

CHAPTER 10
SUCCESSION TO THE THRONE
AND THE ARCHITECTURE OF
THE CONSTITUTION OF CANADA

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[T]he Constitution should not be viewed as a mere collection of discrete textual provisions. It has an architecture, a basic structure. By extension, amendments to the Constitution are not confined to textual changes. They include changes to the Constitution's architecture.

Reference re Senate Reform, 2014 SCC 32
per curiam at para 27, [2014] 1 SCR 704.

In this essay, I will consider the law governing succession to the throne—the law about who may become King or Queen—and the relationship of this law to the “architecture” of the Constitution of Canada. The law on royal succession has ancient roots in English law. It is an old law in need of reform. To this end, the Parliament of the United Kingdom enacted the *Succession to the Crown Act, 2013*.¹ When proclaimed in force, this Act will abolish two discriminatory rules that form part of the law of royal succession, namely, the preference for males over females in the line of succession and the rule disqualifying from the throne anyone marrying a person of the Roman Catholic faith.

These reforms are not controversial. Indeed, the sixteen states, including Canada, that recognize the Crown as their head of state or government—the ‘Commonwealth realms’—have already agreed

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1. The *Succession to the Crown Act, 2013* (UK), c 20.

to them.² What is controversial, however, is the question about what the Commonwealth realms need to do to ensure that their laws align with the reforms adopted in the United Kingdom. My objective is to consider this question in relation to Canada. Do changes in the law governing succession to the throne made in the United Kingdom require an amendment to the constitutional law on the Crown in Canada before the substance of those changes may take effect here? The government of Canada says *no*. It acknowledges, however, that by a non-legal constitutional norm, or convention, the Parliament of Canada should “assent” to the reforms in Britain—which it did by enacting the *Succession to the Throne Act, 2013*.³

The government’s position has attracted support.⁴ But it has also produced criticism and a legal challenge in the courts.⁵ It has been argued that the Crown in Canada is now a *Canadian* institution and there is a *Canadian* law governing royal succession. Although this law was incorporated from the United Kingdom, it is now a separate body of law. It follows, on this account, that Canada must amend its law of royal succession so that it aligns with reforms made in the United Kingdom, and as these amendments will affect the “office of the Queen” within the meaning of section 41(a) of the *Constitution Act, 1982*,⁶ they will require the approval of the houses of Parliament and the legislative assemblies of all provinces. The government’s position, it is claimed, assumes that *British* law can determine the identity of

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2. See Josh Hunter, “A More Modern Crown: Changing the Rules of Succession in the Commonwealth Realms” (2012) 38 Commonwealth L Bull 423 at 433-434.
 3. *Succession to the Throne Act*, SC 2013, c 6, s 2. For the government’s position see Rob Nicholson (Minister of Justice), “Changing the Line of Succession to the Throne” (2013) 36 Canadian Parliamentary Review 8; (on constitutional law and constitutional convention, see AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1915) at 413-434.
 4. Peter W Hogg, “Succession to the Throne” (2014) 33 NJCL 83; Robert E Hawkins, “The Monarch is Dead; Long Live the Monarch’: Canada’s Assent to Amending the Rules of Succession” (2013) 7 Journal of Parliamentary and Political Law 593; Mark D Walters, “Submission to the Standing Senate Committee on Legal and Constitutional Affairs Concerning Bill C-53, *An Act to assent to alterations in the law touching the Succession to the Throne*” (5 March 2013).
 5. Garry Toffoli & Paul Benoit, “More is Needed to Change the Rules of Succession for Canada” (2013) 36 Canadian Parliamentary Review 10 [Toffoli & Benoit]; Philippe Lagassé & James W J Bowden, “Royal Succession and the Canadian Crown as a Corporation Sole: A Critique of Canada’s *Succession to the Throne Act, 2013*” (2014) 23 Const Forum Const 17 [Lagassé & Bowden]; Anne Twomey, “The royal succession and the de-patriation of the Canadian Constitution” (4 February 2014), posted at http://blogs.usyd.edu.au/cru/2013/02/the_royal_succession_and_the_d.html (accessed October 21, 2014); Anne Twomey, “Changing the Rules of Succession to the Throne” (2011) PL 378.
 6. *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11.

the Canadian Crown. Canada must assert ownership over the law identifying its own Queen.

This seems like a powerful argument. It is tempting to assume that because Canada is a sovereign and independent state with its own Crown it must have its own law of royal succession, albeit one originally borrowed from the United Kingdom. I will argue in this essay, however, that if we attend to the structure or “architecture” of the Constitution of Canada, it will become apparent that the identity of the Crown in Canada is based upon a different kind of rule, one that *is* distinctively Canadian and therefore *not* based on laws of royal succession incorporated from the United Kingdom. To put it simply, Canada recognizes the Queen as its Queen for different reasons than the United Kingdom recognizes the same person as its Queen. I will conclude that the Canadian government is right: no constitutional amendment is necessary for Canada’s law to align with recent changes to the law governing succession to the throne in the United Kingdom because that alignment exists without any need to change the rule of Canadian constitutional law governing the identity of the Crown in Canada.

SOPHIA AND THE PROTESTANT HEIRS OF HER BODY

The *Act of Settlement, 1701* provided that (under certain conditions) the Crown would vest in “Princess Sophia Electress and Dutchess Dowager of Hannover and the Heirs of Her Body being Protestants”.⁷ Who was Sophia and why was a Protestant princess of a German palatinate selected as the foundation for the British monarchy?

The answer lies in the story of constitutional and religious struggle in England that stretched across the seventeenth century, a struggle that involved assertions of royal absolutism by the first Stuart monarch, James I, the execution of his successor, Charles I, the restoration to the throne after an eleven-year Puritan interregnum of his son, Charles II, and the forced abdication of his successor, James II, in the Glorious Revolution of 1688. Protestant parliamentarians tolerated James II’s Catholicism so long as his Protestant daughters, Mary and Anne, were his heirs apparent—but that changed with the birth of a son by his (Catholic) second wife.

7. *Act of Settlement, 1701*, 12 & 13 Will, c 2 (Eng), article 1.

Parliamentary support for the King was already tenuous for other reasons, and James was forced to flee England. His eldest daughter Mary and her husband William of Orange were invited to accept the throne in his place.⁸

The transition was affirmed by the *Bill of Rights, 1689*.⁹ To preserve the “auntient Rights and Liberties” of the English people and to deliver them from “Popery and Arbitrary Power”, Parliament enacted that William and Mary were thereby made King and Queen. It directed that they hold the Crown jointly during their lives, and then the Crown was to descend through a defined line that included their direct descendants and Anne and her direct descendants. The Crown went to Anne in 1702. But Parliament, anticipating a failure of heirs and wary of the Catholic Stuarts exiled in France, had already enacted the *Act of Settlement, 1701*. This Act ensured that, if necessary, the Crown would vest in Sophia and the Protestant heirs of her body. Sophia may have been a German princess, but her mother was the daughter of James I. Anne had no heirs and Sophia pre-deceased Anne, so upon Anne’s death the Crown went to Sophia’s eldest son who became King George I in 1714. The rest is, as they say, history. Elizabeth II is Queen in the United Kingdom today because she is the latest Protestant heir of Sophia. The *Succession to the Crown Act, 2013* leaves in place the principal terms set by the *Act of Settlement, 1701*, including the rule that the King or Queen must be Protestant.

What does this story have to do with Canadian constitutional law? In fact, quite a bit. Aside from addressing succession to the throne, the *Bill of Rights* and the *Act of Settlement* affirmed principles relating to parliamentary privilege, legislative supremacy, the rule of law, and the independence of the judiciary that are now part of Canada’s constitutional architecture, having entered, as Chief Justice Antonio Lamer said, through the “grand entrance hall” to the constitution, *i.e.*, the preamble of the *Constitution Act, 1867*, which proclaims Canada’s constitution to be “similar in principle to the Constitution of the United Kingdom”.¹⁰ But what does the convoluted story about how the Crown in the United Kingdom came to be held

8. See in general Steve Pincus, *1688: The First Modern Revolution* (New Haven: Yale University Press, 2009).

9. *Bill of Rights, 1689*, 1 Will and Mar, sess 2, c 2.

10. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 [*Constitution Act, 1867*]. See *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3, per Lamer C J C at paras 83, 87, 107 (on the *Act of Settlement*), and para 109 (“grand entrance hall”); also, *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 63 (on the *Bill of Rights, 1689*).

by the Protestant heirs of Sophia have to do with the Constitution of Canada? The answer, in my view, is *nothing*.

THE SIMPLE RULE OF CROWN IDENTIFICATION

This answer requires some explanation. It will help, I think, to begin by stepping back from history for a moment to think more theoretically about what it means for one state to recognize the Crown of another state as its own. In this respect, it is worth emphasizing that the Commonwealth realms are members of a “voluntary association of independent and equal sovereign states”.¹¹ How the Queen in the United Kingdom gets to be the Queen within a Commonwealth realm is therefore entirely a matter for the internal or domestic constitutional law of that realm.

There are two basic ways by which a realm may recognize the King or Queen in the United Kingdom as its King or Queen. First, a state may adopt a constitutional rule that provides that the King or Queen under its constitution is that person who, at the relevant time, is King or Queen in the United Kingdom under the laws of royal succession in force there. In other words, a state may adopt what I will call a *rule of Crown identification*.¹² Under this approach, the state has no law of royal succession. The simple rule of Crown identification renders the need for a law of royal succession unnecessary. Second, a state may choose to have its own law of royal succession to determine who is the Crown in its country, and then incorporate as the substance of that law the same body of law that governs royal succession in the United Kingdom. In this case, the state will have what I will call an *incorporated law of Crown succession*.

It is within the power of any state wishing to recognize the Crown of the United Kingdom as its Crown to decide for itself whether to have a rule of Crown identification or an incorporated law of Crown succession. There are advantages and disadvantages associated with both. It may seem odd that a state might decide to have as its King or

11. *Charter of the Commonwealth* (14 December 2012), preamble.

12. The rule has also been called the “rule of recognition”: Hogg, *supra* note 4 at 90; Walters, *supra* note 4. To avoid confusion with the version of the “rule of recognition” put forth by H L A Hart in *The Concept of Law* (Oxford: Clarendon Press, 1961), which is an extra-legal social convention that identifies the criteria of legal validity for a legal system, I will here use the expression “rule of Crown identification”—which is, I hasten to add, very much a rule of ordinary constitutional law rather than an extra-ordinary or extra-legal norm.

Queen whoever happens to be King or Queen in a second state under that state's laws. But it may seem even odder for a state to copy and incorporate into its own law a body of law concerning royal succession that developed in another state under social and political conditions peculiar to it. There is a sense of oddity either way.

The rule of Crown identification does not imply any legal connection or unity between Crowns as offices (or "corporations sole").¹³ The rule of identification is just that: it identifies the person occupying the office. That the same person occupies another office (or fifteen other offices) is not inconsistent with the distinct legal identity of each office. The degree of separateness that the office of Crown will enjoy within any realm will be determined by other laws governing the Crown in the country, not the rule of Crown identification, which, again, only serves the purpose of identifying who occupies or exercises the powers of the office.

Furthermore, it is important to emphasize that under neither of the two approaches does the law of the United Kingdom have any force within the realm. For those realms having a rule of Crown identification, the British law of royal succession does not extend to or apply within the realm; changes to that law made in the United Kingdom will affect indirectly who can be King or Queen in the realm, but those changes will not extend as a matter of law to the realm and they will leave the realm's rule of Crown identification wholly untouched. For those realms having an incorporated law of Crown succession, in contrast, change to the law of royal succession made in the United Kingdom will have no effect directly or indirectly on who can be King or Queen in the realm, and so the realm will have to go through the process of updating its law on royal succession to ensure that it remains substantively identical with the law in the United Kingdom.

Is a realm with a rule of Crown identification less independent or sovereign than a realm with an incorporated law of Crown succession? No. At any time, the realm with a rule of Crown identification can amend its law to adopt a different rule for identifying its monarch, or to abolish its monarchy altogether. Until then, the effect of the rule is simply to spare the realm the burden of having to amend its own law each time the law of royal succession in the United Kingdom changes. The choice between having a rule of Crown identifica-

13. Lagassé & Bowden, *supra* note 5.

tion and an incorporated law of Crown succession, then, is really just a choice between two different default positions regarding the identity of the Crown. Does the realm want to amend its law governing the identity of its Crown each time the law of royal succession in the United Kingdom changes or only when it no longer wishes to have the Crown of the United Kingdom as its Crown? That is the basic question to be answered.

Once the commitment is made by a state to recognize the Crown in the United Kingdom as its Crown, the rule of Crown identification seems much simpler and more efficient than having an incorporated law of Crown succession. However, the legacy of the British empire casts a long shadow. For a realm that still feels insecure about its image as an independent state, the symbolic value of changing its own law each time the law of royal succession is changed in the United Kingdom may be important politically. Even so, it should be understood that this symbolism comes at a very high price in terms of constitutional architecture. By adopting an incorporated law of Crown succession, the realm will have to accept within its own constitutional law large swathes of law that only really make sense in light of the social and religious history of England which I briefly summarized above. The attempt by a country to weave the constitutional narrative that explains why the King or Queen must be the direct Protestant heir of Sophia into its own constitutional narrative may even prove damaging to the country's constitutional foundations. I return to this point in the final part of this essay. For now, however, it may be said that there are sound reasons for why an independent and sovereign state may prefer having a rule of Crown identification over an incorporated law of Crown succession.

I have been discussing the decision about whether to have a rule of Crown identification or an incorporated law of Crown succession as if it were a choice to be consciously made by the framers of a constitution. The reality for certain Commonwealth realms, however, is that they have old written constitutions dating from the days of the British empire, and the question is not really about which rule the framers selected but about how best to interpret the constitution today. If the written constitution was adopted when the state was a colony, it probably did assume something like a rule of Crown identification. Given the emergence of the colony into a sovereign state that continues to recognize the Crown, must the constitution now be interpreted differently as embracing an incorporated law of Crown succession? This is, in very general terms, the question confronting Canada today.

THE CANADIAN RULE OF CROWN IDENTIFICATION

Canada's foundational constitutional text is an Act of the United Kingdom Parliament, the *British North America Act, 1867* (or the "BNA Act"), now called the *Constitution Act, 1867*.¹⁴ Section 9 provides that the "Executive Government and Authority of and over Canada" is "vested in the Queen", and section 17 provides that there shall be "One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons." But who is the "Queen" as that term is employed within the *Constitution Act, 1867*?

There was no mystery in 1867 about who this "Queen" was: it was the Queen, Victoria, who gave royal assent to the Act. There was also no mystery about who would be the "Queen" after Victoria's death. The Act does not contain any substantive rules of royal succession. However, the preamble to the *Constitution Act, 1867* stated—and still states today—that the provinces are united federally "under the Crown of the United Kingdom of Great Britain and Ireland". Furthermore, section 2 of the *BNA Act* provided:

The Provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.

Finally, section 128 provided—and still provides today—that members of the House of Commons and Senate and members of all provincial legislative assemblies must swear the oath of allegiance that is set out in the Fifth Schedule, namely:

I A.B. do swear, That I will be faithful and bear true Allegiance to Her Majesty Queen Victoria.

Note. The Name of the King or Queen of the United Kingdom of Great Britain and Ireland for the Time being is to be substituted from Time to Time, with proper Terms of Reference thereto.

The *Constitution Act, 1867* seems unequivocal: Canada has a rule of Crown identification not an incorporated law of Crown succession. References to the "Queen" in the Act are to be taken as references to that person, whether King or Queen, who shall, from time to time, occupy the office of "Crown of the United Kingdom". Or at least that is what the written text adopted in 1867 says. Whether the essential structure or architecture of the Constitution of Canada is best

14. *Constitution Act, 1867*, *supra* note 10.

interpreted that way today is a point to which I return below. First, however, it is necessary to consider whether events between 1867 and today altered the written texts that I have just summarized.

THE CAREFUL CLERKS AND THE REPEAL OF SECTION 2

We may begin by addressing briefly the fact that section 2 of the *BNA Act* was repealed by the United Kingdom Parliament in 1893 by a *Statute Law Revision Act* that purported to remove from a host of statutes provisions that were “spent” or had ceased “by lapse of time or otherwise” to be necessary.¹⁵ Section 2 was one of several provisions in the *BNA Act* repealed. Was the identification of the “Queen” in the *BNA Act* as the King or Queen of the United Kingdom spent or unnecessary? There had been no political developments by 1893 suggesting it was. If the substantive point of law recognized in section 2 had been considered obsolete, then the drafters of the 1893 Act would have repealed or amended the preamble and the Fifth Schedule of the *BNA Act* too—but they did not.

Perhaps section 2 was thought to be redundant in light of the enactment of section 30 of the *Interpretation Act, 1889*, which provided a similar interpretive rule for all statutes.¹⁶ But, if so, it is unclear why, a few years later, the *Commonwealth of Australia Constitution Act, 1900* included a provision very similar to the one that had just been removed from Canada’s *BNA Act*.¹⁷ Another possible explanation that has been offered is that the repeal of section 2 was a “clerical error”—that the intention was not to repeal section 2 but section 3, a section that dealt with the proclamation bringing the new Dominion of Canada into existence that was “spent” but inexplicably left un-repealed.¹⁸

15. *Statute Law Revision Act, 1893* (UK), 56-57 Vict, c 14, preamble.

16. *Interpretation Act, 1889* (UK), 52 & 53 Vict, c 63.

17. *Commonwealth of Australia Constitution Act, 1900* (UK), 63 & 64 Vict, c 12. It should be noted that three High Court of Australia judges in *Sue v Hill* (1999) 199 CLR 462 (HCA) assumed (at para. 93) that section 2 of the 1900 Act did not imply what I have called a rule of Crown identification, and this case is taken to establish the view in Australia that changes to the law governing royal succession in the United Kingdom have no direct or indirect effect in Australia unless Australian law is changed (see Twomey, *supra* note 4). It should be noted, however, that the assumption was expressed *obiter dicta* by only three of seven of the judges deciding the case.

18. A R Hassard, *Canadian Constitutional History and Law* (Toronto: Carswell, 1900) at 78.

Whatever the explanation, the 1893 amendments to the *BNA Act* went largely unnoticed by Canadian legal scholars who continued to refer to section 2 and to reproduce the Act without the amendments.¹⁹ Only in 1942 did the renowned constitutional scholar (and poet) F.R. Scott draw attention to them. The 1893 amendments were made, Scott said (facetiously) by “careful law clerks” working for a committee tasked with “lopping off the dead wood” in all English statutes, and they wrongly assumed that the *BNA Act* was just another English statute.²⁰ Something of the nature of the exercise is revealed by the fact that after dealing with Canada’s foundational constitutional document the careful clerks turned their attention to cleaning up the *Dog Licences Act, 1867*.

Scott observed that the amendments went unacknowledged not only in Canadian textbooks but also in copies of the *BNA Act* printed by the King’s Printer in Ottawa, a result of the fact that they had been passed by the United Kingdom Parliament “without the Canadian Parliament being in any way informed”.²¹ This was a violation of the convention that the British Parliament would only legislate for Canada upon its request and consent. Perhaps the entire exercise was a clerical error. Scott conceded, however, that none of the amendments were of practical importance. What about section 2? Here, he admitted, it was difficult to understand why the provision identifying the “Queen” in the Act as the King or Queen of the United Kingdom was repealed. But it did not matter. Wrote Scott: “No doubt this rule remains in our law without the necessity of its statement in the B.N.A. Act, but *cela va bien mieux en le disant*”.²²

Section 2 appears to affirm in Canadian constitutional law a rule of Crown identification. In light of the story behind its repeal, and the fact that the preamble and Fifth Schedule, which also affirm that rule, were left untouched, it would be unreasonable now to infer from the repeal an intention to depart from the rule of Crown identi-

19. W H P Clement, *The Law of the Canadian Constitution*, 2nd ed (Toronto: Carswell, 1904) at 76; A H F LeFroy, *Canada’s Federal System, being a Treatise on Canadian Constitutional Law under the British North America Act* (Toronto: Carswell, 1913), at 2 and 768; A.H.F. LeFroy, *A Short Treatise on Canadian Constitutional Law* (Toronto: Carswell, 1918) at 41; W P M Kennedy, *The Constitution of Canada: An Introduction to its Development and Law* (London: Oxford University Press, 1922) at 459.

20. F R Scott, “Forgotten Amendments to the Canadian Constitution” (1942) 20 Can Bar Rev 339 at 339-340.

21. *Ibid* at 339.

22. *Ibid*.

fication. As F.R. Scott suggested, the language of section 2 continued to capture the meaning of the *BNA Act* regarding the identity of the Queen in Canada.

‘ASSENT’, ‘REQUEST AND CONSENT’ AND THE STATUTE OF WESTMINSTER

It was perhaps not surprising that the *BNA Act* contained a rule of Crown identification, for it was adopted at a time when the Crown was considered “one and indivisible throughout the Empire”.²³ As colonies emerged into self-governing Dominions and then sovereign states, however, the Crown in each jurisdiction came to be seen as legally separate—that “in matters of law and government the Queen of the United Kingdom...[became] entirely independent and distinct from the Queen of Canada”.²⁴ I argued above that there is no legal or logical reason why a sovereign and independent state with its own Crown cannot have a rule of Crown identification. But did the particular legal reforms adopted in response to the independence of Canada and other Dominions involve a decision to move away from that kind of rule?

The independence of the Dominions from the United Kingdom was accepted as a matter of constitutional convention and then constitutional law.²⁵ By 1926, it was recognized that the United Kingdom and the Dominions were “equal in status...though united by a common allegiance to the Crown”.²⁶ Representatives from the Dominions and the United Kingdom meeting in 1929 agreed that the power of the Dominion parliaments to amend or repeal British law extending to them should be affirmed legally.²⁷ But how was this power to be reconciled with their common allegiance to the Crown? The solution proposed was that they should all acknowledge the existence of a “constitutional convention” governing how they would in

23. E.g. LeFroy, *Short Treatise*, *supra* note 19 at 59-60 (“The Crown is to be considered as one and indivisible throughout the Empire; and cannot be severed into as many distinct kingships as there are Dominions, and self-governing colonies.”).

24. *The Queen v The Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*, [1982] Q B 892 (Eng CA), 913 (May LJ).

25. Peter Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand* (London: Oxford University Press, 2005).

26. “Report of the Inter-Imperial Relations Committee of the Imperial Conference 1926” (November 1926) at 2.

27. “Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation 1929”, Cmd 3479 (1930) at para 58.

future exercise their legislative independence in relation to the law of succession to the throne, a convention “similar to that which has in recent years controlled the theoretically unfettered power of the Parliament of the United Kingdom to legislate on these matters”.²⁸ These recommendations were implemented by the *Statute of Westminster, 1931*.²⁹

The *Statute of Westminster* applied to the United Kingdom and six Dominions, including Canada. The heart of the Act is section 2, which conferred upon Dominion parliaments the authority to amend or repeal Acts of the United Kingdom Parliament that extended to them. This power was supplemented by section 4, which provided that in future no Act of the United Kingdom Parliament would extend to form part of the law of a Dominion unless the Act expressly declared that the request and consent of the Dominion government for the statute had been given.

These rules of law were supplemented by constitutional conventions affirmed in the preamble to the Act. The preamble’s third recital corresponded with the legal rule in section 4 and provided that no law made by the United Kingdom Parliament shall extend to any Dominion as part of its law otherwise than at the request and with the consent of the Dominion government. The second recital captured the compromise relating to the Crown described above. It provided that “as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown” it was 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 the Parliament of the United Kingdom”.

Finally, the Act addressed the particular concerns of individual Dominions. In Canada’s case, section 7(1) provided that Canada did *not* have the authority to amend or repeal the *British North America Act, 1867* or subsequent *British North America Acts* that had modified or supplemented it. Until the federal and provincial governments in Canada could agree to a constitutional amending formula, they did not wish to have that power. The authority to amend the *BNA Act* thus remained with the United Kingdom Parliament, though by

28. *Ibid* at paras 60, 61.

29. *Statute of Westminster, 1931*(UK), 22 Geo V, c 4.

virtue of the third recital and section 4 of the *Statute of Westminster* that power could only be exercised upon the request and consent of Canada.

What did the various conventional and legal rules articulated in the *Statute of Westminster* mean for changes to the law governing succession to the throne? We may consider this question first from the perspective of the Dominions. Reading section 2 and the second recital of the preamble together in light of the 1929 recommendations mentioned above, it seems clear that the Dominions were to have full legislative power, exercised according to the requirements of their respective constitutions, to enact laws governing succession to the throne subject only to the convention that all parliaments “assent” to any changes made. Section 2 did not itself change the substance of any Dominion’s constitution or laws; it merely gave the green light to Dominions to make changes to their laws if and when they wanted, subject to whatever internal rules regarding amendments their respective constitutions imposed. It follows, then, that if a Dominion had a rule of Crown identification, it could, if it wanted, amend its law to adopt an incorporated law of Crown succession. But until any such change was made, existing constitutional law remained in force.

As a result, whether an “assent” by a Dominion parliament was sufficient to keep laws on royal succession aligned after the United Kingdom or another Dominion acted to amend the law of royal succession depended upon whether the Dominion had a rule of Crown identification or an incorporated law of Crown succession. The statutory “assent” by a Dominion did not itself change any law but only served as a formal indication that changes to the law on royal succession to be made in another quarter were acceptable. For a Dominion with a rule of Crown identification, no further steps were necessary to ensure that its laws were in line with new laws on royal succession, so long, that is, as the United Kingdom made the necessary changes to its law of royal succession. However, those Dominions with an incorporated law of Crown succession (if any) would have had to take the further step, in addition to assenting, of either changing their own laws of royal succession or requesting and consenting to the extension to their jurisdiction of the changes made in the United Kingdom if their law of royal succession was to remain consistent with the reforms.

Of course, these conclusions were modified in Canada’s case by the fact that the power to change its rule of Crown identification to another rule was denied because section 7(1) prevented it from making changes to the *BNA Act*. Writing two years after the *Statute*

of *Westminster, 1931* was enacted, Arthur Berriedale Keith insisted that from a “legal point of view” the Dominions were bound by their respective constitutions to recognize the Crown in the United Kingdom as their Crowns, and pointed in particular to Canada and the terms of the *BNA Act*: “The language of the British North America Act, 1867, is emphatic: the Act was passed to unite the provinces in a federal union under the Crown of the United Kingdom”.³⁰ The *Statute of Westminster* had done nothing to change that.

We can now consider the question from the perspective of the United Kingdom. If the United Kingdom Parliament wanted to enact a statute altering the law of succession to the throne but this statute did not purport to extend to form part of the law of a Dominion, then the convention in the second recital would apply (the assent of all Dominion parliaments would be needed), but the convention in the third recital and the legal rule in section 4 (the need for request and consent of the Dominion government and the express acknowledgment of that request and consent in the statute itself) would not apply.³¹ This approach would have been appropriate in relation to those Dominions, like Canada, with a rule of Crown identification: the law of the United Kingdom on royal succession would change, Canada’s law would remain the same, but the ideal of a common allegiance to the Crown would be maintained. If, in contrast, the United Kingdom Parliament enacted a statute to alter the law touching succession to the throne that was intended to extend to form a part of the law of a Dominion, then not only would the request and consent of the Dominion government be required by constitutional convention (third recital) and a statutory declaration to that effect would be required by law (section 4), but the convention requiring the assent of the parliaments of all the Dominions (second recital) would also apply.³² This approach would have been necessary in relation to those Dominions (if any) that had an incorporated law of Crown succession but that either lacked the authority to change their own constitution on this point or were content to permit British legislation to do the job. Finally, if Canada wanted to amend the *BNA Act* to alter its rule of Crown identification and to adopt instead an incorporated law of Crown succession, then an Act of the United Kingdom Parliament made upon the request and consent of Canada (third recital

30. Arthur Berriedale Keith, *The Constitutional Law of the British Dominions* (London: Macmillan, 1933) at 60.

31. K C Wheare, *The Statute of Westminster and Dominion Status*, 4th ed (Oxford: Oxford University Press, 1949) at 151.

32. *Ibid* at 153.

and section 4) would have been required, but the assent of the other parliaments (second recital) would not be needed unless the Act also purported to amend the substance of the law of royal succession.³³

Under the regime contemplated by the *Statute of Westminster*, then, had the United Kingdom Parliament enacted the equivalent of the *Succession to the Crown Act, 2013*, that Act would have required, by constitutional convention, the assent of the Parliament of Canada and the other parliaments by virtue of the second recital in the preamble to the *Statute of Westminster*; however, because it would not have extended to form part of the law of Canada or to amend the *BNA Act* (because the rule of Canadian constitutional law governing the identity of the “Queen” in Canada would not have been affected), the rules concerning request and consent in the third recital and section 4 would not have applied. As Keith insisted in 1933, the *Statute of Westminster* left Canada’s rule of Crown identification in place. No changes to Canada’s constitution have taken place since then that explicitly alter this rule, though the effect of ‘patriation’ in 1982 has placed the legal power to make changes to that rule in Canadian hands.

THE 1936 ABDICATION ‘PRECEDENT’

A mere five years after the enactment of the *Statute of Westminster*, its provisions on royal succession were put to the test with the abdication of Edward VIII. The outcome is not, at first glance, helpful to the argument that I just made.

Edward VIII came to the throne in January of 1936 and within the year abdicated so that he could marry Wallis Simpson. Edward signed an Instrument of Abdication on December 10, 1936, and a bill was immediately introduced into the House of Commons in response. The next day, Edward gave royal assent to *His Majesty’s Declaration of Abdication Act, 1936* thus sealing his own fate as King.³⁴ Section 1(1) of the Act provided that “His Majesty shall cease to be King” and there shall be “a demise of the Crown” and the person “next in succession to the Throne shall succeed thereto”. The moment the Act came into force, then, Edward ceased to be King and his younger brother, Albert, who would assume the regal name George VI, succeeded him to the

33. *Ibid* at 189.

34. *His Majesty’s Declaration of Abdication Act 1936* (UK), 1 Edw VIII & 1 Geo VI, c 3.

throne. Section 1(2) provided that Edward and his children and their descendants would have no right, title or interest to the throne and the *Act of Settlement* was to be “construed accordingly”.

Whether section 1(2) was legally necessary is doubtful (a point, as we shall see, made by the Leader of the Opposition in Canada). Once the statute provided for a “demise” of the Crown and the accession of the person next in line to the throne, any future children of Edward (there would be none) would have been excluded automatically. It is arguable, then, that the *Abdication Act* did not alter the law of succession to the throne at all but merely advanced the Crown one step through the existing line of succession before it would otherwise have done so.

The Canadian government received word from the British government by cable on the morning of December 10th that the King would abdicate. The Canadian Parliament was not then in session, but the cabinet met and an order in council was made and cabled to London in time for its terms to be incorporated into the preamble to the *Abdication Act*.³⁵ In the language of that preamble, the government communicated that “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”.

The Canadian Parliament reconvened in January of 1937 and immediately took into consideration the question of what response it should make to the abdication, and the *Succession to the Throne Act, 1937* was in due course enacted.³⁶ In its preamble, this Act recites the fact of the “request and consent of Canada” pursuant to section 4 of the *Statute of Westminster* to the enactment of the United Kingdom *Abdication Act* had been given, and it then quotes the second recital from the *Statute of Westminster* concerning the need for “assent” by the parliaments of the Dominions to changes to the law of royal succession, and the Act then enacts that “[t]he alteration in the law touching the Succession to the Throne” set forth in the *Abdication Act* is “hereby assented to”.

What significance does the abdication crisis have for understanding royal succession in Canadian law today? The crisis raises a

35. Order in Council, P C 3144 (10 December 1936). The events were explained by the Prime Minister in the House of Commons: Dominion of Canada, *Official Report of the Debates, House of Commons*, 18th Parl, 2nd Sess, (18 January 1937) at 40-41.

36. *Succession to the Throne Act, 1937* (Can), 1 Geo VI, c 16.

thicket of legal issues. If the argument that I made above concerning the rule of Crown identification under the *BNA Act* is right, then it would follow that in 1936 Canada did not, as a matter of law, need to request and consent to the United Kingdom *Abdication Act* pursuant to section 4 of the *Statute of Westminster* in order for Canada's Crown to remain aligned with the British Crown. But Canada *did* request and consent to the *Abdication Act*, suggesting that, contrary to my argument, the law of royal succession *was* part of Canadian law and needed to be changed to keep step with changes to the law of royal succession in the United Kingdom. Clearly, the events of 1936-37 deserve closer attention. In fact, the debates in the Canadian House of Commons reveal the existence of a range of views on the 'request and consent' question.

When Parliament reconvened in January, the Liberal government of William Lyon Mackenzie King found itself on the defensive. J.S. Woodsworth, leader of the Commonwealth Cooperative Federation party, insisted that Parliament rather than cabinet should have dealt with Edward's abdication. The Prime Minister defended the government's decision to proceed with the request and consent procedure before Parliament met, and his comments are largely consistent with the view that the accession to the throne of George VI required changes to Canadian law.³⁷ Of course, the Prime Minister spoke as a statesman rather than judge or lawyer, and his approach was informed by two important political factors. First, he emphasized that with Edward's abdication the Commonwealth confronted a crisis and the Canadian government did not have time to recall Parliament but had to act on its own in a common sensical way.³⁸ Second, the Prime Minister emphasized that the government wanted to ensure "imperial unity" during the crisis while also "preserving everything that was essential to national autonomy".³⁹

Woodsworth's main concern was that the Prime Minister had taken it upon himself to choose "our king" when this was, in his view, Parliament's decision to make.⁴⁰ He therefore appeared to think that the rules of royal succession formed part of Canadian law. However, he also argued that the convention of parliamentary "assent" not the legal rule of governmental "request and consent" governed—a position inconsistent with that view. In the end, however, Woodsworth conceded

37. *HC Debates*, *supra* note 35 at 43, 67.

38. *Ibid* at 42-43.

39. *Ibid* at 39-40.

40. *Ibid* at 14-15.

that he did not understand fully the difference between law and convention. “This is obviously a field day for the constitutional lawyers,” he said at one point, and “[n]either by training nor by temperament am I fitted to enter upon the purely legal aspects of this case”.⁴¹

There were, of course, lawyers in the House, and they adopted different approaches to the question. Three main arguments were developed. The first argument was developed by Charles Cahan, a member of the opposition Conservative party and cabinet minister in the previous government. Cahan argued that the request and consent procedure found in section 4 of the *Statute of Westminster* did not apply to the situation at hand because “no constituted parliament or government of any dominion had the legislative jurisdiction to deal with an act of abdication.”⁴² This was particularly so in Canada, he said, because “[w]e are circumscribed by the four corners of the British North America Act” and under that Act the authority to legislate on the royal succession “never was vested in Canada”.⁴³ Cahan insisted that “the King of the United Kingdom is and will continue to be the King mentioned and described in the British North America Act, 1867”.⁴⁴ Canada had been wrong to adopt the request and consent procedure—the transition to a new King required no change in Canadian law.

A second legal argument was advanced by Ernest Lapointe, the Attorney General and Minister of Justice. Lapointe conceded that “strictly speaking, from the legal point of view”, Cahan was right in saying that “at the moment the present king came to the throne he became our sovereign”.⁴⁵ This conclusion followed, said Lapointe, from the fact that by section 7 of the *Statute of Westminster* the *BNA Act* remained binding upon Canada and it provided that “the king of the United Kingdom is our sovereign”.⁴⁶ “The crown is interwoven through many of the sections and so long as the British North America Act is not repealed,” he said, “those sections of the act apply to us in the strictly legal viewpoint”.⁴⁷ Lapointe did say, however, that the situation had evolved as a matter of constitutional convention, and he read from the 1929 recommendations that served as the basis for the

41. *Ibid* at 81.

42. *Ibid* at 73.

43. *Ibid*.

44. *Ibid* at 70.

45. *Ibid* at 76.

46. *Ibid*.

47. *Ibid*.

second recital to the preamble of the *Statute of Westminster* concerning the “assent” procedure.

So why in his view had the request and consent procedure been appropriate? Lapointe reminded the House that the United Kingdom *Abdication Act* had two main parts and he argued that each demanded a different response from Canada. He said that the request and consent from Canada was needed in relation to the accession of George VI to the throne secured by section 1(1) of the Act, which did not involve any alteration to the law on royal succession, and that the “assent” from the Parliament of Canada required by “convention” was needed in relation to section 1(2) “because of the alteration in the law of succession [made by that section], which is quite a different thing”.⁴⁸ His point about section 1(1) is confusing, since he had already stated that, legally speaking, Canada got a new King the instant George VI acceded to the throne in the United Kingdom. But he seems clear in saying that changes to the law governing succession to the throne in the United Kingdom did *not* require Canada’s request and consent, just Parliament’s assent. “In so far as the legislation [the U.K. *Abdication Act*] would operate to alter the law touching the succession to the throne,” he observed, “the assent of the dominion parliament is required in accordance with constitutional convention set out in the second recital to the Statute of Westminster”.⁴⁹

A third legal argument was advanced by R.B. Bennett, the former Prime Minister and then leader of the opposition Conservative party. In Bennett’s view, the abdication of the King and the accession of his successor to the throne did not require any change in the law of royal succession at all: once the abdication was determined to be a “demise” of the Crown the legal consequences were the same as if Edward had died.⁵⁰ Furthermore, like Cahan, Bennett argued that as a matter of law Canada needed to do nothing in response to this transition. “Our written constitution provides,” Bennett argued, “that the crown...shall as of right devolve upon the successors of Her late Majesty, Queen Victoria”.⁵¹ As George VI took the throne as the next of those successors, under Canadian constitutional law there was nothing at all that Canada needed to do. Unlike Cahan, however, Bennett supported the government’s handling of the issue. The request and consent may not have been required as a matter of law, and so

48. *Ibid* at 78, 80.

49. *Ibid* at 80.

50. *Ibid* at 26.

51. *Ibid* at 86.

had no legal effect, but the government confronted a “condition and not a theory” and given the need to act quickly in the face of a crisis concern about legal niceties was inappropriate.⁵²

Outside Parliament, several prominent constitutional scholars also questioned the use of section 4 by Canada. F.C. Cronkite, Dean of Law at the University of Saskatchewan, argued that the request and consent procedure was unnecessary because the Crown was identified by the *BNA Act* as being whoever held the Crown in the United Kingdom.⁵³ W.P.M. Kennedy, later the Dean of Law at the University of Toronto, argued that section 4 “was never intended to deal with succession to the throne” as this topic was a matter within the legislative authority of the United Kingdom and governed only by the convention set out in the second recital of the preamble to the *Statute of Westminster*.⁵⁴ Kennedy later argued that the reference to the “Crown of the United Kingdom” in the preamble to the *BNA Act* as well as the terms of section 2 of that Act established the “fundamental position” regarding the identity of the Queen in Canada, and that this position was “protected” by section 7 of the *Statute of Westminster* and so the United Kingdom *Abdication Act* “became in law automatically operative in Canada” without its request and consent under section 4.⁵⁵ Kennedy did emphasize, however, that Canada’s rule for identifying the Queen was *Canadian* and the choice to keep it was *Canada’s*:

We must...remember that the law today is not imposed on us. The suit that we wear was not cut and tailored in Downing Street. The tariff of constitutional right and custom is too high today to allow Canada to import. We are down—or up—to home-spun.⁵⁶

So how did Kennedy explain Canada’s decision to invoke section 4 of the *Statute of Westminster*? In the second edition of his book, *The Constitution of Canada*, Kennedy praised the Prime Minister for the “statesmanlike manner” in which he handled Canada’s response to the crisis, but then he quickly added that the government had acted “with abundance of caution, to satisfy every conceivable jot and tittle of law and convention” and had “erred on the side of supererogation”.⁵⁷

52. *Ibid* at 86, 89-90.

53. F C Cronkite, “Canada and the Abdication” (1938) 4 *Canadian Journal of Economics and Political Science* 177 at 185-186, 190.

54. W P M Kennedy, “Canada and the Abdication Act” (1937) 2 *UTLJ* 117 at 118.

55. W P M Kennedy, “The Kingdom of Canada” (1939) 17 *Can Bar Rev* 1 at 4.

56. *Ibid* at 6.

57. W.P.M. Kennedy, *The Constitution of Canada, 1534-1937: An Introduction to its Development, Law and Custom* 2nd ed (London: Oxford University Press, 1938) at 562, 563.

Kennedy's final position was not unlike Bennett's: the request and consent was politically wise but legally superfluous.

It is worth observing that in developing his arguments, Kennedy referred to section 2 of the *BNA Act*, apparently not knowing that it had been repealed. He was not alone. So did Cronkite. On this point, the law professors were in good company. In the parliamentary debates of 1937, the Minister of Justice himself had assumed section 2 was still in force.⁵⁸ Nobody in the House corrected him. Had the academic and political actors of the day had the advantage of reading F.R. Scott's account of the 1893 repeal of section 2 written a few years later, would they have altered their arguments? It is fair to say that there is a good chance that, like Scott, they would have considered the deletion of section 2 as substantively immaterial. Kennedy, for example, put equal weight on the reference to the "Crown of the United Kingdom" found in the *BNA Act's* preamble—which of course has never been repealed or amended.

We may now sum up. If there had been a general consensus that the changes to the law governing succession to the throne adopted in the United Kingdom's *Abdication Act* needed the request and consent of Canada under section 4 of the *Statute of Westminster*, then the 'abdication crisis' could now be taken as a kind of precedent in favour of the view that the law of royal succession did indeed extend to Canada to form part of its law and that amendments to that Canadian law were necessary before changes in the United Kingdom on royal succession could have any direct or indirect effect here—and if that was true in 1936 then it remains true today (although we now have a different amendment procedure). But there was no such consensus. Different political actors supported the government's decision to invoke the request and consent procedure for different reasons. The leader of the Official Opposition supported the move as politically wise but legally superfluous. The Minister of Justice appeared to say that the procedure was legally unnecessary in relation to the part of the *Abdication Act* that purported to alter the law on succession to the throne. Prominent legal scholars insisted that the request and consent procedure had not been necessary. It is clear that the government faced an emergency and adopted what it thought was a pragmatic response. Obviously the events of 1936-37 do not establish a precedent one way or the other. Today, the abdication crisis provides important context, but no unequivocal answers.

58. *HC Debates*, *supra* note 35 at 76.

There is one further argument concerning the abdication crisis to consider. It might be said that even if the request and consent by Canada to the *Abdication Act* was not legally necessary, its legal effect, on its own or in conjunction with Canada's *Succession to the Throne Act, 1937*, was to incorporate the entire body of British law governing royal succession into Canadian law.⁵⁹ The main difficulty with this argument is that the terms of neither Act indicate that this was the legislative purpose or effect. The *Abdication Act* merely affirms that there was a single demise of the Crown and the accession of a new King, and it then clarifies that the law of succession is to be "construed" accordingly. In the *Succession to the Throne Act*, the Parliament of Canada merely "assented" to that interpretive clarification in compliance with a constitutional convention. The debates on the bill in the Canadian House of Commons confirm that legislators thought they were responding to a particular crisis, not changing Canadian constitutional law in a general way (something that they could not have done anyway given section 7 of the *Statute of Westminster*).

Under the regime established by the *Statute of Westminster*, then, the "Queen" within Canada's constitution was determined by the same rule as before. The summary provided by constitutional historian Donald Southgate thirty years later therefore seems accurate: "If the Queen opens the parliament of the Dominion of Canada she does so as Queen of Canada not as Queen of the United Kingdom, although by Canadian law it is the person who is monarch of the United Kingdom who is monarch of Canada".⁶⁰

PATRIATION

On April 17, 1982, in the rain on Parliament Hill in Ottawa, the Queen signed a Proclamation that brought into force the *Constitution Act, 1982*. With the stroke of her pen, the 'patriation' of the Constitution of Canada was legally completed. Long after it had emerged as a sovereign and independent state, Canada was finally freed from the last of the legal ties that kept it nominally linked to the United Kingdom.

If Canada had a rule of Crown identification before 1982, the patriation of the Canadian constitution seems to have had no impact,

59. Lagassé & Bowden, *supra* note 5 at 21; Toffoli & Paul Benoit, *supra* note 5 at 11-12.

60. Donald Southgate, "Epilogue" in James A Williamson, *A Short History of British Expansion: The Modern Empire and Commonwealth*, 6th ed (London: Macmillan, 1967) at 377.

explicitly at least, on that rule—other than to change who can amend it. The “Constitution of Canada” is now defined by the *Constitution Act, 1982* as the “supreme law” of Canada (s. 52(1)), and it includes the following written provisions: the “Queen” has the executive authority of and over Canada (*Constitution Act, 1867*, s. 9); the “Queen” is a component of the Parliament of Canada (*Constitution Act, 1867*, s. 17); the provinces in Canada are federally united “under the Crown of the United Kingdom of Great Britain and Ireland” (*Constitution Act, 1867*, preamble); members of federal and provincial legislatures must swear an oath of allegiance to “the King or Queen of the United Kingdom of Great Britain and Ireland for the Time being” (*Constitution Act, 1867*, s. 128 and Fifth Schedule); Canada is a member of a “Commonwealth of Nations...united by a common allegiance to the Crown” and it acknowledges a constitutional convention that no “alteration in the law touching the Succession to the Throne” shall be made without the “assent” of the parliaments of the United Kingdom and the Dominions (*Statute of Westminster, 1931*, preamble); after 1982, no statute of the United Kingdom Parliament may extend to form part of the law of Canada (*Canada Act, 1982*, s. 2; *Constitution Act, 1982*, schedule (repealing ss. 4 and 7(1) of the *Statute of Westminster, 1931*)); and, changes to the “office of the Queen” require a constitutional amendment approved by the Senate and House of Commons and the legislative assemblies of all the provinces (*Constitution Act, 1982*, s. 41(a)). There are no rules or laws expressly set forth within the Constitution of Canada governing succession to the throne or incorporating the law of royal succession from the United Kingdom. The provisions that before suggested a rule of Crown identification are still there.

It should now be apparent why the government has concluded that Canada needs to make no amendments to its constitution to ensure that the identity of the Crown in Canada aligns with the new rules governing succession to the throne established by the United Kingdom’s *Succession to the Crown Act, 2013*. It has assumed that Canada still has a rule of Crown identification. In light of section 2 of the *Canada Act, 1982*, the *Succession to the Crown Act, 2013* cannot extend to Canada or form part of its law. But of course the rule of Crown identification is animated by the principle that the law of royal succession *never* extended to Canada in the first place, and it provides that amendments to that law made in the United Kingdom do *not* extend to Canada either. From this perspective, Canada does not recognize the Queen as its Queen for the same reasons that the United Kingdom recognizes the same person as its Queen. It has its own constitutional rule of Crown identification that is left

unchanged by the reforms to the law on royal succession made in the United Kingdom.

Of course, the United Kingdom is under a duty by virtue of constitutional convention to seek the “assent” of Canada’s Parliament before amending its law of royal succession, and the Parliament of Canada is presumably under a duty by convention to give “assent” to reasonable proposals to reform the law of succession. Given the indirect impact that those changes may have on who can be King or Queen in Canada, the duties associated with the convention articulated in the second recital of the preamble to the *Statute of Westminster*—now part of the “Constitution of Canada”—still make good sense. In relation to the reforms of 2013 to the law of royal succession, both the United Kingdom and Canada have complied with this rule of constitutional convention.

CANADA’S RAMBLING CONSTITUTIONAL MANSION

There are two concerns about the government’s approach that might be raised. It may be said, first, that the government’s argument involves an originalist reading of constitutional text, and, second, that it is a highly technical or formalistic understanding of that text. To be fair, when the government’s argument is reduced to its simplest form—who may be King or Queen in the United Kingdom may have changed, but who may be King or Queen in Canada remains the same because that person is whoever is the King or Queen in the United Kingdom—it might sound not just formalistic but casuistic or sophistical or even silly.

No matter how much support can be found for the government’s argument in either history or text, the argument cannot be accepted unless it can be justified by that theory of underlying value and principle that provides the Constitution of Canada its normative compass today. This, I think, is what the Supreme Court of Canada meant in the *Senate Reform Reference* when it said that the government’s argument in that case “privileges form over substance” and that attention must instead focus on the “architecture of the Constitution”.⁶¹ The question whether Canada has a rule of Crown identification or an incorporated law of Crown succession is, like all hard questions of constitutional law, an *interpretive* question that can only be answered

61. *Reference re Senate Reform*, 2014 SCC 32 *per curiam* at paras 52, 53, [2014] 1 SCR 704.

through the construction of constitutional meaning in its broadest and most generous sense.

It is worth pausing to consider the architectural metaphor briefly. For the real architect, structure has a physical essence: buildings exist in fact and their foundations are concrete. But this sense of physicality is not quite the point conveyed by the image of constitutional architecture. In our constitutional tradition, law is an interpretive discourse that emerges through an on-going effort to understand text, tradition and history in light of a theory of constitutionalism compelling for people today. The Court approaches the Constitution of Canada holistically. Written texts and the underlying or unwritten principles that they presuppose are understood to form a coherent and organic unity—a normative structure with a shape and identity distinct from the particular provisions and norms it embraces.

Law may not be a concrete fact, but the architectural metaphor remains a powerful one. Here we may think of William Paley's famous analogy, that the constitution "resembles one of those old mansions" that was built "in different ages of the art" with continual "additions and repairs suited to the taste, fortune, or convenience of its successive proprietors".⁶² When we speak of respect for constitutional architecture, then, we are interested in locating the structure implicit within a dynamic tradition of constitutional law. The question is not what would make the best constitution—what plans an architect would draw up today. The objective, rather, is to identify the best interpretation of the existing constitution. What interpretive strategies, including possible renovations, will show the rambling mansion that we have inherited in its best light? The deep structure of the evolving constitutional narrative in Canada is one that must include things that we might not necessarily choose if we were writing a new constitution today. The task is to make the best interpretive sense of the structure that we have been given.

The government's position is, in effect, that Canada has a rule of Crown identification rather than an incorporated law of Crown succession. This position *is* consistent with a compelling account of Canadian constitutional architecture. Let me explain why through critical reflection on two recent cases, *Teskey v Canada* and *O'Donohue v Canada*.⁶³

62. William Paley, *The Principles of Moral and Political Philosophy* (London: R Faulder, 1785) at 465-466.

63. *Teskey v Canada (Attorney General)*, 2013 ONSC 5046; aff'd 2014 ONCA 612; *O'Donohue. Canada*, [2003] OJ No 2764 (Ont SC), aff'd [2005] O J No 965 (Ont CA).

In both *Teskey* and *O'Donohue*, the Ontario Court of Appeal upheld lower court decisions that rejected claims concerning the law of royal succession. The gist of those claims was that in discriminating against Roman Catholics the rules governing royal succession found in the *Act of Settlement* violate the right to equality under the *Canadian Charter of Rights and Freedoms*. The response of the first judge to consider this argument, Justice Paul Rouleau in *O'Donohue*, has been accepted by all of the other judges in these two cases, so I will therefore focus on his reasons.

Rouleau J. began by observing that the preamble to the *Constitution Act, 1867* confirms that “Canada is united under the Crown of the United Kingdom of Great Britain” and therefore the principle that Canada is “[a] constitutional monarchy, where the monarch is shared with the United Kingdom” is “at the root of our constitutional structure.”⁶⁴ Following the architectural metaphor, it might be said that any other conclusion would render the “grand entrance hall” (as Lamer C.J.C. called it) to the constitutional mansion a mere façade or false-front.

Rouleau J. then rightly identified as a general principle of Canadian constitutional law the proposition that the adoption of a specific institution or principle of parliamentary government by the written constitution implies the inclusion within the constitution of those parts of British constitutional law “necessary” or “essential” to the “proper functioning” of that institution or principle, an inclusion affirmed by the assertion found in the preamble to the *Constitution Act, 1867* that Canada’s constitution is “similar in principle” to the United Kingdom constitution.⁶⁵

The next step in his argument is critical. Rouleau J. stated:

Applying that reasoning to the present case, it is clear that Canada’s structure as a constitutional monarchy and the principle of sharing the British monarch are fundamental to our constitutional framework. In light of the preamble’s clear statement that we are to share the Crown with the United Kingdom, *it is axiomatic that the rules of succession for the monarchy must be shared and be in symmetry* with those of the United Kingdom and other Commonwealth countries. One cannot accept the monarch but reject the legitimacy or legality of the rules by which this monarch is selected.⁶⁶

64. *O'Donohue v Canada*, [2003] OJ No 2764 at para 21.

65. *Ibid* at paras 26, 27.

66. *Ibid* at para 27 (emphasis added).

The rules of royal succession, he continued, are “essential to the proper functioning of the shared monarchy principle” and so are “by necessity incorporated into the Constitution of Canada” as part of “the unwritten or unexpressed constitution”.⁶⁷ Having determined that the law of royal succession is incorporated into and forms part of the Constitution of Canada, Rouleau J. then concluded that any claim to the effect that this part of the constitution violates another part of the constitution is not justiciable. But, in addition, he observed, “if the courts were free to review and declare inoperative certain parts of the rules of succession, Canada could break symmetry with Great Britain, and could conceivably recognize a different monarch than does Great Britain”, and this would involve the courts “changing rather than protecting our fundamental constitutional structure”.⁶⁸

There is much of value in this reasoning, but it contains a *non sequitur*. The principle of Crown symmetry does lie at the core of our constitutional structure. Any interpretation of the constitution that left Canada united within one Dominion under a Crown of the United Kingdom (to paraphrase the preamble) different from the actual Crown of the United Kingdom would show the constitutional mansion that we have inherited to be a shambles. But it does not follow that the law of royal succession found in the United Kingdom must be incorporated into Canadian law. It is not necessary or essential for the proper functioning of the principle of Crown symmetry for Canada to have a law of royal succession identical to Britain’s; on the contrary, the only meaningful way that the principle of Crown symmetry can be guaranteed is through a rule of Crown identification. Under an incorporated law of Crown succession the principle of Crown symmetry is reduced from an established principle of law to a contingent matter of politics to be negotiated through the constitutional amendment procedure whenever there is a need to alter the law of succession to the throne.

In the end, however, perhaps the most troubling aspect of Rouleau J.’s reasoning is the implication that it has for other aspects of Canadian constitutional integrity. If we accept within our own law the law of royal succession that emerged in England during the seventeenth century, we must defend the idea that our constitutional law contains at its core a principle of religious discrimination inconsistent with our commitment to equality and respect for minorities. Are we prepared to do this? Rouleau J. says that “[we] cannot accept the

67. *Ibid* at paras 21, 28.

68. *Ibid* at para 29.

monarch but reject the legitimacy or legality of the [British] rules by which this monarch is selected". I disagree. We can accept the monarch for other reasons—reasons that better reflect our own sense of constitutional identity.

The law governing succession to the throne in the United Kingdom is the product of a constitutional narrative that is not ours. The seventeenth-century struggle between the Catholic Stuarts and Protestant parliamentarians may shape aspects of our constitutional tradition indirectly, but the legal outcome, that the Crown is vested in "Princess Sophia Electress and Dutchess Dowager of Hannover and the Heirs of Her Body being Protestants", does not resonate with the implicit structure of the Canadian constitutional narrative, and it does need to form part of Canadian law. The story about the struggle between the Stuarts and Parliament explains why Elizabeth II is Queen in the United Kingdom; however, it does not explain why Elizabeth II is Queen in Canada. The reason why the Queen is Queen in the United Kingdom is not the same reason as the reason that she is Queen in Canada. To be sure, she is Queen in Canada because she is the Queen in the United Kingdom. But it is not casuistic or sophisticated or silly to insist upon that distinction. On the contrary, recognizing this distinction explicitly opens the possibility for a uniquely Canadian constitutional narrative on why we recognize the Crown in the United Kingdom as our Crown.

I cannot explore fully how that distinctive constitutional narrative would look. Canada and other common law jurisdictions are still struggling to articulate a theory of the state and still struggling to articulate a place for the Crown in that theory.⁶⁹ There is perhaps the obvious point that we recognize the Crown in Canada because it represents an entire system of parliamentary government and the rule of law to which we are committed—as the recent judgment in *McAteer* affirms.⁷⁰

But the narrative is more than that. It is an autochthonous understanding of the Crown that has emerged over a very long and hard history in Canada. As in England, here constitutional interpretation cannot be detached from the legacy of our past—it is just that our pasts are not entirely the same. In Canada, for example,

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

70. *McAteer v Canada (Attorney General)*, ONCA 578, (2014) 121 O R (3d) 1 (CA) at para 7.

we might point to the issuing of the *Royal Proclamation of 1763* and the subsequent development of a Crown-Aboriginal relationship, a relationship fraught with its own difficulties, of course, but still one in which a distinctive concept of the Crown informed by the perspective of indigenous legal tradition can be seen to have emerged.⁷¹ We may find as well a distinctively Canadian approach to allegiance and religion. The inclusion of a Roman Catholic French Canadian community by force was balanced by subsequent measures to accommodate religious diversity and legal pluralism. The exclusion of Roman Catholics from political life is not part of our constitutional heritage. The *Quebec Act, 1774* is a powerful reminder that here the link between allegiance and religious identity was severed at an earlier point than it was in Britain.⁷²

The development of a Canadian constitutional narrative that exhibits a sense of normative unity and integrity of its own may (counter-intuitively) be encouraged through the continued recognition of the Crown in the United Kingdom as the Canadian Crown. The facile assumption that because Canada is truly independent it must have its own law of royal succession, but one borrowed from the United Kingdom, may actually inhibit the emergence of a coherent and uniquely Canadian theory of the Crown and the Constitution of Canada.

The result of my argument may not be of much comfort for the applicants in the *Teskey* and *O'Donohue* cases. It might not make much difference to them that the rule that the Crown cannot be Catholic is a rule of another country that has only indirect effect here. But I am inclined to think that there is an important difference in legal and constitutional principle, and that if we try to justify that difference through an explication of Canadian constitutional architecture that endeavours to honour our commitment to equality, the rule of law, democracy, federalism, and respect for minorities, then what seems at first glance a formalistic or pedantic distinction between the rule of Crown identification and the incorporated law of Crown succession will be understood as a distinction of constitutional substance well worth grasping.

71. Mark D Walters, "Your Sovereign and Our Father": The Imperial Crown and the Idea of Legal-Ethnohistory" in Shaunnagh Dorsett and Ian Hunter eds, *Law and Politics in British Colonial Thought: Transpositions of Empire* (Houndmills: Palgrave Macmillan, 2010) at 91-108.

72. *Quebec Act, 1774* (GB), 14 Geo III, c 83.

The status of the Crown in Canada is, as W.P.M. Kennedy stated back in 1939, entirely “home-spun”. The spinning or weaving of the constitutional narrative that defines that status continues today. It is still worth pondering how best to encourage our own sense of how the Crown fits within that distinctively Canadian constitutional fabric.