. *Ibid.* at 356-57.
162. *Ibid.* at 358-60.

However, Justice Cooke did not characterize the incidental prerogatives as necessarily nongovernmental and agreed with Justice Reed in *Lennox Industries* that "in the collection of income tax the Crown ... is acting in its governmental capacity."[163] Justice Cooke came to this conclusion notwithstanding his acknowledgment that this prerogative was possessed by the Crown "simply by accident of birth."[164] He did not equate the indirect or incidental prerogatives with the Crown's personal and nongovernmental nature or capacity as did Blackstone and Phillips in their texts on constitutional law.[165] It is only the direct prerogatives which are defined by these two scholars as "political."[166] Webster's Dictionary defines political as "of or relating to government."[167] Only the direct prerogatives can be referred to as political or governmental. This is because they are possessed by the Queen in her governmental capacity. The incidental prerogatives, on the other hand, belong to the Queen in her personal capacity because of the honourable and sacred position attributed to the Crown as royalty and head of the feudal hierarchy.

Justice Cooke explained his reason for upholding the constitutional validity of the Crown prerogative of priority in this way:

> Regardless of the historical development of the prerogative of priority, the taxing power of the Federal Government, both in its imposition and collection, is an exercise by the Crown of its governmental capacity and has been since 1867 and the passage of s. 91(3) of the then *British North America Act*. As such, the Crown is not an individual with whom a comparison can be made to determine if a s. 15 violation has occurred.[168]

While there is no doubt that section 91(3) of the *Constitution Act, 1867* gives Parliament the power to make laws granting to the federal government the power to give itself priority in the collection of taxes, it is equally clear that Parliament has not done so. Justice Cooke explicitly acknowledged this in his reasons for decision.[169] Section 91 of the *Constitution Act, 1867* does not in and of itself *give* any tax collection power to the federal government, it merely *reserves* it. Therefore, until Parliament legislates otherwise, the federal government is forced to rely on the common law powers of the Queen to collect debts, including taxes. In relying on the Queen's common law powers to collect debts, the federal government may or may not cause the Queen to assert her prerogative priority. It may be correct to say that a tax debt is governmental in nature. However, it would be legally and constitutionally incorrect to say that the Queen is acting in her governmental capacity when asserting her prerogative priority with respect to the payment of a tax debt. The Queen could assign the debt and the assignee could recover the debt

163. *Ibid.* at 360-62.
164. *Ibid.* at 357.
165. Blackstone, *supra*, note 11 at 232-233; Phillips, *supra*, note 25 at 266.
166. Blackstone, *supra*, note 164; Phillips, *supra*, note 165.
167. *Webster's Ninth New Collegiate Dictionary*, (Markham, Ont.: Thomas Allen and Son Ltd., 1990) at 910.
168. *Montreal Trust Company* v. *Tottrup*, *supra*, note 55.
169. *Ibid.*

through the legal process. No one could seriously argue that, because of the original tax nature of the debt, the assignee was acting governmentally.

In *Re K.L. Tractors Ltd.*[170] the Australian High Court highlighted the importance of understanding that the prerogative of priority does not depend upon the nature of the origin of the debt: "According to all the statements of the rule, it depends not on the nature of the origin of an obligation, but on the mere facts that there is a debt, and that the creditor is the Crown and the competing creditors are subjects."[171] The focus must, therefore, be on the Crown, not the debt. The Queen when exercising the prerogative of priority, is acting in her personal as opposed to political capacity. When exercising an incidental or nonpolitical prerogative the Crown can only be described as acting in a nonpolitical or nongovernmental mode. If the prerogative of priority does not depend on the nature of the origin of the debt (taxes, contract or tort) then how can it be said that the Queen is acting governmentally when she exercises such prerogative?

In *Alberta Home Mortgage Corporation* v. *Castleridge Apartments Ltd.*,[172] Justice Conrad of the Court of Queen's Bench of Alberta was faced with the same issue addressed by Justice Cooke in *Montreal Trust Company* v. *Tottrup*: When is the Crown acting governmentally for the purposes of section 15 of the *Charter*? Justice Conrad upheld a decision of a Master granting the Crown leave to take the next step in an action notwithstanding that the "normal indicators for refusing leave to take the next step" were present. She based her decision on the Crown prerogative *nullum tempus occurrit regi* (time does not run against the Crown). Before reaching this conclusion she had to first determine whether the Crown could exercise this prerogative in the face of the *Charter*. She turned to the decision of Justice Cory in *Rudolph Wolff & Co.* v. *The Queen*[173] for help with this question. In her view, Justice Cory looked at whether or not the Crown was acting on behalf of the government of Canada when it committed the acts which were the subject matter of the cause of action. Because Alberta Home Mortgage Corporation was part of a program set up to meet broad governmental objectives, Justice Conrad concluded that the Crown was acting governmentally and, therefore, not subject to the *Charter*. In her view, the issue was similar to that in *Rudolph Wolff & Co.* and should be decided in the same way.

Can the reasoning in *Rudolph Wolff & Co.*, as explained by Justice Conrad, be applied to cases where the Crown asserts the prerogative of priority? The answer will be yes if debts can be divided into "governmental" and "non-governmental" categories. The common law has never recognized such a categorization. For the reasons set forth in the discussion of Justice Cooke's decision in *Montreal Trust Company* v. *Tottrup*,[174] the Crown cannot be said to be acting governmentally when enforcing any debt, regardless

170. (1961), 106 C.L.R. 318 (Austr. H.C.).
171. *Ibid.* at 336.
172. [1991] 5 W.W.R. 125 (Alta. Q.B.).
173. *Supra*, note 73.
174. See pages 32-34 above.

of the nature of the debt. It may be that Justice Conrad is right in concluding that causes of action can be divided into governmental and non-governmental. However, unlike debt, one cannot transfer a cause of action.

C. PRIORITY OF THE CROWN NOT JUSTIFIED IN A FREE AND DEMOCRATIC SOCIETY

1. Section 1 Queries

A determination that a law is inconsistent with a right or freedom guaranteed by section 1 of the *Charter* obliges the defender of the legislation to prove on a balance of probabilities that it represents a "reasonable limit ... in a free and democratic society."[175] The standard will be applied rigorously[176] "[h]aving regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect."[177] This evidentiary burden is "attributable in part to [courts'] reluctance to conclude that society must be prepared to condone and live with legislation which in its application breaches a fundamental right."[178]

The Queen v. *Oakes*[179] sets out the questions which must be answered in order to apply the constitutional measure which section 1 represents. They are as follows: 1. What is the objective of the challenged law? 2. Is the law a response to pressing and substantial concerns which are important enough to justify contravention of a *Charter* protected right or freedom? 3. Do the law's means rationally promote the attainment of the objective? 4. Do the means impair the infringed right of freedom as little as possible? 5. Is the deleterious impact of the law on those whose rights or freedoms are infringed greater than the ameliorative values associated with the objective the law was designed to achieve?[180] The Supreme Court of Canada has recently confirmed that the *Oakes* analysis of section 1 is equally applicable in the context of violations of section 15 of the *Charter*.[181]

The Supreme Court of Canada has identified two further factors which must be taken into consideration under the section 1 analysis. First, it is the original purpose of the law which must be justified. The American concept of shifting purpose has been rejected in Canada.[182] Second, it is the original justification advanced by the Crown which must be considered. The American approach of accepting any reasonably conceivable justification is not consistent with the approach of the Supreme Court of Canada. In *Reference Re*

175. *The Queen* v. *Oakes*, *supra*, note 71 at 136-37.
176. *Ibid.* at 137.
177. *Ibid.* at 138.
178. *Reference Re French Language Rights of Accused in Saskatchewan Criminal Proceedings*, [1987] 5 W.W.R. 577 at 633 (Sask. C.A.).
179. *Supra*, note 71 at 138-40.
180. *Ibid.*
181. *Andrews* v. *Law Society of British Columbia*, *supra*, note 79 at 154.
182. *The Queen* v. *Big M Drug Mart*, *supra*, note 68 at 334-36.

Public Service Employee Relations Act[183] Chief Justice Dickson declined to supplement the list of claimed reasons which prompted government to pass the impugned legislation.

2. Application to the Crown Prerogative of Priority

The original medieval justification of *detur digniori*, or "let it be given to the worthier," is no longer a valid rational for a rule which treats the Crown more favourably than the subjects of the Crown, the citizens of Canada. "There is no reason to retain outmoded, inegalitarian, status-bound concepts of the Crown and her prerogatives and privileges."[184] The Crown priority was originally justified on the basis that it was not consistent with the dignity of the Crown to share with a subject.[185] The nature of the prerogative's medieval origins lead the Law Reform Commission of British Columbia to recommend that the Crown priority be abandoned as an operative principle in the conduct of government.[186]

According to the Supreme Court of Canada in *The Queen* v. *Big M Drug Mart*[187] it is the original purpose of the law which must be justified under section 1 of the *Charter*. The House of Lords applied a similar principle in *McKendrick* v. *Sinclair*.[188] In discussing the revival of a dormant common law rule, Lord Simon of Glaisdale said "that if a rule is revived, it must be taken with all its incidents, however outmoded — you cannot pick and choose among them."[189] The Crown must establish that both the purpose and the effect of the prerogative priority are justified in a free and democratic society. The Crown cannot take advantage of the effect of a common law rule without first establishing that the original purpose of the rule is constitutional.

The Irish courts have been the only courts to seriously consider the original purpose of the Crown prerogative of priority. In *Re Irish Employers Mutual Insurance Association*[190] Justice Kingsmill Moore of the High Court of Ireland reviewed an earlier decision of Justice Gavan Duffy in *Re P.C., an Arranging Debtor*[191] wherein Justice Gavan Duffy concluded that:

183. [1987] 1 S.C.R. 313 at 374.
184. D. Cohen "Thinking About the State: Law Reform and the Crown in Canada" (1987) 24 Osgoode Hall L.J. 379 at 386.
185. H. Broom, *A Selection of Legal Maxims, Classified and Illustrated*, 8th ed. (London: Sweet and Maxwell, 1911) at 55-58.
186. Law Reform Commission of British Columbia, *Report on The Crown as Creditor: Priorities and Privileges* (Vancouver: The Commission, 1982) at 39 [hereinafter *B.C. Law Reform Report*]. See also *Wright* v. *Canada*, *supra*, note 146 at 419.
187. *Supra*, note 68 at 334-36.
188. [1972] S.L.T. 110 at 117 (H.L.).
189. *Ibid.*
190. *Supra*, note 40 at 176.
191. *Supra*, note 113 at 306.

> The common law prerogative of prior payment of his debts belonged to the king, not because he was the supreme executive authority, but because of the personal pre-eminence over all subjects which attached to him at common law, on the principle expressed in the phrase *"detur digniori."*[192]

Justice Kingsmill Moore adopted this explanation of the original purpose of the prerogative of priority after carefully reviewing British constitutional history so as to independently satisfy himself as to the validity of the statement. As a result of his research, Justice Kingsmill Moore concluded that the Crown prerogative of priority was originally justified on the basis of the feudal concept of inequality among persons.[193]

He referred to the 1691 decision of *Woodward* v. *Fox*[194] in his review of the law. In that case the court identified the legal theory behind the preference in favour of the Crown: "[I]f the right lies equal between the King and subject the King's title hath the preference by law, *detur digniori* is a rule, 9 Co. 24, in case of concurrence of titles, between the King and subject."[195] The prerogative of the Crown cannot be justified under section 1 on the basis of giving way to the "worthier." The medieval political system and social structure have long been abandoned. Section 15 of the *Charter* now requires that this vestige of that society also be left behind.

The fact that Canada is a democracy rather than a fiefdom is no reason to exclude the incidental prerogatives of the Crown from the ambit of section 15 of the *Charter*. Holdsworth was of the view that the threat of the tyranny of the majority was a good reason for limiting rather than giving full reign to the Crown prerogative:

> [T]he law as to the Crown's remedies against the subject needs to be brought up to date; and the need is the more urgent by reason of the increased powers which the Legislature is in the habit of giving to the Crown and its servants; for many of these powers can be enforced by these drastic prerogative remedies, in the employment of which the Crown still has very many of its old procedural and pleading privileges. Moreover, the survival of these procedural and pleading privileges is at the present day far more dangerous to individual liberty than at any other period, because they are at the disposal of a democratic government — a form of government which Burke, with some reason, said was the most shameless and fearless thing in the world, and more oppressive than any other form of government to a minority; for, while Kings or aristocracies were always more or less conscious of the fact that they must conciliate public opinion by a moderate use of their powers, the majority in a democratic state, however small it is, always imagines that it voices public opinion, and so can act as it pleases without further reflection.[196]

192. *Irish Employers supra*, note 40 at 199.
193. *Ibid.* at 215.
194. *Supra*, note 41 at 268.
195. *Irish Employers supra*, note 40 at 207.
196. Holdsworth, *supra*, note 18 at 346-47.

The *Charter*, and section 15 in particular, was enacted for the very purpose of protecting minorities from the tyranny of the majority.[197]

Over the centuries, different theories have been suggested as justifications for the priority given to the Crown. Courts and commentators in the seventeenth century were particularly active in creating justifications for the Crown's unusual privilege.

Justice Kingsmill Moore reviewed these justifications in *Re Irish Employers Mutual Insurance Association Limited*.[198] He came to the conclusion that they did not explain the origins of the prerogative of priority but did account for its continued existence:

> It remains to consider the third class of authorities bearing on this prerogative, those in which some attempt is given to provide reasons for its existence. The reasons suggested, if they are meant to provide an explanation of its origin can hardly be taken seriously; but, as explanations why the prerogative continued to exist, and escaped questioning or attack, they probably reflect with some accuracy the changing political thought and theory of the times when they were expressed.[199]

Justice Kingsmill Moore identified two of the major reasons advanced to explain why the prerogative of priority was "allowed to exist" through the centuries. The first justification was that the Crown was intended to be busy about the public good and should not have to worry about what its agents were doing to collect debts owing to her. A number of latin maxims have been coined to represent this proposition: *thesaurus regis est vinculum pacis et bellorum nerui, ardua regni pro bono publico* and *firmamentum belli et ornamentum pacis*.[200] Justice Kingsmill Moore was not impressed by these high sounding latin phrases:

> Those reasons reflect a growing feeling that such an exceptional class of privileges requires some justification and some reconcilement with the public interest. They are clearly fictitious as explanations of the origin of the privilege, though they may serve as excuses for its retention.[201]

The second reason was explained in *Giles* v. *Grover*: "That by the King is in reality to be understood the nation at large, to whose interest that of any private individual ought to give way."[202] Justice Kingsmill Moore concluded that these explanations did not illuminate the origin of the prerogative of priority:

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197. *Andrews* v. *Law Society of British Columbia*, *supra*, note 79 at 152 (section 15 intended to protect interests of "those groups in society whose needs and wishes elected officials have no apparent interest in attending").
198. *Supra*, note 40 at 208-11.
199. *Ibid.* at 208.
200. *Ibid.* at 209.
201. *Ibid.*
202. *Ibid.* at 210.

> The various dicta to which I have referred seem to me partially an expression of political outlook, partially a statement of constitutional reality at the time when they were uttered. They cast no light on the origin of the prerogative or as to its strict legal nature, but they do account for its survival, hardly restricted by the legislature, on the ground that, in the hands of the executive it serves a purpose advantageous to the community.[203]

While the courts in Ireland have rejected the prerogative of priority as part of the common law in force in that country,[204] courts in the United States have come to the opposite conclusion, holding that the Crown priority was received into the laws of individual states as part of the common law of England.[205] These differing conclusions can be explained by the divergent understandings of the basis for the prerogative of priority. The United States courts defined the prerogative of priority as "an incident to sovereignty, and not as a personal right attaching to the king's person."[206] Justice Story of the United States Supreme Court wrote in an 1832 opinion that the Crown priority of payment of debts was "founded not so much upon any personal advantage to the sovereign as upon motives of public policy in order to secure an adequate revenue to sustain the public burdens and discharge the public debts."[207]

As noted previously, the Irish courts came to the opposite conclusion:

> The Common law prerogative of prior payment of his debts belonged to the king, not because he was the supreme executive authority, but because of the personal pre-eminence over all subjects which attached to him at common law, on the principle expressed in the phrase "*detur digniori*".[208]

The Supreme Court of Ireland was of the view that the prerogative of priority was inconsistent with the Constitution of Ireland and, therefore, was not received into the laws of Ireland as part of the common law in force prior to the new Irish Constitution.[209] In coming to this conclusion the Supreme Court of Ireland relied on a clause in the Constitution of Ireland which adopted the former common law "to the extent to which [it was] not inconsistent" with the Constitution.[210] Interestingly, a similar clause in the Constitution of the State of Maryland did not lead the courts in that state to reject the Crown prerogative of priority.[211] The survival of the prerogative of priority will depend

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203. *Ibid.* at 210-11.
204. *Irish Employers, supra*, note 40 at 240-41.
205. *State* v. *Bank of Maryland* (1834), 6 G. & J. 205 at 225-28; *State* v. *Foster* (1895), 38 P. 926 at 928.
206. *State* v. *Foster, supra*, note 205 at 928.
207. *United States* v. *State Bank of North Carolina*, 8 L. Ed. 308 at 310 (U.S. 1832).
208. *Irish Employers, supra*, note 40 at 199 (cited in *Montreal Trust Company* v. *Tottrup, supra*, note 55 at 25.
209. *Irish Employers, supra*, note 40 at 199.
210. *Ibid.*
211. *State* v. *Bank of Maryland, supra*, note 205 at 226 (common law adopted by Bill of Rights, "so far at least as it was not inconsistent with the principles of that instrument, and the nature of our political institution").

to a great extent on whether the American or Irish view of the prerogative of priority is ultimately adopted by the Supreme Court of Canada.

The legislative committees and commissions from various Commonwealth nations which have studied the issue have identified three reasons usually advanced today to justify the Crown priority:

i) the Queen is not able to choose her debtors, particularly in regard to taxation;

ii) the necessity to protect the reserves of the Crown and thereby maintain the financial stability of the government;

iii) the general good of the community should prevail over the good of one member thereof.[212]

Although some of the concerns identified may be pressing and substantial under certain circumstances, there is no longer a rational connection between the priority of the Crown and the reasons advanced for its continued existence.[213] In connection with the argument that the Queen is not able to choose her debtors the Australian Senate Committee noted that:

> While it is apparent that these reasons were once valid, it is clear that they no longer have the same force. It is still true that, as regards taxation debts, the Crown is not a voluntary creditor. However, the Crown is not peculiar in this. Individuals who have been awarded damages against an insolvent individual or company are also seeking repayment of debts which they had not willingly permitted to be incurred.[214]

The 1970 Canadian Study Committee Report followed the same line of reasoning and asked: "[W]hether, in our economy of lazy credit, the businessman has always the economic freedom to choose his debtor or whether he is not bound, to a certain point, to give credit to the same extent as do his closest competitors."[215] The Canadian Study Committee similarly rejected the argument that the priority was necessary for the financial stability of the government.[216] The Australian Senate Committee concluded that: "With

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212. *Australian Senate Report*, *supra*, note 21 at 6-7; *B.C. Law Reform Report*, *supra*, note 184 at 35-36; Study Committee on Bankruptcy and Insolvency Legislation *Bankruptcy and Insolvency* (Government of Canada Publication 1970) ("Canadian Study Committee Report") at 122-23; C. Dunlop, *Creditor – Debtor Law in Canada* (Toronto: Carswell, 1981) at 449.

213. See, however, *Wright* v. *Canada*, *supra*, note 147 at 419 where the only judge to have thus far addressed the section 1 issue in this context determined that the Crown had not established pressing and substantial concerns.

214. *Australian Senate Report*, *supra*, note 21 at 6. See also M. Shanker "The Worthier Creditors (and a Cheer for the King)" (1975-76) 1 Can. Bus. L.J. 340.

215. *Canadian Study Committee Report*, *supra*, note 212 at 123.

216. *Ibid.*

respect to the need to protect the revenues of the Crown, the position was clearly different when only a small section of the general public funded public expenditure."[217]

The Canadian Study Committee attacked the logic behind the third reason identified, noting that "it could even be argued that the government should rank after ordinary creditors, as the public treasury is, in fact, in a better position than anyone to bear the inevitable losses."[218] The committee was of the view that it would be more logical for the government to divide the burden of tax left unpaid among all the tax paying public "than to take advantage of the bankruptcy of an insolvent taxpayer to reimburse itself, at the expense of the creditors who have already suffered losses."[219] The committee concluded that "there can be no rational explanation for the government attempt to obtain payment of the tax due by a bankrupt from his creditors. Such a proposition offends one's sense of natural justice."[220] This view was shared by the House of Lords in *Attorney General* v. *De Keyser's Royal Hotel*: "[T]he feeling that it [is] equitable that burdens borne for the good of the nation should be distributed over the whole nation and should not be allowed to fall on particular individuals has grown to be a national sentiment."[221]

The Australian Senate Committee doubted whether the "community as a whole would support the retention of this priority in its name at the expense of creditors who suffer the consequences of the winding-up much more directly."[222] The common law preference for Crown debts was also subject to strong criticism by Justice Murphy of the High Court of Australia in *Bank of New South Wales* v. *The Commissioner of Taxation*.[223] In commenting on the "unjust operation of the common law," Justice Murphy referred to the report of the Australian Senate Committee and its recommendation that the Crown priority be abrogated.[224]

The Supreme Court of Canada has expressed similar doubts about the justification for privileges in favour of the Crown in modern society. In *The Queen* v. *Eldorado Nuclear Ltd.* Justice Dickson wrote:

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217. *Australian Senate Report*, *supra*, note 21 at 7.

218. *Canadian Study Committee Report*, *supra*, note 212 at 123.

219. *Ibid.* See also *Extract from the House of Commons Debates of 10th February 1969*, 12 C.B.R. 117 at 120 ("[T]he important principle is who can best afford to bear the loss, the small businessman or the vast resources of government? The answer is obvious.").

220. *Canadian Study Committee Report*, *supra*, note 212 at 123.

221. [1920] A.C. 508 at 553. See also Report of the Advisory Committee on Bankruptcy and Insolvency, *Proposed Bankruptcy Act Amendments* [hereinafter *Canadian Advisory Committee Report (1986)*] ("The burden of tax left unpaid by the bankrupt should be divided among all the tax-paying public rather than borne by the creditors, who have already suffered loss").

222. *Australian Senate Report*, *supra*, note 21 at 7.

223. (1979), 54 A.L.J.R. 129 at 134 (H.C.).

224. *Ibid.* at 134.

> The more active government becomes in activities that had once been considered the preserve of private persons, the less easy it is to understand why the Crown need be, or ought to be, in a position different from the subject.[225]

A seven judge panel of the Court of Appeal of Alberta in *Farm Credit Corporation* v. *Dunwoody*[226] agreed: "That it has become 'less easy ... to understand why the Crown need be, or ought to be, in a position different from the subject.' "[227]

Justice Hugessen of the Federal Court of Appeal expressed strong views on this issue in *C.I.A.C.* v. *The Queen*:[228] "[T]his old notion of royal immunity cannot be reconciled with our modern understanding of a democratic state and of the right of every citizen to be equal before the law."

These expressions of disapproval for the Crown prerogative are not particularly new. Over 100 years ago Justice Patterson of the Supreme Court of Canada said the same thing in a discussion of "the general rule of English Law which gives the crown, when claiming as a creditor, priority over other creditors of equal degree."[229] He said:

> There may be practical force in the suggestion that the law would be more in consonance with the real life and spirit of the time if the public in the aggregate, nominally represented by the crown, and the public as individuals, were made to stand in this particular on the same footing.[230]

Unfortunately, until section 15 of the *Charter* came into force in 1985, judges were not equipped to modify the common law and tame the Crown prerogative of priority. Now that the prerogative of priority is under the control of the *Charter* and the courts, therefore, all creditors may stand equal before the law.

Finally, the deleterious impact of the Crown priority far outweighs any benefit it bestows upon society. The British Columbia Law Reform Commission identified four adverse effects of the Crown priority:

i) hardship for other creditors;

ii) inhibiting effect of the Crown's priority on other creditors;

iii) forbearance and its effect on apparent liquidity;

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225. [1983] 2 S.C.R. 551 at 558.
226. [1988] 5 W.W.R. 87 (Alta. C.A.).
227. *Ibid.* at 94.
228. [1984] 2 F.C. 866 at 870-71 (A.D.).
229. *Maritime Bank* v. *The Queen*, [1889] 17 S.C.R. 657 at 684.
230. *Ibid.* See also Law Reform Commission of Canada, *The Legal Status of the Federal Administration*, vol. 40 (Ottawa: The Commission, 1985) at 2 ("Today, the Crown continues to represent a legal reality endowed with many privileges, powers and immunities that are difficult to reconcile with the ideals of a society concerned about equality and democracy").

iv) uncertainty occasioned by exercise of discretionary powers.[231]

In its 1982 report criticizing the Crown priority the Scottish Law Commission cited the following passage from the opinion of Lord Anderson in *Admiralty* v. *Blair's Trustee*:

> In the case of *Palmer* Lord MacNaghten justifies the doctrine on the ground that its assertion results in the benefit of the general community (that is, the general body of taxpayers) although at the expense of the individual. I should have thought this was a reason for condemning the principle. Why should individuals be made to suffer for the general good, especially in a case like the present, where the general benefit is infinitesimal but the individual loss substantial?[232]

The Australian Senate Committee was of the view that the Crown priority worked a great hardship upon those affected by it:

> By far the most important of these objections is the hardship which is experienced by creditors who have not been repaid debts owing to them because the remaining assets have been used to pay debts owing to the Crown. Many instances have been brought to the Committee's attention concerning the hardship which has been experienced by employees, small businessmen and creditors of varying means who have been severely disadvantaged by the existence of the Crown's priority.[233]

Parliamentarians from both sides of the Canadian House of Commons have also referred to the hardship created by the Crown priority.[234]

A further effect of the Crown priority is to inhibit the creditor from pursuing a claim where it is possible that the Crown will intervene to assert its priority and thus deprive the creditor of the fruits of the time and effort invested to pursue potential sources of reimbursement.[235] "The creditor does all the work and the revenuers move into reap the benefit."[236]

The problem of forbearance and its effect on apparent liquidity was considered by the Law Reform Commission of British Columbia in its 1982 report on the Crown as creditor. The Commission favoured abolition of the Crown prerogative priority of first payment of debts because ordinary creditors have been severely prejudiced by the apparent liquidity occasioned by the Crown's action or, more accurately, lack thereof.[237] Even those who support the retention of the Crown priority believe it should not be given to the "lazy tax collector."[238]

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231. *B.C. Law Reform Report, supra*, note 184 at 37-39.
232. Scottish Law Commission (No. 68), *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Edinburgh: H.M.S.O, 1982) at 217.
233. *Australian Senate Report, supra*, note 21 at 27.
234. *Extract from the House of Commons Debates of 10th February 1969, supra*, note 219.
235. *B.C. Law Reform Report, supra*, note 184 at 38.
236. *Extract from the House of Commons Debates of 10th February 1969, supra*, note 219 at 120.
237. *B.C. Law Reform Report, supra*, note 189 at 38-39.
238. *Ibid.* at 39.

The manner in which the Queen may exercise the priority provides another compelling reason for its abandonment. The Queen may decide not to insist upon her right to prior payment in certain cases. This ability to selectively assert the priority is in and of itself a violation of the rule of law and the principle of equal treatment. The Australian Senate Committee was of the firm opinion that "The situation should no longer be permitted to exist."[239]

The conclusion of each of the reports out of Australia, British Columbia, Scotland and Canada is that "the priority of the Crown in our modern society cannot be justified."[240]

D. CONCLUSION

Section 15 of the *Charter* proscribes discrimination on the basis of personal differences irrelevant to the purpose of a law. This includes irrelevant personal differences between the Queen and her subjects. The Supreme Court of Canada has indicated that discrimination on the basis of relevant personal differences between Queen and subject is not contrary to section 15 of the *Charter*. Therefore, an analysis of the purpose of the Crown priority is necessary. If the purpose of the prerogative priority was related to the Queen's position as head of state then no prima facie case of discrimination under section 15 could be established. The existence of relevant differences between Queen and subject would make comparison under section 15 improper. However, as the purpose of the prerogative priority relates to medieval concepts of the royal dignity of the person of the Queen, section 15 of the *Charter* is implicated. Discrimination based on personal status in society is the type of discrimination the *Charter*, and section 15 in particular, is meant to remedy. Recognition or perpetuation of a class structure is inimical to the principles set forth in section 15 of the *Charter*.

The common law has given the Queen a prerogative priority in recognition of her royal person and not because of her position as chief executive officer of the government. If Parliament desires the Queen to have a priority as the representative of the executive arm of government, Parliament must legislate such priority and not rely on archaic theories inconsistent with modern principles of law.

The Crown prerogative of priority is not worth saving at the expense of the legal principles and moral values enshrined in the *Charter*. Under the Constitution of Canada, the Crown prerogative of priority is "legally unnecessary and morally inadequate. It is legally unnecessary because, in fact, no sovereignty, however conceived, is weakened by living the life of the law. It is morally inadequate because it exalts authority over justice."[241]

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239. *Australian Senate Report*, 21 at 33.

240. *Canadian Study Committee Report, supra*, note 212 at 23. See also *Australian Senate Report, supra*, note 21 at 42 & 70; *B.C. Law Reform Report, supra*, note 184 at 35 & 40; *Canadian Advisory Committee Report, supra*, note 219 at 79.

241. H. Laski "The Responsibility of the State in England" (1919) 147 L.T.J. 259 at 298.