Changing the Rules of Succession to the Throne for Canada

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The Prime Ministers of the sixteen Realms of Her Majesty the Queen agreed at the Commonwealth Heads of Government Meeting in Perth, Australia (28 – 30 October, 2011) to change the rules of Succession to the Throne to provide for succession by the eldest child of the Sovereign regardless of gender (primogeniture) rather than by the eldest male child followed by younger male and then female children (male primogeniture) and to remove the restriction preventing the Sovereign or an heir from marrying a Catholic. This agreement will have to be implemented according to the necessary Commonwealth and national legal requirements. With the announced pregnancy of Her Royal Highness the Duchess of Cambridge the planned change has come to the fore. As of February 2013, however, no legal changes to the rules of Succession have in fact taken place, so the Succession remains by male primogeniture.

Any changes in the rules of Succession must first refer to the Statute of Westminster, 1931 which established the independence in international law of the Dominions.

The preamble of the Statute makes two provisions regarding alterations in the Succession. First, it provides that the Parliament of the United Kingdom commits itself not to alter the law without the "assent" of the Parliaments of all the Dominions.

> [Paragraph Two] And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom:

Secondly, the preamble provides that any such law passed will not apply to any Dominion without the "request and consent" of that Dominion.

> [Paragraph Three] And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and consent of that Dominion.

Preambles to acts are not absolutely binding but give meaning and guidance to interpreting acts. Sections of acts, on the other hand, are binding. The first provision regarding the Succession exists only in the preamble; the second provision is given statutory status since it is repeated in Section 4 of the Statute.

> [Section 4] 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.

In summary, therefore, under the Statute of Westminster, 1931, the Parliament of the United Kingdom is morally bound but not legally bound to seek the assent of the Parliaments of the other fifteen Realms to any change in the rules of Succession but any such change does not legally apply to the other Realms unless they express their request and consent that it apply to them. Without such request and consent the existing rule of male primogeniture will continue to apply to any such Realm.

For several of the Dominions, however, Section 4 (request and consent) of the Statute of Westminster, 1931 has been repealed.

In the case of Canada the situation is quite clear. The procedure described in the preceding paragraphs applied until the patriation of the Canadian Constitution in 1982. But Schedule I, Item 17 of the Constitution Act, 1982 repealed Section 4 of the Statute of Westminster insofar as it applied to Canada. Section 2 of the Canada Act, 1982 further, explicitly, states "No Act of the Parliament of the United Kingdom passed after the Constitution Act, 1982 comes into force shall extend to Canada as part of its law." Therefore, even if the Parliament of Canada assents to an act of the Parliament of the United Kingdom changing the rules of Succession, the act, and therefore the change, will not apply to the Succession to the Throne for Canada, and Canada can no longer request and consent, by act of parliament, by order-in-council, or by any other means, that it should. The rules of Succession as defined by common law, the Act of Settlement and other statutory provisions passed prior to 1931 are part of the received law of Canada and to effect a change in the rules of Succession to the Throne for Canada now requires a Canadian action independent of what is done in the United Kingdom. What must this action be? The history since the Statute of Westminster, 1931 should first be considered.

<u>Post-Statute of Westminster, 1931 changes to the Succession and the Royal Style and Titles</u>

There has been one change in the Succession since the passing of the Statute of Westminster, 1931 requiring a legal action. In December 1936 King Edward VIII determined to abdicate the Throne and executed an Instrument of Abdication to do so. An abdication is not valid however unless an act of Parliament is passed giving effect to the abdication. The Parliament of the United Kingdom initiated such an act in 1936. In accordance with the Statute of Westminster the United Kingdom Government sought the assent of the Dominions. This was granted by Australia, New Zealand and South Africa, but each in a different way. In Australia the Parliament was sitting and assent was given by resolutions of the two houses. In New Zealand the Parliament was not sitting but the Government gave its assent on behalf of Parliament. In 1937, when Parliament was

sitting, a resolution of assent was retroactively passed. South Africa decided that King Edward VIII's Instrument of Abdication automatically placed King George VI on the Throne under domestic South African law and thus gave its assent by saying it was unnecessary. But later, in 1937 it too agreed to give retroactive parliamentary assent through an act of Parliament. The Parliament of Canada was not sitting in December 1936 either and therefore could not give its assent. The Government of Canada did pass an order-in-council expressing Canada's request and consent that the act apply to Canada. That order-in-council was considered to also include interim assent. The Succession to the Throne Act, which gave Canadian assent, was not passed by the Parliament of Canada until 1937, being given royal assent on 31 March, 1937 in the name of King George VI, who was then the rightful King of Canada.

Why did Canada provide "request and consent" as well as "assent" while Australia and New Zealand did not? Section 4 of the Statute of Westminster did not at the time apply to all the Dominions as Section 10 of the Statute provided that Section 4 would only extend to Australia, New Zealand and Newfoundland when the Parliaments of those Dominions adopted Section 4. By 1936 Newfoundland had had its Dominion status suspended and therefore was not involved. Australia did not adopt Section 4 until 1942 and New Zealand did not until 1947, long after the abdication. Once the Parliament of the United Kingdom passed its act it therefore automatically applied to Australia and New Zealand without invoking Section 4 of the Statute. As mentioned, South Africa maintained that the change of Succession applied to South Africa through its existing domestic law without invoking Section 4 and the Irish Free State used the abdication to effectively remove the King from the internal constitution of Ireland and therefore did not wish to invoke Section 4.

[Ireland maintained that its own enactment of the Executive Authority (External Relations) Act, 1936 (12 December), implied its assent and, without requesting anything, applied the desired effect of the British act to itself by declaring that so long as the Free State was associated with a named list of Commonwealth nations and so long as the King recognised by those nations as the symbol of their co-operation continued to act (on advice) on behalf of each of them for the purposes of diplomatic appointments and international agreements, that King was authorised to act for the Free State for the like purposes. The act then provided that, on its passing, King Edward VIII's Instrument of Abdication would take effect and whoever was to succeed him if he had actually died on 10 December was to be King for the purposes set out in the act.]

The act passed by the Parliament of the United Kingdom ["His Majesty's Declaration of Abdication Act, 1936"] in consequence of the different actions of the several Dominions therefore stated:

> And Whereas, following upon the communication to His Dominions of His Majesty's said declaration and desire, the Dominion of Canada pursuant to the provisions of section four of the Statute of Westminster, 1931, has requested and consented to the enactment of this Act, and the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa have assented thereto.

This act was passed on 11 December, 1936.

What did 1936/1937 establish? First, it is clear that the assent of the Dominion parliaments cited in the preamble of the Statute of Westminster was a desirable situation but not an absolute necessity. The Parliament of Canada clearly had not given its assent when the act came into force and there was no consistency in the timing or the actions of the parliaments of the other Dominions. Secondly, "request and consent" was however necessary for the act to apply to certain Dominions, hence Canada's request and consent was cited in the United Kingdom act. Thirdly, such request and consent did not have to come from a parliament; it could come from an order-in-council. Fourthly, such an order in council was deemed to have covered, for at least an interim period, any moral requirement in the preamble for assent. And fifthly, although the law came into force, throughout the Commonwealth and within Canada, without the Canadian, New Zealand or South African Parliaments' assents, it was deemed appropriate that those assents should be given in due course.

Although it did not affect the Succession to the Throne, in 1953 the several Dominions of the Queen changed the Royal Style and Titles for their respective countries, an action that was also covered by the preamble to the Statute of Westminster. Although the preamble would suggest that the parliaments of the Dominions should have proceeded in a combined action, as in 1936/1937 – Westminster effecting a common change with the other parliaments assenting to the action, that is not what happened. While a common element in the Style and Titles was included for all, each parliament acted unilaterally. However, the reason for this was that in 1953 it was not an act of the Parliament of the United Kingdom that was being assented to by the other parliaments but a series of prerogative acts of the Sovereign that were being assented to respectively by each of the parliaments. Their unilateral actions, therefore, were still in accord with the wording of the preamble to the Statute of Westminster because they provided the assents of the parliaments. What had evolved was not the nature of the parliaments but the nature of the Sovereign, who was now acting in her several personalities, in right of the United Kingdom and each Dominion, rather than as one personality.

In Canada, Parliament passed the Royal Style and Titles Act, 1953 which "assented", not to legislation by the Parliament of the United Kingdom, but to a proclamation being issued by the Queen as Queen of Canada establishing her Royal Style and Titles for Canada. The Canadian act did not create the Royal Style and Titles for Canada, they were created by the Queen of Canada, after she had received the assent to her doing so from her Canadian Parliament. The final action remained one of royal prerogative.

> [Section 1 of the Act] The assent of the Parliament of Canada is hereby given to the issue by Her Majesty of Her Royal Proclamation under the Great Seal of Canada establishing for Canada the following Royal Style and Titles, namely, …

In both 1937 and 1953 therefore the Parliament of Canada's actions were ones of "assent" not of implementation. In 1937 it was the legislation of the Parliament of the United Kingdom that changed the Succession and in 1953 it was the proclamation by the Queen that established her Royal Style and Titles. In 1936/1937, by order-in-council, Canada's "request and consent" was also given. The procedure in 1936/1937 was transnational within the Commonwealth; the procedure in 1953 was purely internal. But on both occasions the procedure conformed to the Statute of Westminster and the authority of the Parliament of Canada was not expanded.

What do the procedures in 1936/1937 and 1953 suggest for 2013, especially regarding Canada? While the assent of all sixteen parliaments would obviously be desirable, and is morally compelling, to change the rules of Succession, that assent is not absolutely necessary to allow the Parliament of the United Kingdom to pass an act changing the rules of Succession *for the United Kingdom*. But any such change must either be implemented by domestic actions by each of the realms for which Section 4 of the Statute of Westminster no longer applies or must receive the request and consent of each particular Realm for which the Section does apply, and that request and consent must be cited in the act for the act to apply to each Realm respectively.

It has been suggested that the action of the Parliament of Canada in 1953 expanded the authority of the Parliament of Canada to alter the Succession as it had altered the Royal Style and Titles. But, as noted previously, the Parliament of Canada did not alter the Royal Style and Titles; it gave its assent to the alteration, as provided for in the Statute of Westminster. So, if the authority of the Parliament of Canada has indeed been expanded, it was not demonstrated by that action. A more compelling case for an evolved and expanded authority for Dominion parliaments might be found in the unilateral actions by several Dominions over the decades to become republics. They unilaterally amended the Succession for their countries by terminating it. So it may be the case that the Parliament of Canada acquired from the Parliament of the United Kingdom the right to legislate on the Succession but it cannot be so stated with certainty based on any Canadian precedents such as 1953.

The Procedure for 2013

On 13 December 2012 a bill was introduced in the Parliament of the United Kingdom to change the rules of Succession to the Throne concerning female succession and marriage of the Sovereign or heirs to Catholics. The changes would replace male primogeniture with general primogeniture and allow for the Sovereign or heirs to marry Catholics, but would still require the Sovereign to be in communion with the Church of England as by law established and not to be in communion with the Pope or the See of Rome. There would also be changes to the Royal Marriages Act altering the circumstances in which the Sovereign's consent would be required for royal marriages. The bill would alter both common law and statutory law, and the various laws being altered are enumerated.

It is now up to the Canadian Government to proceed to make similar changes to the rules of Succession to the Throne for Canada. On 31 January, 2013 it took its first step with the introduction of Bill C-53 ("An Act to assent to alterations in the law touching the Succession to the Throne").

Bill C-53

The Canadian Bill C-53, if enacted, would give the assent of the Parliament of Canada to the bill before the Parliament of the United Kingdom, if it were enacted. This addresses the moral, but not legal, requirement set out in paragraph two of the Statute of Westminster, 1931. It is worded similarly to the assent given retroactively in 1937 by the Parliament of Canada to "His Majesty's Declaration of Abdication Act, 1936". But, just as the 1937 Canadian act did not extend the 1936 British act to Canada (it was extended

by the Canadian 1936 order-in-council requesting and consenting that that British act be extended to Canada), Bill C-53, should it become law, would not in itself extend the changes to the rules of Succession proposed in the present United Kingdom bill (and subsequent act) to Canada. The Canada Act, 1982, Section 2 has established that that must be done by a domestic Canadian action.

While Bill C-53 is acceptable for the purposes of giving Canadian assent, the background notes issued with the bill make several assertions that do not bear scrutiny.

"The changes to the laws of succession do not require a constitutional amendment."

- As will be described in the following section of this paper, that assertion is far from settled and the contrary view has arguably the stronger case.

"The laws governing succession are U.K. law and are not part of Canada's constitution. Specifically, they are not enumerated in the schedule to our Constitution Act, 1982 as part of the Constitution of Canada."

- This was not the opinion of the Ontario Superior Court of Justice in 2003, upheld by the Ontario Court of Appeal in 2005. The Statute of Westminster, 1931, which addresses the requirements for altering the Succession, is indeed listed in the schedule as part of the Constitution of Canada under Schedule I, Item 17.

"Furthermore, the changes to the laws of succession do not constitute a change to the 'office of the Queen', as contemplated in the Constitution Act, 1982. The 'office of the Queen' includes the Sovereign's constitutional status, powers and rights in Canada. Neither the ban on the marriages of heirs to Roman Catholics, nor the common law governing male preference primogeniture, can properly be said to be royal powers or prerogatives in Canada."

- The change for marriages includes the Sovereign as well as the heirs, so the rights of the Sovereign are indeed affected. The U.K. bill also involves amendments to several statutes, such as the Bill of Rights and the Act of Settlement, which are primarily statutes that define several aspects of the Sovereign's constitutional status.

"As the line of succession is therefore determined by U.K. law and not by the Sovereign, the Queen's powers and rights have not been altered by the changes to the laws governing succession in Canada."

- As already noted, the line of Succession has not been determined solely by U.K. law insofar as it applies to Canada since 1931. The precedent of the 1936 Abdication affirmed that any changes to the Succession laws existing as of 11 December, 1931 could only extend to Canada if Canadian request and consent that they extend was given. This method of extending changes to Canada has no longer been legally possible since 1982. Therefore, either the rules of Succession for Canada can never be changed from what they were up to 1982 (surely an untenable position) or they must be subject to change by a domestic Canadian action and not by assent to a British action.

<u>What further actions must be taken by Canada</u>

In determining what further actions beyond Bill C-53 must be taken by Canada, several questions must first be answered: Are the rules of Succession to the Throne for Canada constitutional or ordinary law? If ordinary, then they can be made by Act of the

Parliament of Canada. If constitutional, are they encompassed by Section 44 or by Section 41(a) of the Constitution Act, 1982?

> [Section 44] Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.
>
> [Section 41(a)] An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and the legislative assembly of each province:
>
> (a) the office of the Queen, the Governor General and the Lieutenant Governor of a province.

In the United Kingdom, a unitary state (the Scottish Parliament, and the Assemblies of Northern Ireland and of Wales only have devolved powers), the distinction between constitutional and ordinary law is academic since all laws can be and are amended by Parliament. In Canada, a federal state, constitutional laws can only be amended in accordance with the provisions of the Constitution. Generally speaking, laws which affect both the Dominion and the Provinces require some degree of consent between both levels while those which affect only the Dominion can be altered by the Canadian Parliament and those which affect only the Provinces can be altered by the individual Provinces.

It is hard to argue that laws governing the Succession to the Throne of Canada are not of such significance to the country as not to be constitutional laws and that they do not affect both the Dominion and the Provinces. The fact that making any change to the Succession was referenced in the preamble to the Statute of Westminster, 1931 and that the Statute was included in Schedule I of the Constitution Act, 1982, which lists the acts and documents that comprise the Constitution of Canada, would surely confirm this.

The official explanatory notes to the bill proposing the changes to the rules of Succession, introduced in the Parliament of the United Kingdom on 13 December, 2012, which were tabled with the proposed legislation, are clear that the British Government considers the changes to be constitutional in the United Kingdom. For example, Note #23 states "The resulting Act will form part of the United Kingdom's enduring constitutional settlement …" Debate in the House of Commons at Westminster on the bill has made it clear that British Members of Parliament believe that the provisions are constitutional.

So the position that the proposed changes must also be constitutional in Canadian law is quite strong.

If the rules of Succession were ordinary law they would already be subject in Canada to the Charter of Rights and Freedom, and the "discriminatory" parts which are to be amended could simply be ruled unconstitutional by the Supreme Court of Canada, without any Act of Parliament or constitutional amendment. But, in 2003, in the case of O'Donohue versus Her Majesty The Queen In Right of Canada and Her Majesty The Queen In Right of Ontario on that very question, in determining that the rules of Succession to the Throne were not subject to scrutiny by the Charter of Rights and

Freedom, Mr Justice Paul Rouleau of the Ontario Superior Court of Justice held that the rules of Succession were indeed part of the constitutional law of Canada. His ruling was upheld in 2005 by the Court of Appeal of Ontario.

So, if constitutional, do changes to the rules of Succession fall under Section 41(a) or Section 44 of the Constitution Act, 1982? That seems more open to dispute, but Section 41(a) seems to have the better claim. Some commentators, while correctly noting that changing the rules of Succession does not literally change the Office of the Queen, have then suggested that Section 41(a) therefore is only meant to refer to the powers of the Queen, and therefore the section does not apply in this case. But Section 41(a) does not limit itself to amendments to the Office of the Queen, it refers to "an amendment to the Constitution of Canada *in relation to* [my italics] the following matters … the Office of the Queen". "In relation to" is a pretty broad expression. Amendments altering the rules of Succession to the Throne, i.e. who becomes the Queen or King, must surely be a matter *in relation to* the Office of the Queen.

If that is the case then, whether the Parliament of the United Kingdom retained the authority to alter the rules of Succession to the Throne for Canada with Canadian assent, request and consent until 1982, or if the Canadian Parliament had acquired from the Parliament of the United Kingdom the authority to amend the rules of Succession to the Throne for Canada on its own between 1931 and 1982, the Constitution Act, 1982 transferred that authority to the amending formula of the Constitution.

It is therefore clear that while the preamble of the Statute of Westminster establishes that the Parliament of Canada can give its assent to an Act of the Parliament of the United Kingdom changing the rules of Succession, without reference to the several Provinces of Canada, that British Act will have no application to Canada. And the balance of evidence would indicate that the Parliament of Canada cannot on its own apply the contents of the British Act to the Succession to the Throne for Canada. Section 41(a) of the Constitution Act, 1982 would apply and the proposed changes to the rules of Succession to the Throne for Canada will require a constitutional amendment following resolutions of each provincial legislative assembly as well as of the Senate and House of Commons of Canada before they become the law in Canada.

This, however, presents another dilemma. The amending formula for the Canadian Constitution involving both levels of the federation, e.g. Section 41, provides that the proclamation effecting the amendment may be made by the Governor General. The gazetting of proclamations amending the Constitution actually issued since 1982 have been inconsistent. Although all proclamations were made by the Governor General, some were originally gazetted beginning in the name of the Queen, then changed, while others were not.

It would be most unacceptable to have a change in the rules of Succession to the Throne proclaimed by the Governor General, the representative of the Queen, in his or her name, rather than in the name of the Queen and, ideally, any such change should be personally proclaimed by the Queen of Canada. Unless it is determined (as I believe it in fact should be) that because the Constitution Act, 1867 [Sections 9 and 10] provides that the Executive Government and Authority of Canada is vested in the Queen and that the Governor General is only to carry on the Government of Canada "on behalf and in the

name of the Queen", therefore any powers conferred on the Governor General to proclaim amendments to the Constitution as cited in the Constitution Act, 1982 are inherently powers belonging to the Queen and thus exercisable by her personally, the situation must be rectified. If it is not the case that the Queen can currently make the proclamation, then Section 41 of the Constitution Act, 1982 itself must be amended first to provide for the proclamation altering the rules of Succession to the Throne to be made in the name of the Queen and by the Queen.

These are significant issues and questions that need to be carefully addressed and, if necessary, resolved before any action is taken on changing the rules of Succession to the Throne for Canada. The Government of the United Kingdom is also contemplating making and not making other changes to the rules which may or may not be appropriate for Canada. As with the several Royal Style and Titles of the Queen in the Commonwealth, which retain an essential common element but are not uniform, it is necessary that the rules of Succession in the sixteen Realms be the same on essential aspects, such as primogeniture, but not necessarily in all aspects which would not automatically generate a divergence in the Succession. For example, there is no apparent reason why the Canadian rules of Succession should continue to require that the Sovereign be in communion with the Church of England, as long as there is no impediment in the Canadian rules preventing the Sovereign from being in communion with the Church of England. In other words, the Canadian rules need not be exactly the same as those in the United Kingdom as long are they are not in conflict with them. Also, it is one thing for Canada to have inherited for historical reasons the current rules against Catholic marriage or Catholic succession but it may be impossible to justify to Canadians a new Canadian-passed act or constitutional amendment that removed the rule against Catholic marriage but retained the rule against Catholic succession. In any event, retaining the latter restriction may be necessary in the laws of the United Kingdom but unnecessary to be repeated in Canadian law, and it is not required to maintain a shared Sovereign.

There are precedents for limiting such a religious restriction to just the United Kingdom. The Sovereign's commitment in the Coronation Oath was altered in 1937 from "maintain the Protestant Reformed Religion established by law" to "maintain in the United Kingdom the Protestant Reformed Religion established by law", thereby excluding the rest of the Commonwealth from this commitment. Similarly, the parliamentary declaration required of a new Sovereign, professing the Protestant faith, is only required in the United Kingdom Parliament and not in the Parliaments of the Commonwealth Realms. Neither case has impaired the principle of a shared Sovereign. A similar decision could, and perhaps should, be taken regarding the necessity for including the United Kingdom religious provisions in the rules of Succession in the other Commonwealth Realms.

Barring the birth of royal twins this year, with a female twin born before a male twin, the impending birth of the royal child does not in itself require immediate action to amend the rules of Succession. That would only be necessary before the birth of a second royal child if the first child born later this year is female. Also, the proposed changes are to be retroactive to October 2011 (the date of the Commonwealth Heads of Government meeting) in any case, regardless of when the changes are legally adopted in the several Realms, so the impending royal birth is not actually a deadline.

It would therefore be appropriate for the Parliament of Canada to pass Bill C-53 and give its assent to the action of the Parliament of the United Kingdom, allowing that realm to bring the changes to the rules of Succession appropriate to that country. But Canadians should not be under the misapprehension that such Canadian assent would actually change the rules of Succession for Canada. The Canadian Government should, and must, then take the necessary time to determine what process and what changes to the rules of Succession would be appropriate for Canada to actually implement the changes for Canada in conformity with Canadian principles but keeping an essential unity throughout the Commonwealth realms.

If all the issues surrounding Canadian changes to the rules of Succession can be resolved over the spring of 2013, then there should be no objection to proceeding in the coming months, but the Government of Canada need not engage in precipitate action to meet a deadline that is not a real deadline and thereby proceed in an inappropriate manner. It is more important to make such significant changes carefully and correctly.

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