

# **Is There a Canadian Law of Succession and Is There a Canadian Process of Amendment?**

Paper prepared as a supplement to the paper of 4 February, 2013 (Changing the Rules of Succession to the Throne for Canada) by

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The Canadian Royal Heritage Trust background paper of 4 February, 2013 essentially limited its analysis to the question and history of whether the rules of Succession to the Throne for Canada could be altered in 2013 by the Parliament of the United Kingdom or required a domestic Canadian action. I thought it was generally understood that the existing laws of Succession of the United Kingdom had become the laws of Canada through the principle of received law. That is, that prior to the Statute of Westminster, 1931 the Parliament of the United Kingdom had the sole authority to enact laws involving the Succession for the Dominions, so any such laws passed, including the Act of Settlement, 1701 and the Royal Marriages Act, 1772, and English common law had become the law of Canada and remained so after the Statute of Westminster came into force.

I still believe that to be the case but some commentary from the Government of Canada has indicated that the Government does not hold to that belief and it therefore maintains that there is no Canadian law of Succession, but rather that Canada is still governed directly by the United Kingdom laws of Succession. Specifically, it is maintained that the Act of Settlement, 1701, the Royal Marriages Act, 1772 and the principle of male primogeniture are not cited in Canadian statutes since “the 1982 repatriation [sic] did not incorporate the UK laws of succession into either Canada’s Constitution or laws or amend the preamble to the Statute of Westminster. That deliberate choice is a reflection of the decision to leave the question of succession to be determined by UK law as opposed to establishing a Canadian law of succession.”

## A Canadian Sovereign and a Canadian Succession

It is argued in the Government talking points that the part of the preamble to the Constitution Act (British North America Act), 1867 referencing the Crown of the United Kingdom read together with the reference to the Queen in Section 9 of the Act supports the position that whoever is the Sovereign of the United Kingdom is “in turn” recognized as the Sovereign of Canada. In fact this line of constitutional pursuit undermines, rather than supports, the conclusion presented. The preamble to the British North America Act, 1867 does not refer to the Crown of the United Kingdom of Great Britain and Northern Ireland (the current name of the realm), it refers to the Crown of the United Kingdom of Great Britain and Ireland (the name before the Irish Free State was created).

To pursue this line of reasoning, therefore, one must concede that the nature of the Crown can, and has evolved, a concession with which I readily concur. But there is no merit in arguing that there was evolution but that it stopped before the Statute of Westminster, which was the most important constitutional evolution for Canada prior to the patriation of the Constitution in 1982. The Sovereign's Royal Style and Title has changed several times since 1867. The Interpretation Act of the Revised Statutes of Canada has thus been periodically changed, to reflect those alterations, in determining how the words "the Queen" and "the Crown" are to be read in Canadian statutes. The Interpretation Act, 1985 (the most recent) states that "the Queen" and "the Crown" mean "the Sovereign of the United Kingdom, Canada and Her Other Realms and Territories, and Head of the Commonwealth". The Crown in the preamble to the Constitution Act, 1867 cannot be read in 2013 as meaning the Crown of the United Kingdom of Great Britain and Northern Ireland but must be read as meaning the Crown of the United Kingdom, Canada and its Other Realms and Territories, based on the current Royal Style and Titles for Canada and the Interpretation Act, 1985. Therefore, the Crown of Canada must be read as coincident with, not dependent upon, the Crown of the United Kingdom in the Constitution Act, 1867.

It should also be remembered that throughout Canada's history and constitutional development the Crown has always been a domestic institution. When the BNA Act was passed in 1867 there was no Dominion of Canada and the British North American provinces that were being federated were colonial provinces of the United Kingdom. So the Crown of the United Kingdom referred to in the preamble was not a Crown external to Canada but an internal Crown since Canada was in no way external to the sovereignty of the United Kingdom at the time. As the United Kingdom and Canada have evolved since 1867 they have become countries external to each other, though freely associated in the Commonwealth of Nations. The Constitution Act (BNA Act), 1867 did not, and does not, contemplate Canada being subject to an external Crown. While the Monarch is a shared Sovereign, determined by common rules of Succession, she reigns in each realm as a domestic Sovereign, having come to the Throne simultaneously in each realm.

The talking points attributed to the Government also add that purportedly solely British laws of Succession "determine the selection of the person who is the Sovereign of the United Kingdom, which in turn is recognized as the Sovereign of Canada". If that were true then the Government of the United Kingdom would have to inform the Government of Canada who their new Sovereign was when the reigning Sovereign died. Otherwise Canada would not know who its Sovereign was. That is simple logic, but any such interpretation of the Constitution was dismissed in practice as well as in theory on 6 February, 1952. Queen Elizabeth II was proclaimed in Canada as the Sovereign and "Supreme Liege Lady in and over Canada to whom we acknowledge all faith and constant obedience" *before* she was proclaimed Sovereign in the United Kingdom. Of course Elizabeth II had become the Queen of both countries the instant that her father had died, by virtue of the laws of Succession. Her sovereignty was announced to her peoples, not granted, by the respective Accession Proclamations, but Canadians were able to recognize who their Sovereign was without reference to any proclamation of recognition

in the United Kingdom because the laws of Succession in the two countries produced the same Sovereign. If there were no laws of Succession in Canada the Canadian Accession Proclamation in 1952 could not have been issued first. For the record, it was the already proclaimed Queen of Canada who was then proclaimed as Queen of the United Kingdom.

The talking points opinion also ignores the fact that there is a Canadian law of Succession existing not just through received law but through a Canadian statute. The statute is the Succession to the Throne Act passed by the Parliament of Canada on 31 March, 1937. That statute gave assent to His Majesty's Declaration of Abdication Act, 1936, passed by the Parliament of the United Kingdom. As explained in the CRHT's background paper of 4 February, 2013, such assent was morally but not legally necessary for the British act to extend to Canada since Canada had already "requested and consented" that the British act extend to Canada through an invocation of Section 4 of the Statute of Westminster, 1931 by a Canadian order-in-council, and the British act had become "part of the law" (to quote Section 4) of Canada on 11 December, 1936.

But passage of the Succession to the Throne Act by the Parliament of Canada on 31 March, 1937 had the secondary statutory effect of establishing from that date a law of Succession for Canada by Canadian enactment if in fact none existed at the time by inheritance, as the Government of Canada now argues. That is to say, the Succession to the Throne Act of 1937 is the statutory repository of the law of Succession for Canada, so it is irrelevant whether or not the patriation of the Constitution in 1982 specifically incorporated the UK laws of succession into Canadian law, as that had already been done in 1937, and it was not necessary in 1982 to create a Canadian law of Succession since one already existed.

#### The Canadian Succession to the Throne Act of 1937

The sequence of events from December 1936 through March 1937 is critical. King Edward VIII issued his Instrument of Abdication on 10 December, 1936. The British Government then sought the assent of the Dominion Parliaments and, in the case of Canada, the country's request and consent, to change the Succession, giving effect to King Edward VIII's abdication and King George VI's accession. The Canadian Government gave its request and consent to the British act by an order-in-council but the Parliament of Canada was not sitting so it could not give its assent. That assent was only morally and not legally necessary anyway so the process continued. The Parliament of the United Kingdom passed His Majesty's Declaration of Abdication Act, 1936 on 11 December, 1936, citing in the statute Canada's request and consent under Section 4 of the Statute of Westminster, to extend the act to the law of Canada, thus giving legal force to the abdication and accession for Canada. On 31 March, 1937 the Parliament of Canada gave its retroactive assent by statute (The Succession to the Throne Act).

Therefore, in the end, the Parliament of Canada gave its assent not only to the part of the British act changing the Succession for Canada (as per paragraph 2 of the preamble to the Statute of Westminster) as would have been the case had it acted in December, 1936 before the British act was passed, but, by acting in March, 1937, it also gave its assent to

the British Parliament invoking paragraph 3 of the preamble and section 4 of the Statute to extend the act to Canada “as part of the law” of Canada, since the latter had been included in the British act as passed. Therefore, all the provisions of His Majesty’s Declaration of Abdication Act, 1936 became “part of the law” of Canada not only by act of the Parliament of the United Kingdom but also by a confirmatory act of the Parliament of Canada.

What were the provisions of the Succession to the Throne Act and His Majesty’s Declaration of Abdication Act, 1936 which became, through Section 4 of the Statute of Westminster, 1931 part of the law of Canada through the British and then the Canadian acts?

The Canadian Succession to the Throne Act contains two schedules. The first is Edward VIII’s Instrument of Abdication. The second is the United Kingdom act, consisting of the preamble, one section of three sub-sections plus a second section naming the act, and a schedule with the Instrument of Abdication. So the Instrument of Abdication is brought into Canadian statute law twice – indirectly through the British act and directly through the Canadian act. The Schedule One Instrument of Abdication in the Canadian act is therefore included as a Canadian action by King Edward VIII, which altered the Succession, not one dependent upon United Kingdom legislation. This Schedule established certain aspects of Canadian succession law going forward, i.e. removing possible descendants of the former King from any claim to the Crown: “I, Edward VIII ... do hereby declare My irrevocable determination to renounce the Throne for Myself and for My descendants ...”

In Schedule Two of the Canadian act, Section 1(1) states that “... the member of the Royal Family then next in succession to the Throne [i.e. King George VI] shall succeed thereto and to all the rights, privileges, and dignities thereto belonging.”, thus bringing into Canadian law the common law principle of male primogeniture (since that was the basis being applied for the Succession), and any other applicable statutes in existence that determined the succession of King George VI.

Section 1(2) brings the Act of Settlement specifically into Canadian law, stating: “His Majesty [King Edward VIII], His issue, if any, and the descendants of that issue, shall not after His Majesty’s abdication have any right, title or interest in or to the succession to the Throne, and section one of the Act of Settlement shall be construed accordingly.”

Section 1(3) brings the Royal Marriages Act, 1772 specifically into Canadian law, stating: “The Royal Marriages Act, 1772 shall not apply to His Majesty after His abdication nor to the issue, if any, of His Majesty or the descendants of that issue.”

It is perhaps worth noting at this point that the Constitution Act, 1982, including the Charter of Rights and Freedoms, became part of the law of Canada through Section 1 of the Canada Act, 1982 (an act of the Parliament of the United Kingdom, not of the Parliament of Canada) which provided that: “The Constitution Act, 1982 set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada

and shall come into force as provided in that Act.” This is the same statutory procedure that was used in 1936 and 1937, by invoking Section 4 of the Statute of Westminster, 1931, to bring His Majesty’s Declaration of Abdication Act, 1936 into the law of Canada. It stated: “No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend or be deemed to extend, to a Dominion as part of the law of that Dominion unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.”

Therefore, His Majesty’s Declaration of Abdication Act, 1936 and its provisions for extending to the law of Canada the rules of Succession, derived from British law, is no less a part of the law of Canada than the Constitution Act, 1982 and its provision for the Charter of Rights and Freedoms, and the 1936 act exists in Canadian law on its own and within the Succession to the Throne Act, a specifically Canadian statute.

So Canadian statute law includes the rules of Succession for the late King Edward VIII and his descendants (though there were none) and the late King George VI and his descendants (our current Royal Family) even if one maintains that there is no previous Canadian Succession law prior to either 11 December, 1936 or 31 March, 1937 that affected the other descendants of King George V and those of previous monarchs.

#### A Made-In-Canada Process For Changes

By including the extension to the law of Canada of amendments of various British laws of Succession and the Instrument of Abdication of the Sovereign in a Canadian statute, the Succession to the Throne Act of 1937 brought all those laws into the statutory law of Canada for the future, following the Abdication of King Edward VIII. And this provides a Canadian means for Canada to amend the laws of Succession in 2013 as intended in Bill C-53 but which the repeal of Section 4 of the Statute of Westminster, 1931 and the passage of Section 2 of the Canada Act, 1982 (both taking place in 1982) preclude the assent to the British legislation provided by the bill from actually doing.

From 1937 to 1982 Canada could have requested and consented to the extension into the law of Canada of any changes in the rules of Succession that the Parliament of the United Kingdom may have enacted, which would then have altered the effect of, amended, or superseded the Succession to the Throne Act of 1937. That in fact did not happen and the patriation of the Constitution terminated the possibility of it happening in the future. The Succession to the Throne Act remains the current last word on the question of the rules of Succession for Canada.

The proposed changes alluded to in Bill C-53 therefore could be enacted as amendments to the Canadian Succession to the Throne Act of 1937 since the latter incorporates common law and the several statutes concerning the Succession as Canadian law. This action, rather than purporting to make the changes for Canada by amendments to the statutes in their original British existence, which can no longer be extended to the law of Canada, would actually bring about the changes.

The question that would still have to be answered, however, is whether the Succession to the Throne Act of 1937, enacted by the Parliament of Canada, has now been made subject to the authority of Section 41(a) of the Constitution Act, 1982 and therefore requires a constitutional amendment to alter, or whether it has remained under the authority solely of the Parliament of Canada. There is a strong case, as explained in the CRHT's background paper of 4 February, 2013 that Section 41(a) has the authority. But either way, once properly determined, would be a correct method of altering the rules of Succession to the Throne for Canada in Canada and should be the path followed.

The Parliament of Canada can therefore pass Bill C-53 to provide the courtesy assent required in the preamble to the Statute of Westminster, 1931 for the Parliament of the United Kingdom to change the laws of Succession as it desires for that country, and the Government of Canada can then turn its attention to the real Canadian issue of changing the Canadian law of Succession for this country in an essentially similar if not exactly the same manner. There is no need for theoretical musings or assertions by the Government of Canada about how British law can still be extended to Canada, nor a need to invent a Canadian method to proceed. The Succession to the Throne Act sits waiting to be called once more into service.

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