

**CHAPTER 12**  
**SUCCESSION TO THE CROWN**  
**OF CANADA**

**Anne Twomey\***

The recent move to change the rules of succession to the throne in the United Kingdom has, for the first time since the 1936 abdication of Edward VIII, forced the various Realms to reconsider fundamental constitutional issues concerning their relationship with the Crown and their independence from the United Kingdom. This has proved particularly challenging in federations, where Constitutions are entrenched and difficult to change and where the Crown plays a constitutional role at both the national and the sub-national level.

In Australia, despite some initial difficulties with the State of Queensland,<sup>1</sup> the issue was settled relatively amicably and without legal controversy. It was accepted that each of the States had an interest in the Crown and the identity of the monarch. It was agreed that the Commonwealth Parliament<sup>2</sup> would not attempt to enact legislation unilaterally (which would have created a controversy and would undoubtedly have been challenged in the courts). Instead, it was agreed to employ a federally cooperative approach under s 51(xxxviii) of the Australian Constitution, under which the

---

\* Professor of Constitutional Law, University of Sydney.

This chapter draws in part from expert opinion given by the author for proceedings in *Motard and Taillon v Attorney-General (Canada)*, challenging the validity of the *Succession to the Throne Act 2013* (Canada). The case will be heard by the Quebec Superior Court in June 2015.

1. These difficulties were resolved by negotiation at a meeting of the Council of Australian Governments on (19 April 2013), online: Council of Australian Governments <[http://www.coag.gov.au/sites/default/files/COAG\\_Communique\\_190413.pdf](http://www.coag.gov.au/sites/default/files/COAG_Communique_190413.pdf)>.
2. References to 'Commonwealth' in this paper mean the national level of government in Australia – not the Commonwealth of Nations.

State Parliaments request Commonwealth legislation and then the Commonwealth Parliament enacts the requested legislation. All six States enacted legislation<sup>3</sup> requesting the Commonwealth Parliament to pass a Bill in a particular form. The *Succession to the Crown Act* 2015 was passed by the Commonwealth Parliament on 19 March 2015 and came into effect along with the legislative changes made by other Realms on 26 March 2015. The Australian Act effects a change in the rules of succession in relation to the Crown at all levels in Australia.

In contrast, the Canadian Parliament has chosen to take a unilateral approach and has not sought the cooperation of the provinces. Moreover, in order to do so, it has abdicated its own responsibility to deal with the rules of succession to the Canadian Crown, arguing that succession to the Canadian Crown is, and always has been, determined by the rules of succession to the British throne. The Canadian Parliament enacted the *Succession to the Throne Act* 2013 (Canada),<sup>4</sup> giving no more than its ‘assent’ to the Westminster Parliament passing its *Succession to the Crown Bill* 2013 (UK). Neither Act made any substantive change to Canadian law concerning the rules of succession to the Canadian Crown. On the contrary, the Canadian Government asserted that no such rules had become part of Canadian law and there was therefore nothing to amend.

The Canadian Government’s approach is most surprising to constitutional lawyers from the other Realms. It appears to be contrary to the historical record and to reverse what had been a well-accepted path of independence by the Realms under a divisible Crown. This chapter seeks to provide an outsider’s perspective, unaffected by local Canadian political influences, on why the Canadian Government’s approach does not seem to be consistent with constitutional law and constitutional history.

---

3. *Succession to the Crown (Request) Act* 2013 (NSW) (assent 1 July 2013); *Succession to the Crown Act* 2013 (Qld) (assent 14 May 2013); *Succession to the Crown (Request) Act* 2014 (SA) (assent 26 June 2014); *Succession to the Crown (Request) Act* 2013 (Tas) (assent 12 September 2013); *Succession to the Crown (Request) Act* 2013 (Vic) (assent 22 October 2013); *Succession to the Crown Act* 2015 (WA) (assent 3 March 2015).

4. SC 2013, c 6 (the Act was given royal assent on 27 March 2013).

## THE RULES OF SUCCESSION TO THE THRONE

The law of succession to the Crown of the United Kingdom is to be found in the common law<sup>5</sup> as altered by statute.<sup>6</sup>

The common law rules find their source in the rules of hereditary descent attached to land from feudal times. They include the rule of primogeniture, that the elder heir of the same degree takes precedence over the younger. This rule is modified by the rule of male preference, that male heirs take precedence over female heirs of the same degree. A further rule of 'representation' provides that surviving children take the place of their dead parent in the line of succession. Heirs must also be legitimate.<sup>7</sup>

These common law rules have been altered in other ways by statute. The primary Imperial statutes are the *Bill of Rights* 1688 and the *Act of Settlement* 1700.<sup>8</sup> Other relevant statutes include the *Union with Scotland Act* 1706, the *Union with Ireland Act* 1800, the *Accession Declaration Act* 1910 and *His Majesty's Declaration of Abdication Act* 1936. The *Royal Marriages Act* 1772 also has the potential to affect succession, at least to the extent that it renders marriages invalid and any children of such marriage will therefore be treated as illegitimate and excluded from succession to the throne.

The line of inheritance was altered by s 1 of the *Act of Settlement* 1700, marking a new starting point of inheritance as Princess Sophia, Electress of Hanover and the 'heirs of her body being Protestant'. It was altered again by *His Majesty's Declaration of Abdication Act* 1936, which excluded any children of Edward VIII from inheriting the throne.

- 
5. See further: D Freeman, "The Queen and her dominion successor: the law of succession to the throne in Australia and the Commonwealth of Nations Pt 1" (2001) 4:2 *Constitutional Law and Policy Review* 28 at 29-30. See also Ollivier's characterization of the common law rules as 'amongst the earliest and most important constitutional conventions' of Canada: Maurice Ollivier, *Problems of Canadian Sovereignty: From the British North America Act 1867 to the Statute of Westminster 1931* (Canadian Law Book Co, 1945) at 49.
  6. See further: V Bogdanor, *The Monarchy and the Constitution* (Oxford: Clarendon Press, 1995) at 41-60.
  7. The succession to the throne is not affected by laws that otherwise have removed the legal disadvantages of illegitimacy: *Legitimacy Act* 1976 (UK), Schedule 1, cl 5.
  8. While the dates of 1689 and 1701 are commonly used as a result of the change of calendar, the dates adopted here are those used in the formal British statutes.

Religious qualifications and disqualifications have also been imposed by statute. The *Bill of Rights* 1688 and s 2 of the *Act of Settlement* exclude from succession to the throne ‘any person who shall be reconciled to, or hold communion with, the See or Church of Rome, or profess the popish religion or marry a papist’. Such a person is treated as if he or she was dead for the purposes of the succession. Section 3 of the *Act of Settlement* requires that the monarch join in communion with the Church of England and the *Accession Declaration Act* 1910 requires that the sovereign declare that he or she is a faithful Protestant. Various oaths must also be taken by the monarch to preserve the established Church of England and the Presbyterian Church of Scotland.

The *Succession to the Crown Act* 2013 (UK), once it comes into force<sup>9</sup>, will alter the common law by removing male preference from the rule of primogeniture. This means that the eldest child of the monarch, whether male or female, becomes and remains the next heir to the throne regardless of sex. It also amends statutes by removing the disqualification of persons from the line of succession for marrying a Roman Catholic and providing that only the first six people in line to the throne need the monarch’s permission to marry.<sup>10</sup>

### **RECEIVED LAWS AND LAWS THAT APPLIED BY PARAMOUNT FORCE**

The first question is whether and to what extent the common law and these Imperial statutes became part of the law of Britain’s colonies.

Settlers of those colonies brought with them the common law, as their birthright.<sup>11</sup> Imperial statutes also applied in British colo-

- 
9. The substantive provisions are not yet in force. Once in force, however, most of the provisions have a degree of retrospective effect. Section 1, in relation to the gender of an heir, applies to any heir born after the Perth Agreement on 28 October 2011. Section 2, concerning marriage to a Roman Catholic, applies to any person, still alive at 28 October 2011, who had previously been disqualified for marrying a Catholic. Section 3, concerning permission for royal marriages, treats prior marriages as never having been void, as long as certain conditions apply.
  10. For a more detailed analysis of these changes and their history, see: Neil Parpworth, “The Succession to the Crown Act 2013: Modernising the Monarchy” (2013) 76:6 MLR 1070; Norman Bonney & Bob Morris, “Tuvalu and You: The Monarch, the United Kingdom and the Realms” (2012) 83:2 *The Political Quarterly* 368.
  11. *Kielley v Carson* (1842), 4 Moo PC 63, 84-5; 13 ER 225, 233; *Cooper v Stuart* (1889), 14 AC 286, 291 (Lord Watson). See also: B H McPherson, *The Reception*

nies, at least to the extent that they could appropriately apply to the circumstances of the colony. While there were different rules in relation to settled, conquered and ceded colonies,<sup>12</sup> and different dates of ‘reception’ of laws in different parts of Canada, British ‘public law’ applied to all colonies, however acquired.<sup>13</sup> Received laws became part of the law of the colony, but could be amended or repealed by a local colonial legislature. Moreover, the subsequent amendment or repeal of those same laws by the Westminster Parliament after their reception in the colony had no effect upon their application in the colony, which remained the same as the date they were received, unless they were altered by the local laws of the colony.<sup>14</sup>

Certain Imperial statutes, however, had a higher status than received laws. They were the laws that applied to the colonies expressly or by necessary intendment.<sup>15</sup> Many of them were constitutional statutes, while others concerned matters such as shipping, defence, extradition and trade. Such statutes applied by ‘paramount force’, meaning that unlike ordinary ‘received’ laws, they could not be amended or repealed by colonial legislatures and that any colonial law that was ‘repugnant’ to such Imperial statutes was void.<sup>16</sup>

Fundamental statutes, such as those altering or qualifying the succession to the throne, fell within that category. Booker and Winterton noted that s 1 of the *Act of Settlement* expressly applies to the Crown of ‘England France and Ireland and of the dominions thereunto belonging’ and that ‘a fundamental law on the identity of the sovereign would apply to the colonies by necessary intendment’.<sup>17</sup> They concluded that when Parliament legislates on fundamental constitutional matters and expressly applies the law to all British possessions or a relevant class of them, then there is a necessary intendment that such a law apply also to subsequently-acquired possessions.<sup>18</sup> McPherson has also observed that ‘provisions affecting the

---

*of English Law Abroad* (Supreme Court of Qld Library, 2007) at 241; and *Act of Settlement* 1700, s 4.

12. Peter Hogg, *Constitutional Law of Canada, 5<sup>th</sup> Edition* (Toronto: Carswell, 2007) Vol 1, at 33-40 ff 2.2-2.3 [Hogg, *Constitution Law of Canada*].

13. *Ibid* at 37 ff 2.3(a).

14. *Ibid* at 34 ff 2.2(a) (unless altered by British laws of paramount force).

15. E Campbell, “Changing the rules of succession to the throne” (1999) 1:4 Constitutional Law and Policy Review 67 at 70.

16. The doctrine of repugnancy was originally a common law doctrine but was later confirmed and limited in its application by the *Colonial Laws Validity Act* 1865 (Imp), s 2.

17. Keven Booker & George Winterton, “The Act of Settlement and the Employment of Aliens” (1981) 12 FL Rev 212 at 214.

18. *Ibid* at 224.

royal succession, which fixed the identity of the sovereign to or from whom duties of allegiance and protection were owed throughout the empire' applied to the colonies by paramount force.<sup>19</sup>

While these laws were part of the law of the colony, they could not be repealed or amended by the legislature of the colony. This was for two reasons. First, as the Crown was regarded as 'indivisible',<sup>20</sup> it would have been beyond the legislative competence of any colony to legislate with respect to succession to the Imperial Crown.<sup>21</sup> Secondly, fundamental constitutional laws, such as those that qualified the rules of succession to the throne, applied by paramount force to the colonies. Hence, the one set of rules applied throughout the Empire, even though they were incorporated as part of the local law of different colonies.

The fact that these laws were incorporated as part of the law of the colony has been recognised on many occasions. In Australia, a number of jurisdictions have undertaken audits of the British laws that continued to apply as part of the law of the jurisdiction – covering both received laws and those that applied by paramount force. In 1967 the New South Wales Law Reform Commission completed a report on such laws<sup>22</sup>, resulting in the enactment of the *Imperial Acts Application Act 1969* (NSW), which confirmed the application of certain Imperial laws as part of New South Wales law and re-enacted some provisions as local laws. All other received laws were then repealed. Section 6 preserved a list of 'Constitutional Acts' and confirmed that they remained in force as part of the law of New South Wales. They include: the *Bill of Rights Act 1688*; the *Act of Settlement 1700*; the *Demise of the Crown Act 1702*; the *Succession to the Crown Act 1707*, s 9; and the *Royal Marriages Act 1772*, ss 1 and 2.<sup>23</sup>

In Canada, Rouleau J in the Ontario Superior Court of Justice took the view that the *Act of Settlement* forms part of Canadian law

---

19. B H McPherson, *The Reception of English Law Abroad* (Brisbane: Supreme Court of Qld Library, 2007) at 237.

20. A B Keith, *The Sovereignty of the British Dominions* (London: MacMillan & Co Ltd, 1929) at 252.

21. G J Lindell, "Applicability in Australia of Section 3 of the Act of Settlement 1701" (1980) 54 Aust L J 628 at 629.

22. Austl, Commonwealth, New South Wales Law Reform Commission, *Report of the Law Reform Commission on the Application of Imperial Acts* (Sydney: Parliament of NSW, 1967). See 59-62 re 'Constitutional Enactments'.

23. See also: *Imperial Acts Application Act 1984* (Qld); *Imperial Acts Application Act 1986* (ACT); *Imperial Acts Application Act 1980* (Vic).

by virtue of being an Imperial statute applying to Britain's dominions.<sup>24</sup> The Canadian Department of External Affairs also developed a list in the 1940s of British Acts that applied as part of Canadian law. It includes the *Bill of Rights* 1688, the *Act of Settlement* 1700, the *Royal Marriages Act* 1772, various enactments concerning the demise of the Crown and *His Majesty's Declaration of Abdication Act* 1936.<sup>25</sup> The Canadian provinces have also recognised such Imperial Acts as forming part of their laws. For example, the *Revised Statutes of Ontario* of 1897 include the *Act of Settlement* as one of the constitutional statutes of the United Kingdom that apply to Ontario.<sup>26</sup> Some have regarded these Imperial statutes as forming part of the Canadian constitution.<sup>27</sup> Hogg has recognised that the *Act of Settlement*, which applied to British colonies, became part of the law of Canada upon confederation.<sup>28</sup>

#### **THE STATUTE OF WESTMINSTER 1931 (IMP)**

The Imperial Conference of 1926 declared, in what became known as the Balfour Declaration, that the United Kingdom and the Dominions were 'autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations'.<sup>29</sup>

Effect was given to this declaration in two ways. First, the Sovereign began to act upon the advice of the responsible Ministers of the Dominion concerned when acting in relation to that Dominion. This had the effect of making the Crown divisible, with the Sovereign

24. *O'Donohue v Canada*, (2003) 109 CRR (2d) 1 at para 3, 2003 CanLII 41404 (ONSC) [O'Donohue].

25. Maurice Ollivier, *Problems of Canadian Sovereignty: From the British North America Act 1867 to the Statute of Westminster 1931* (Canadian Law Book Co, 1945), Appendix B, 465-469.

26. *O'Donohue*, *supra* note 24 at para, 35.

27. W P M Kennedy, *The Constitution of Canada 1534-1937* (London; Toronto: Oxford University Press, 1938) at 378; Norman Ward, *Dawson's The Government of Canada* (University of Toronto Press, 5<sup>th</sup> ed, 1970) at 62; Josh Hunter, "A More Modern Crown: Changing the Rules of Succession in the Commonwealth Realms" (2012) 38:3 Commonwealth L Bull 423 at 445-446. See also *O'Donohue v Canada* (2003) *supra* note 24 at para 28.

28. Peter Hogg, "Succession to the Throne" (2014) 33 NJCL 87.

29. "The Report of the Imperial Conference of 1926 upon Inter-Imperial Relations", Cmd 2768 (1926).

acting in different capacities, according to the advice of his different sets of responsible advisers. Hence it was the King of Australia who appointed the Governor-General of Australia on the advice of his Australian Ministers and it was the King of Canada who acted in relation to Canadian affairs on the advice of Canadian Ministers. The complete independence of a Dominion was not required to make this transformation – just the change in the source of responsible advice to the Sovereign.<sup>30</sup>

The second method of giving effect to the Balfour Declaration was legislative. The Conference on the Operation of Dominion Legislation met in 1929 to develop a legislative response.<sup>31</sup> It decided that the ‘appropriate method of reconciling the existence of [the legal power in the Parliament of the United Kingdom to legislate for the Dominions] was to place on the record a convention that no law of the United Kingdom Parliament would in future ‘extend to any Dominion otherwise than at the request and with the consent of the Dominion’.<sup>32</sup> It concluded that this convention should be included in the preamble to the proposed statute and that due to ‘practical considerations affecting both the drafting of Bills and the interpretation of Statutes’ a provision should also be included in the substantive part of the Act,<sup>33</sup> which became s 4 of the *Statute of Westminster* 1931.

The Conference’s proposal to remove the application of the *Colonial Laws Validity Act* 1865 and the doctrine of repugnancy with respect to Dominion laws meant that a Dominion would have the power to repeal the application of the *Act of Settlement* and other relevant statutes with respect to the Dominion and enact a new law regarding succession to the throne.<sup>34</sup> King George V wanted a limitation to be placed upon the removal of the application of the *Colonial Laws Validity Act*, ‘to ensure no tampering with the Settlement Act’.<sup>35</sup> Initially, the British Government argued that the *Colonial Laws Validity Act* should continue to apply to certain foundational

---

30. *R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte Indian Association of Alberta* [1982] 1 QB 892, 917 (Lord Denning MR); 927 (Kerr LJ); and 928 (May LJ).

31. “Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation”, Cmd 3479 (1929) [Report Cmd 3479].

32. *Ibid* at 54.

33. *Ibid* at 55.

34. The grant of full power to make laws having extra-territorial operation by s 3 of the *Statute of Westminster*, would also have removed any legislative constraint based upon extra-territoriality.

35. Letter by His Majesty to the Prime Minister, 30 November 1929, quoted in: H Nicolson, *King George the Fifth* (London: Constable & Co Ltd, 1952) at 485.



laws that touched the essential structure of the Empire. However, the Irish Free State, Canada and South Africa objected on the basis that co-equal States could not be bound by the will of one of them.<sup>36</sup> The Irish argued instead that uniformity should be achieved by mutual consent and reciprocal legislation enacted on a voluntary basis.<sup>37</sup> This was finally accepted by the Imperial Conference. It saw the subject of succession to the throne as falling within a category 'in which uniform or reciprocal action may be necessary or desirable for the purpose of facilitating free co-operation among the members of the British Commonwealth in matters of common concern'.<sup>38</sup> The retention of exclusive British legislative power over succession to the throne was regarded as inconsistent with the principle of equality laid down in the Balfour Declaration.<sup>39</sup>

The Conference concluded that as the Dominions and Great Britain were now equal in status but bound by a common allegiance to the Crown, 'it is clear that the laws relating to the succession to the Throne and the Royal Style and Titles are matters of equal concern to all'.<sup>40</sup> It therefore decided not to exclude the succession laws from the application of s 2, but rather to establish a convention to deal with succession to the throne, which would be recorded in the preamble to the proposed statute.<sup>41</sup>

The leading Australian delegate, Sir William Harrison Moore, noted with respect to the succession that the Conference had considered 'that even this fundamental matter must be dealt with in conformity with the principle of equality and not by leaving it as an exclusive or paramount power in the British Parliament'.<sup>42</sup> He explained that a convention was chosen because it was a familiar method that would be readily understood and that 'avoiding rigidity, it would impose the least restraint upon the flexibility which has been a distinctive feature of the British constitutional system'.<sup>43</sup> Another reason that a convention was chosen, rather than a law, was

36. Thomas Mohr, "The Colonial Laws Validity Act and the Irish Free State" (2008) 43 *Ir Jur* 21 at 37 [Mohr].

37. *Ibid* at 37-38.

38. Report Cmd 3479, *supra* note 31 at 57.

39. Austl, Commonwealth, *Report of Sir William Harrison Moore on the Conference on the Operation of Dominion Legislation*, Parl Paper No (1930) at 1367 [Report of Sir William Harrison Moore]. See also: Report Cmd 3479, *supra* note 31 at 60.

40. Report Cmd 3479, *supra* note 31 at 59.

41. K H Bailey, "The Abdication Legislation in the United Kingdom and in the Dominions" (1938) 3 *Politica* 1 at 12.

42. Report of Sir William Harrison Moore, *supra* note 39.

43. *Ibid*.

due to concern that the United Kingdom Parliament could not bind itself in this manner by law.<sup>44</sup> An attempt was made during debate on the *Statute of Westminster* to insert an equivalent provision in the text of the *Statute*, but after debate, the proposed amendment was withdrawn.<sup>45</sup>

The convention was not intended to be set in stone. Coghill has observed that the convention concerning the succession is ‘in a form more of expectation and hope than of command’ and that it is ‘not of imperative force’.<sup>46</sup>

The relevant parts of the preamble to the *Statute of Westminster* 1931 state:

And WHEREAS it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom. [paragraph 2]

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 with the consent of that Dominion. [paragraph 3]

As noted above, the United Kingdom Parliament previously had full power to legislate in a manner that bound the Dominions by laws of paramount force. While s 2(2) of the *Statute of Westminster* took away the ‘paramount force’ of such laws by permitting their local amendment or repeal, s 4 of the *Statute* limited the future extension of British laws to the Dominions to circumstances where the Dominion had requested and consented to such an enactment. Section 4 provided:

No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Domin-

---

44. *Ibid.*

45. UK, HC, *Parliamentary Debates*, House of Commons, vol 260, col 355-62 (24 November 1931).

46. E H Coghill, “The King – Marriage and Abdication” (1937) 10 *Austl L J* 393 at 398.

ion 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.

These recitals and s 4 have been extensively examined by Wheare.<sup>47</sup> As he pointed out, they declare three conventions and a legal requirement. These are as follows:

1. Dominion legislation that alters the law touching succession to the throne or the royal style and titles requires the assent of the Parliaments of the United Kingdom and other Dominions (preamble, paragraph 2);
2. United Kingdom legislation that alters the law touching succession to the throne or the royal style and titles, whether or not it is intended to extend as part of the law of the Dominions, requires the assent of the Parliaments of the other Dominions (preamble, paragraph 2);
3. United Kingdom legislation that alters the law touching succession to the throne or the royal style and titles and which is intended to extend to any Dominion, as part of its law, requires the request and consent of that Dominion (preamble paragraph 3); and
4. United Kingdom legislation that alters the law touching succession to the throne or the royal style and titles shall not extend, or be deemed to extend, to a Dominion as part of its law, unless it is expressly declared in that Act that the Dominion has requested, and consented to, its enactment (section 4).<sup>48</sup>

Underlying these conventional and legal requirements there are two critical understandings. The first is that the laws touching succession form part of the law of the Dominions and may therefore be amended or repealed and replaced by new laws enacted by a Dominion with respect to the Crown of that Dominion. To the extent that there would otherwise have been an argument that a Dominion had no power to legislate to amend or repeal foundational Imperial laws, such as those dealing with succession, this was wiped away by the insertion, at the insistence of Canada, of s 2(2) in the *Statute of Westminster*.<sup>49</sup> Wheare has

47. K C Wheare, *The Statute of Westminster and Dominion Status*, 5th ed (London: Oxford University Press, 1953) 150-157, 277-299 [Wheare].

48. This is a summary of those rules described by Wheare: *Ibid* at 278-280.

49. Canada apparently threatened the collapse of the Imperial Conference if the British did not agree to the inclusion of this provision: Mohr, *supra* note 36 at 40 (referring to Canadian archival records).

observed that the convention on the succession set out in the preamble was directly related to the powers conferred on the Dominion Parliaments by s 2(2) of the *Statute of Westminster*<sup>50</sup> to repeal or amend the laws of succession ‘in so far as the same is part of the law of the Dominion’. If the laws of succession to the throne did not form part of the laws of the Dominions, then s 2(2) of the *Statute of Westminster* would not permit their amendment or repeal by a Dominion with the consequence that there would be no need for convention 1 above. Paragraph 2 of the preamble would have been worded differently if this were the case. The drafting of the *Statute of Westminster* is clearly predicated upon the assumption that the laws of succession do form part of the laws of the Dominions and may be altered by them as a consequence of the application of s 2(2). Hence the need for the convention.

Secondly, it was assumed that the United Kingdom Parliament could legislate to change the rules of succession in such a way that the law either did or did not extend as part of the law of the Dominions. If the United Kingdom Parliament was changing its own law concerning the Crown of the United Kingdom but not applying that law as part of the law of the Dominion, then only ‘assent’ by Dominion Parliaments was required, whereas ‘request and consent’ were required in addition and in advance, if the change being made by the United Kingdom Parliament was also to extend as part of the law of the Dominion with respect to its Crown.

Four other distinctions ought to be addressed in relation to how these conventions and this statutory requirement operate. First, in terms of timing, conventions 1 and 2 require ‘assent’, which might take place before or after the United Kingdom’s legislation is enacted (although it would obviously be prudent for the United Kingdom to seek an informal indication of assent in advance).<sup>51</sup> Convention 3 and legal requirement 4 instead require both a request and consent. The request must take place before the enactment of the legislation implementing it, particularly if legal requirement 4 applies, as it needs to be recorded in the implementing Act itself. The use of ‘assent’ in conventions 1 and 2, cannot therefore be taken as a substitute for ‘request and consent’ in convention 3 and s 4.

---

50. Wheare, *supra* note 47 at 175.

51. *Ibid* at 283; R T E Latham, *The Law and the Commonwealth* (London: Oxford University Press, 1949) at 619.

Secondly, regarding the source of agreement, conventions 1 and 2 require the assent of ‘Parliaments’<sup>52</sup> whereas convention 3 and legal requirement 4 require the request and consent of ‘the Dominion’, incorporating a degree of ambiguity as to how this is to be given and by which institution.<sup>53</sup>

Thirdly, in terms of application, the *Statute of Westminster* applied from its commencement in December 1931 to the Dominions of Canada, Australia, New Zealand, South Africa, the Irish Free State and Newfoundland.<sup>54</sup> However, the substantive provisions in sections 2-6 did not extend to Australia, New Zealand or Newfoundland as part of their law until adopted by the relevant Dominion Parliament.<sup>55</sup> Hence, while s 4 did not initially apply to these Dominions,<sup>56</sup> the preamble did. One reason for the preamble, therefore, was to apply these conventions in the meantime before s 4 of the *Statute of Westminster* was adopted.

Fourthly, the convention in paragraph 2 of the preamble treats the Parliaments of the United Kingdom and the Dominions equally. It requires the ‘assent’ of all of them – it does not specify that the United Kingdom Parliament makes the change to the law of succession while the Dominion Parliaments assent to its application as part of their laws. As a consequence of the application of the Balfour Declaration on equality, paragraph 2 of the preamble permits the enactment of identical or ‘reciprocal’ legislation by each of the Parliaments of the United Kingdom and the Dominions<sup>57</sup> or, in the alternative, the application of a United Kingdom law to the Dominion as part of its law, but only when a request and consent has been made.<sup>58</sup>

52. Bailey has argued that the use of ‘Parliament’ in this context was ‘natural, since the convention was accepted, as a matter of record, in order to control the exercise by the Parliaments of the Commonwealth of their several and independent legislative powers, recognized or conferred by the Statute of Westminster itself’: K H Bailey, ‘The Abdication Legislation in the United Kingdom and in the Dominions’ (1938) 3 *Politica* 147 at 155 [Bailey, ‘Abdication Legislation’].

53. Wheare, *supra* note 47 at 283 (note that this ambiguity was clarified with respect to Australia (at its request) by s 9(3) of the *Statute of Westminster*).

54. 1931 (UK), 22 & 23 Geo V, c 4 s 2 [*Statute of Westminster*].

55. *Ibid* at s 10.

56. The *Statute of Westminster* was adopted by Australia in 1942, with retrospective application back to 3 September 1939. It was adopted by New Zealand in 1947. It was never adopted by Newfoundland, which later came under direct rule of the United Kingdom Government in 1934 and became a Province of Canada in 1949.

57. See further: K H Bailey, *The Statute of Westminster 1931* (Melbourne: Government Printer, 1935) at 8.

58. The request and consent was to be made pursuant to s 4 of the *Statute* where it applied or the convention in the 3<sup>rd</sup> paragraph of the preamble for those Dominions to which the substantive provisions of the *Statute* did not yet apply.

Two Canadian commentators at the time of the 1936 abdication queried the application of the ‘request and consent’ by the Canadian Government. This was in part driven by the fact that only Canada ‘requested and consented’, so it was seen to be the odd one out. W P M Kennedy argued that it ‘would seem that the intention of the Statute of Westminster is that laws relating to the succession to the throne and to the royal style and title should be excepted out of the general obligation of s 4 of the Statute’.<sup>59</sup> He based this view on the fact that the succession is mentioned only in the preamble, not in the text of the *Statute*, and that this was a deliberate decision of the Conference on the Operation of Dominion Legislation. He assumed, therefore, that s 4 of the *Statute of Westminster* did not extend to laws concerning succession to the throne.<sup>60</sup>

It would seem clear, however, that the convention concerning the succession in paragraph 2 of the preamble adds to, rather than substitutes for, the requirement that request and consent be provided before legislation can apply as part of a law of the Dominion. It accommodates three possibilities – (1) that a Dominion will change its own law concerning the succession (being a United Kingdom law that had previously applied by paramount force as part of the Dominion’s law, but could now, under s 2(2) of the *Statute of Westminster*, be amended or repealed<sup>61</sup>); (2) that the United Kingdom will change its law of succession to the throne, but not so as to apply as part of the law of a Dominion (so that the Dominion would have to legislate to change its own law if the personal union of Crowns were to be maintained, as South Africa and the Irish Free State did in relation to the 1936 abdication); or (3) that the United Kingdom will amend its law and apply it as part of the law of one or more Dominions (in which case, request and consent would also be required, if s 4 of the *Statute of Westminster* applied to the Dominion, or the 3<sup>rd</sup> paragraph of the preamble would apply if s 4 did not). As the Conference noted, it would have been inconsistent with the ‘equality’ of the Dominions, if the United Kingdom’s laws were to apply as part of the law of the Dominion, without their prior request

---

59. W P M Kennedy, “Canada and the Abdication” (1937) 2 UTLJ 117 at 117.

60. Note, in contrast, the argument by Bailey that s 4 is unlimited in its terms and therefore applies to laws concerning succession, including *His Majesty’s Declaration of Abdication Act 1936*: Bailey, “Abdication Legislation”, *supra* note 52 at 13-14.

61. Note Bailey’s observation that s 2 of the *Statute of Westminster* ‘appears indisputably to bring the laws touching the succession to the throne in general, and the Act of Settlement in particular, within the ambit of Dominion legislative powers’: Bailey, “Abdication Legislation”, *supra* note 52 at 11.

and consent.<sup>62</sup> Moreover, s 4 of the *Statute* is quite explicit that ‘No Act’ of the Parliament of the United Kingdom shall be deemed to extend to the Dominion without the record of request and consent. Such an absolute provision could not be read down by a recital in a preamble.<sup>63</sup> Kennedy’s argument has been rejected by a number of eminent scholars, including Wheare, the foremost expert on the *Statute of Westminster*, and Bailey.<sup>64</sup>

Cronkite took a completely different approach. He relied on the application of s 2 of the *British North America Act 1867* to contend that the Canadian Sovereign is as a matter of law the same person who is Sovereign of Great Britain and Ireland.<sup>65</sup> He seemed to be unaware of the fact that s 2 had been repealed because it was a mere interpretative provision rather than a substantive requirement. Nor did he take into account the subsequent establishment of a separate Canadian Crown. Indeed, he also noted that South Africa only assented to the United Kingdom legislation, rather than requesting and consenting to it,<sup>66</sup> without apparently realising that this was because South Africa decided that it would enact its own legislation to make the change, rather than have the British law apply as part of its own law. South Africa’s ‘assent’ did not result in a change in the rules of succession with respect to South Africa – only its own legislation achieved this. The same can be said for Canada’s 2013 assent.

It is quite clear from both the drafting history of the *Statute of Westminster* and the way in which the preamble, s 2 and s 4 interact, that it was not the case that the laws of succession were intended to be subject only to change by the Westminster Parliament. The laws of succession were regarded as being part of the law of each Dominion which could from then on be changed by: (1) the legislature of the Dominion (with a convention that the assent of the Westminster Parliament and other Dominion Parliaments be given to such a change), or (2) by the United Kingdom, but only at the request and consent of the Dominion, if the amended law was to apply as part of the law of that Dominion. The Westminster Parliament could also change the

62. Report Cmd 3479, *supra* note 31 at 54.

63. Bailey, “Abdication Legislation”, *supra* note 52 at 15.

64. Wheare, *supra* note 47 at 285; Bailey, “Abdication Legislation”, *supra* note 52 at 14-16 (Sir Kenneth Bailey was Dean and Professor of Public Law at the University of Melbourne and later Solicitor-General of the Commonwealth of Australia and High Commissioner to Canada).

65. F C Cronkite, “Canada and the Abdication” (1938) 4:2 CJEPS 177 at 185 [Cronkite].

66. *Ibid* at 186.

law of succession so that it applied only with respect to the law of the United Kingdom and did *not* apply to as part of a law of a Dominion. If so, by convention, only the ‘assent’ of the Dominion was needed. It is this ‘assent’ that Canada has given under the *Succession to the Throne Act* 2013 (Canada). Its effect, therefore, is to agree to the United Kingdom’s change to its own law of succession, but it does not affect the law of succession in relation to the Canadian Crown.

### THE 1936 ABDICATION

While there is debate over whether the abdication of a Sovereign requires legislation, it was needed in the case of Edward VIII to ensure that if he had children they would not inherit the throne. Hence an amendment to the *Act of Settlement* was required.<sup>67</sup> The *Royal Marriages Act* also needed amendment so that the new King did not have to be asked for his consent to the marriage of Edward, Duke of Windsor, to Mrs Simpson. Despite having to enact its own legislation, the British Government sought to avoid the need to enact Dominion legislation, both because of the need for swift action and because it regarded the less debate upon the embarrassing subject, the better.

The British Government therefore tentatively suggested that the Dominions might rely on the change of the Sovereign in the United Kingdom as having the same effect in the Dominions, without any need for action on their part.<sup>68</sup> This suggestion was expressly rejected by the Prime Minister of Canada who replied that this argument ‘does not appear acceptable in view of the recognised position of the Dominions in regard to the Crown’. He concluded that it would be necessary to secure the expression of assent by the Parliament of Canada and that the Government of Canada would ‘formally convey to the Government of the UK consent to the Bill proposed to be introduced in the Parliament at Westminster’<sup>69</sup> in accordance with s 4 of the *Statute of Westminster*.

The British Government’s own legal advice was to the same effect. In the lead up to the 1936 abdication, the British Parliamentary

---

67. Telegram by the UK Prime Minister to the Dominion Prime Ministers (4 December 1936); See also: UK, HC, *Parliamentary Debates*, 5th ser, vol 318, col 2203 (11 December 1936).

68. Telegram from UK Prime Minister to Dominion Prime Ministers (4 December 1936).

69. Telegram from Canadian Prime Minister to UK Prime Minister (6 December 1936); see further clarification in telegram of 8 December.



Counsel, Sir Maurice Gwyer, who was best known for his critical role in the drafting and enactment of the *Statute of Westminster*, advised the British Government that the *Act of Settlement* applied as part of the law of each of the Dominions, and that request and consent under s 4 of the *Statute of Westminster* was necessary for any British law amending the *Act of Settlement* to have effect in Dominions such as Canada. He contended that if the declaration of abdication was made by His Majesty himself, without ministerial advice, then it could be effective throughout the Dominions without the need for separate advice from Ministers of each Dominion. However, when it came to amending the *Act of Settlement*, consent and request was required:

Assuming then that the instrument of abdication were framed in appropriate terms His present Majesty would by its execution cease to be King in the Dominions as well as in the United Kingdom but a very difficult position would nevertheless arise for section four of the Statute of Westminster makes it clear that an Act which, for example, amends the Act of Settlement (which latter Act is at the present time part of the law of all the Dominions) would not extend to any Dominion unless it was expressly declared in the amending Act that the Dominion had requested, and consented to, its enactment. I am of opinion that it will, therefore, be necessary, not merely as a matter of courtesy and constitutional propriety but as a matter of law, to secure the assent of the Dominions to the proposed Bill and that if consent is not obtained from any Dominion the amendments of the Act of Settlement for which the Bill makes provision will be of no effect in that Dominion, and, accordingly, in that Dominion the new King will not become King nor will the new succession become the law of the Dominion.<sup>70</sup>

Coffey has summarised the situation in 1936 as follows:

So, if the British Act amended the Act of Settlement but Canada did not request and consent to it, then the Act of Settlement would remain unamended in Canada.<sup>71</sup>

The initial draft Bill of 4 December listed all the Dominions as requesting and consenting to the enactment of the Bill. South Africa objected, stating that under its *Status of Union Act 1934*, British law

70. Memorandum by Sir Maurice Gwyer, Parliamentary Counsel, to the UK Attorney-General (23 November 1936): PRO: PREM 1/449. Crown law advice to the UK Government was to the same effect: 'The Act of Settlement is at the present moment part of the law of each Dominion as well as of the United Kingdom, and the abdication will, therefore, be of no effect in a Dominion unless the action taken alters the law in the Dominion as well as in the United Kingdom': PRO: DO 121/39.

71. Donal K Coffey, "British, Commonwealth and Irish Responses to the Abdication of King Edward VIII" (2009) 44 Ir Jur 95 at 105.

could not apply to it directly. Hence a request and consent was inappropriate. The only course was for South Africa to enact its own law. It would, however, express its assent to the UK legislation, but it would not apply as part of South African law.<sup>72</sup> It therefore applied convention 2 (above) but excluded the application of convention 3 and s 4. The Irish Free State also objected and would give neither its assent nor its request or consent, saying only that it would have to enact its own legislation.<sup>73</sup>

Canada, New Zealand and Australia agreed to have the British law extend to them as part of their own laws. The *Statute of Westminster* applied in full to Canada, so conventions 2 and 3 and legal requirement 4 applied in its case. The consent and request of Canada to the enactment of *His Majesty's Declaration of Abdication Act 1936* was given by way of executive order in council<sup>74</sup> and recorded in the preamble to that Act. As Wheare has clearly stated:

The Act therefore applied to Canada *as part of the law of Canada*, and would be so construed by a Court.<sup>75</sup>

In order to meet the parliamentary assent requirement of convention 2, the Canadian Parliament later enacted the *Succession to the Throne Act 1937* (Canada).

Section 4 of the *Statute of Westminster* had not yet been adopted by Australia or New Zealand, so it was not necessary to gain and record their request and consent for the law to extend to them. It extended to Australia and New Zealand of its own force without any further legal steps. The request and consent of Australia and New Zealand was therefore removed from the draft bill so that they could join South Africa in merely giving 'assent' to it. There was no legal requirement to record 'assent' in the preamble to *His Majesty's Declaration of Abdication Act 1936* (UK), but it was included as a 'matter of courtesy'.<sup>76</sup> Australia's Parliament was the only Dominion Parliament to indicate its assent prior to the enactment of *His Majesty's Declaration of Abdication Act*.<sup>77</sup>

---

72. Telegram from South African Prime Minister to UK Prime Minister (7 December 1936).

73. Telegram from President of Executive Council of the Irish Free State to the UK Prime Minister (6 December 1936).

74. Minute of the Privy Council of Canada (10 December 1936) PC 3144.

75. Wheare, *supra* note 47 at 285 [emphasis added].

76. R T E Latham, *The Law and the Commonwealth* (London: Oxford University Press, 1949) at 629.

77. *Ibid* at 626.

New Zealand indicated its assent in advance by way of executive act, but later passed a parliamentary resolution in each House which ‘ratified and confirmed’ that assent for the purposes of convention 2.<sup>78</sup> It appears that neither Australia nor New Zealand formally requested and consented to the enactment of the British Act, in accordance with convention 3. Wade has noted that Australia and New Zealand simply behaved as they would have done before the enactment of the *Statute of Westminster*.<sup>79</sup>

As *His Majesty’s Declaration of Abdication Act 1936* (UK) extended as part of the law of Canada, Australia and New Zealand as well as the United Kingdom, the effective date of the abdication in those four countries was the date of commencement of that Act, 11 December 1936, rather than 10 December, which was the day on which Edward VIII signed his declaration of abdication.<sup>80</sup> South Africa’s *His Majesty Edward VIII’s Declaration of Abdication Act 1937* dated the changes to the succession of the Crown of South Africa back to 10 December, being the day on which Edward VIII signed the instrument of abdication. The abdication was implemented in the Irish Free State by the *Executive Authority (External Relations) Act 1936*, which took effect from 12 December 1936.

A number of lessons can be learnt from this exercise in changing the laws of succession. First, it is possible for the laws of succession to diverge and apply differently in Commonwealth Realms. There were different Kings in different Dominions during the period 10-12 December 1936 marking the divisibility of the Crown in the personal, as well as the political, sense. As Wheare described it, the Commonwealth was ‘partly dismembered’ during this period.<sup>81</sup> Bailey also observed that this incident demonstrated that ‘since the Statute of Westminster the unity of the Commonwealth rests rather in the King’s person than in his office; that the office of King can under the existing law be discharged by different persons for different parts of the Com-

78. NZ, *Hansard*, Parliamentary Debates (Vol 248) 9 September 1937, Legislative Council, 5; House of Representatives, 7. See further: K C Wheare, *The Constitutional Structure of the Commonwealth* (Oxford: Clarendon Press, 1960) at 162 on why a resolution was chosen over legislation.

79. E C S Wade, “Declaration of Abdication Act, 1936”, (1937) 1 Mod L Rev 64 at 66.

80. To avoid difficulties over assent to the Act, the declaration of abdication had been drafted so that the throne only passed from Edward VIII to George VI once Edward VIII had given royal assent to it: Telegram by UK Prime Minister to Dominion Prime Ministers (4 December 1936).

81. Wheare, *supra* note 47 at 290; see also: A B Keith, *The Dominions as Sovereign States*, (London: Macmillan & Co, 1938) at 107.

monwealth; and that the unity of the Commonwealth, through the person of the King, is now maintained, not by chance indeed, but by deliberate agreement.<sup>82</sup>

Secondly, there was no acceptance amongst the Dominions in 1936 that a change to the succession of the throne of the United Kingdom would automatically change the succession in relation to the throne of each or any of the Dominions. All took the view that such a change needed to be made as *part of their own domestic law*. Australia and New Zealand only needed to ‘assent’ to the United Kingdom law because they had not yet adopted the substantive provisions of the *Statute of Westminster* and British laws could therefore still apply to them as part of their own domestic laws by express application or necessary intendment without any indication of request or consent. Canada, in accordance with s 4 of the *Statute of Westminster*, requested and consented to the application of the British law as part of Canadian law. Ireland and South Africa enacted their own laws. Only in Newfoundland was there no need to take action, because it had ceased to be a Dominion and no longer had a separate Crown. In 1936 none of the Dominions rested on the assumption that the change in succession in the United Kingdom would automatically effect the same change in the Dominion. All accepted that a change needed to be made to their domestic laws, either by a United Kingdom law or by the enactment of their own law.

### **THE TERMINATION OF THE ABILITY OF THE UNITED KINGDOM TO LEGISLATE FOR THE DOMINIONS**

The capacity of the United Kingdom to legislate for the Dominions, enacting laws that form part of the law of the Dominions, has ceased to exist. South Africa and the Irish Free State became republics. Newfoundland eventually became a part of Canada. The capacity for the United Kingdom to enact laws for Canada ended in 1982<sup>83</sup> and for New Zealand<sup>84</sup> and Australia in 1986.<sup>85</sup>

The consequence is that today, unlike in 1936, any law enacted by the United Kingdom Parliament that touches upon or alters the laws of succession to the throne will not extend as part of the law of

---

82. Bailey, “Abdication Legislation”, *supra* note 52 at 149.

83. *Constitution Act* 1982 (Canada), s 53 and Schedule, item 17. See also *Canada Act* 1982 (UK), 1982, c 11.

84. *Constitution Act* 1986 (NZ), ss 15(2) and 26.

85. *Australia Act* 1986 (Cth) and *Australia Act* 1986 (UK), ss 1 and 12.

any of the Commonwealth Realms. Hence convention 3 and s 4 of the *Statute of Westminster*, which required the request and consent of the relevant Dominions, no longer have any application at all.

To the extent that conventions 1 and 2 still apply, if at all, it is simply a matter of comity between the Realms. The ‘assent’ given under these conventions has no legal effect. It no longer performs the role of recognising the application to a Dominion of the United Kingdom law in cases where the Dominion has not yet adopted the substantive provisions of the *Statute*, as was the case in relation to Australia and New Zealand in 1936. The role of the convention is therefore purely diplomatic.

### **IS THERE A CONSTITUTIONAL REQUIREMENT THAT THE SOVEREIGN OF A REALM BE THE SAME PERSON WHO IS THE SOVEREIGN OF THE UNITED KINGDOM?**

The Constitutions of the older Realms were all written at a time when the Crown was regarded as indivisible. Three of them included provisions that connected the references to the Sovereign in the Constitution, to the Sovereign of the United Kingdom. The critical question was whether these provisions were just ‘interpretation clauses’ intended to indicate that the person of the Sovereign changed from time to time so that references to Queen Victoria were not frozen in their application to her alone, or whether they were intended to create a substantive link between two separate Crowns by requiring them to be held by the same person. The relevant sections provided:

**Australia** – ‘The provisions of this Act referring to the Queen shall extend to Her Majesty’s heirs and successors in the sovereignty of the United Kingdom’.<sup>86</sup>

**Canada** – ‘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’.<sup>87</sup>

**South Africa** – ‘The provisions of this Act referring to the King shall extend to His Majesty’s heirs and successors in the sovereignty of the United Kingdom of Great Britain and Ireland’.<sup>88</sup>

86. *Commonwealth of Australia Constitution Act 1900* (Imp), s 2.

87. *British North America Act 1867* (Imp), s 2.

88. *South Africa Act 1909* (Imp), s 3. See also: s 5 of the *Status of Union Act 1934* (Sth Africa) which defined ‘heirs and successors’ as meaning ‘His Majesty’s heirs and successors in the sovereignty of the United Kingdom of Great Britain and Ireland’.

The Canadian provision was repealed in 1893<sup>89</sup> on the ground that it was redundant because the *Interpretation Act* 1889 (UK) provided that references to the Sovereign at the time an Act was made should ‘unless the contrary intention appears be construed as referring to the Sovereign for the time being’. It was therefore regarded in 1893 as being no more than a statutory interpretation provision that ensured that references to the monarch at the time of the enactment of the Constitution were not frozen in their application to that monarch alone. As Bailey observed, all that ‘such a section should properly be regarded as doing is to ensure that whenever in future a person comes to the throne by a succession law operative in the Dominion, the provisions in the Dominion Constitution referring to His Majesty will extend to such a person’.<sup>90</sup> Bailey also pointed to the history of the negotiations of the *Statute of Westminster*, concluding:

It will be recalled that in none of the discussions that led up to and accompanied the enactment of the Statute of Westminster was it suggested that so far as concerned Canada and Australia at any rate there was no need of the proposed convention, because the Constitution Acts of those Dominions contained sections, beyond the power of the Dominions to alter, which made any succession to the throne in the United Kingdom automatically operative in the Dominion.<sup>91</sup>

As noted above, the Canadian Government took the view in 1936 that it was necessary to request and consent to the application of the United Kingdom law as part of Canadian law. It rejected the proposition that the change in the monarch of the United Kingdom had the effect of automatically changing the monarch of Canada.

In 1936, the South African Government insisted that its Parliament had to enact its own legislation to change the rules of succession

---

as determined by the laws relating to the succession to the Crown of the United Kingdom of Great Britain and Ireland.’

89. *Statute Law Revision Act* 1893 (UK), 52 & 53 Vict c 63, s 30 (note, however, the mistaken assumption that s 2 was still in force at the time of the abdication crisis in 1936 and the analysis of its effect): *House of Commons Debates*, 18th Parl, 2nd Sess, Vol 20 (19 January 1937) at 76 (Mr Lapointe, Minister for Justice); A B Keith, “Notes on Imperial Constitutional Law” (1937) 19 J Comp Leg (3d) 105 at 106; Bailey, “Abdication Legislation”, *supra* note 52 at 20-21[Keith]; Cronkite, *supra* note 65 at 177; and Sir I Jennings, *Constitutional Laws of the Commonwealth* (Oxford: Clarendon Press, 1952) at 384.
90. Bailey, “Abdication Legislation”, *supra* note 52 at 17 (see also his commentary on arguments made in the Canadian Parliament at 21).
91. *Ibid* at 18.

to its Crown.<sup>92</sup> The South African Government did not accept that the UK change had the automatic effect of changing the monarch of South Africa. Bailey described the South African position as follows:

The Act of Settlement was and is, by common consent, part of the law of South Africa; it needed no s 3 of the South Africa Act, no s 5 of the Status of the Union Act, to bring it into and maintain it in operation there. Any subsequent amendment of that Act, however, would operate in South Africa as part of the law thereof only if enacted by the Union Parliament in pursuance of s 2 of the Statute of Westminster, or if enacted by the Parliament of the United Kingdom, with a declaration of the request and consent of the Union, pursuant to s 4 of that Statute.<sup>93</sup>

South African constitutional references to the King and his heirs and successors were repealed when South Africa became a republic in 1961.

The only one of these three provisions that remains in existence is the one concerning Australia – known as covering clause 2. There are three possible views as to how it operates. The first is that it mandates that whoever is the sovereign of the United Kingdom is also, by virtue of this external fact, sovereign of Australia.<sup>94</sup> According to this view, a change in the United Kingdom law of succession would have no legal application as part of Australian law, but if it had the effect of changing the sovereign (eg as a result of abdication) then the new sovereign of the United Kingdom would automatically become the new sovereign of Australia because of the operation of covering clause 2. This view is now regarded as old-fashioned and most unlikely to be accepted by the Australian courts for the reasons noted below. Professor Zines criticised it as follows:

The view that s 2 of the [*Commonwealth of Australia Constitution Act*] requires Australia to have the same monarch as the United Kingdom is anachronistic. To suggest that its object was to ensure that the Queen of Australia was the Queen of the United Kingdom would not have been understandable by anyone in 1900. The Crown was Imperial and the Commonwealth had no power to alter Imperial law. It is also difficult to understand why the British Parliament would see the need to pro-

92. This was so, despite UK pressure for South Africa to ‘request and consent’ in the same manner as Canada: Telegram by UK Prime Minister to South African Prime Minister (10 December 1936).

93. Bailey, “Abdication Legislation”, *supra* note 52 at 26.

94. Keith, *supra* note 95 at 106 (see also the statement by Winterton that the Queen of Australia ‘is constitutionally required to be the British monarch’: G Winterton, “The Evolution of a Separate Australian Crown” (1993) 19 *Monash UL Rev* 1 at 2).

vide Australia with a rule of succession separate from that operating throughout the Empire. The Crown was one and indivisible.<sup>95</sup>

Zines also referred to the potential consequences of such a view. If Britain became a republic, there would be no Queen ‘to which s 2 could refer and all Australian governmental institutions would either immediately or eventually cease to exist’.<sup>96</sup>

The second view is that covering clause 2 is merely an interpretative provision which assumes, but does not enact, the existence of a succession law that is operative in Australia.<sup>97</sup> According to this view, covering clause 2 operates to ensure that references to the Sovereign are not taken to be confined to the Sovereign at the time of the enactment, but extend to whoever happens to be the Sovereign from time to time in accordance with the applicable law. This was to be determined by the succession law that formed part of the law of Australia. Zines has observed that ‘before the *Statute of Westminster*, the Imperial law of succession operated as paramount law in Australia, not by virtue of [covering clause 2], but in its own right, as it did in, for example, New Zealand or Newfoundland, where no provision similar to [covering clause 2] existed’.<sup>98</sup> As the United Kingdom can no longer legislate for Australia, the applicable law would be the pre-existing law of succession as altered by Australian law. This approach is consistent with that taken in relation to other British laws that applied by paramount force prior to the *Statute of Westminster* coming into force. Their repeal or amendment in the United Kingdom had no effect upon their operation in Australia,<sup>99</sup> even when the laws were ludicrously outdated, such as the *Merchant Shipping Act 1894* (Imp).

The third view, which falls between the two extremes, is that covering clause 2 incorporated by reference into the *Commonwealth of Australia Constitution Act* the British laws of succession to the

95. L Zines, *The High Court and the Constitution*, 5th ed (New South Wales: Federation Press, 2008) at 436 [Zines].

96. *Ibid* at 437.

97. Bailey, “Abdication Legislation”, *supra* note 52 at 17; *Final Report of the Constitutional Commission* (AGPS: Canberra, 1988) Vol 1 at 81; Zines, *supra* note 95 at 436-437.

98. Zines, *supra* note 95 at 436.

99. *Copyright Owner’s Reproduction Society Ltd v EMI (Australia)* (1958) 100 CLR 597, 604 (Dixon CJ); *Bisticic v Rokov* (1976) 135 CLR 552; *Ukley v Ukley* [1977] VR 121. See also: R D Lumb, “Fundamental Law and the Processes of Constitutional Change in Australia” (1978) 9 FL Rev 148 at 174-175, and for a New Zealand example: *Re Ashman* [1985] 2 NZLR 224.



throne.<sup>100</sup> Under s 4 of the *Statute of Westminster*, those laws could be amended or repealed by United Kingdom legislation to which Australia had given its request and consent. That is no longer the case since s 1 of the *Australia Acts* came into force. In *Sue v Hill*, three Justices of the High Court of Australia noted that covering clause 2 identifies the Queen ‘as the person occupying the hereditary office of Sovereign of the United Kingdom under rules of succession established in the United Kingdom’. Their Honours went on to state:

The law of the United Kingdom in that respect might be changed by statute. But without Australian legislation, the effect of s 1 of the *Australia Act* would be to deny the extension of the United Kingdom law to the Commonwealth, the States and the Territories.<sup>101</sup>

The argument here is that the rules of succession have been effectively patriated with the Australian Crown and while they continue to exist in their current British form, they may only be amended or repealed by Australian action. On this basis any change of the rules of succession enacted by the Westminster Parliament would have no effect in relation to the Crown of Australia unless Australia chose to take action to change the laws of succession that are part of Australian law to ensure that they remained consistent with those of the United Kingdom.

Given the High Court of Australia’s indication of the approach that it would find acceptable and given the current orthodoxy of this approach within Australian legal and constitutional scholarship<sup>102</sup>, the Australian Government accepted from the start that Australian legislation would be required to implement such a change as part of Australian law. While there were certainly debates about whether federal legislation alone would be sufficient or whether all of the States would have to pass legislation requesting the federal law, there was

100. See eg R Miller, “Constitutional Law” in R Baxt (ed), *An Annual Survey of Law 1980* (Sydney: Law Book Co, 1981) at 492, 512; K Booker and G Winterton, “The Act of Settlement and the Employment of Aliens” (1981) 12 FL Rev 212 at 215; *Sue v Hill* (1999) 199 CLR 462 at para 93 (Gleeson CJ, Gummow and Hayne JJ) [*Hill*].

101. *Hill*, *supra* note 100 at para 93; see also: *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at para 228 (Gummow and Hayne JJ).

102. See, eg, Professor Campbell’s view that if the Queen were to abdicate, separate abdication legislation would have to be enacted in Australia: Enid Campbell, “Changing the Rules of Succession to the Throne” (1999) 1:4 Constitutional Law and Policy Review 67 at 70. See also: Zines, *supra* note 95 at 436-437. Banks has taken the same view in relation to Canada: Margaret Banks, “If the Queen were to Abdicate: Procedure Under Canada’s Constitution” (1990) *Alta L Rev* 535 at 537[Banks].

no debate that Australian law had to make the substantive change to succession to the Australian Crown if it was desired to maintain the personal union of Crowns with the United Kingdom.

**IS THERE AN ‘AUTOMATIC RECOGNITION RULE’  
DERIVED FROM THE PREAMBLE TO THE CANADIAN  
CONSTITUTION THAT REQUIRES THE SAME PERSON  
TO BE MONARCH OF THE UNITED KINGDOM  
AND CANADA?**

It has been claimed that there is an automatic recognition rule, which finds its source in the preamble to the *British North America Act 1867* (now known as the *Constitution Act 1867*).<sup>103</sup> This preamble provides:

Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom;

The Constitution of the United Kingdom, however, does not have an ‘automatic recognition rule’ for determining the monarch. It has a monarch determined by the application of the law of the land (both common law and statute). If Canada has a Constitution ‘*similar in principle to that of the United Kingdom*’, then its monarch too is determined by the law of the land, being the common law as altered by the *Bill of Rights 1688*, the *Act of Settlement 1700* and other relevant statutes, which form part of Canadian law. This is also the case in Australia and the other former ‘Dominions’ (as they were known).

Similarly, the reference to the ‘Crown of the United Kingdom of Great Britain and Ireland’ cannot be regarded as the source of such a rule.<sup>104</sup> First, in 1867 this was an indivisible Crown, so there could not have been any rule at that time recognising that the Queen of Canada must be the same person who holds the office of Queen of the

---

103. See eg: Rob Nicholson, “Changing the Line of Succession to the Crown” (Summer 2013) 36:2 *Canadian Parliamentary Review* 8; Peter Hogg, ‘Succession to the Throne’ (2014) 33 *NJCL* 83 at 90 [Hogg, “Succession to the Crown”]; and Ian Holloway, “The Law of Succession and the Canadian Crown” in D Michael Jackson and Philippe Lagassé, eds, *Canada and the Crown – Essays on Constitutional Monarchy* (Montreal and Kingston: McGill-Queen’s University Press, 2013) 107, 113.

104. Cf *O’Donohue*, *supra* note 24 at para 21.

United Kingdom given that no such separate offices existed. Such a rule of recognition could therefore not possibly be inferred from the preamble as originally drafted and applied. Those who assert that the preamble contains a rule of automatic recognition or a 'rule of Crown identification'<sup>105</sup> are mixing up means and ends. Certainly, in 1867 it would have been true to say that the 'Queen' referred to in the *British North America Act* was the same person who was the Queen of the United Kingdom, as is the case today. However, the means of achieving that end was the law of succession to the throne which formed part of British law and which applied by paramount force as part of Canadian law. It was the paramountcy of this law that ensured the unity of the Crown across the Dominions – hence the concern expressed by George V at the termination of its paramountcy when the *Statute of Westminster* came into effect.

As a rule of Crown identification could have had no logical existence prior to the Crown becoming divisible, if such a rule exists at all today, the preamble to the *British North America Act* must have been given new meaning to provide the basis for such a rule once the Crown became divisible. None of the commentators who proclaim the existence of such a rule, however, explain how a preamble which does not on its face refer to any such rule and which clearly could not have contained such a rule at the time it was first enacted, transformed to include such a rule after the Crown became divisible.

Secondly, it could not realistically be argued that the Crown governing Canada today is still the 'Crown of the United Kingdom of Great Britain and Ireland'. This is because such a Crown no longer exists (given the departure of the Republic of Ireland). Moreover, if Canada was governed by the Crown of the United Kingdom, then the Queen would have to act upon the advice of her British Ministers exercising constitutional powers in relation to Canadian matters. As Her Majesty in fact acts upon the advice of Canadian Ministers, when exercising her powers in relation to Canada, she does so under the Crown of Canada, not the Crown of the United Kingdom. Hence, the reference to the Crown in the preamble, if it is to have any ongoing status beyond an historic statement, must be reinterpreted as referring to the Crown of Canada.

It has also been argued by the Canadian Government that references in the *Constitution Act* to 'the Queen' must be interpreted as

---

105. See Mark Walters' contribution to this volume.

meaning the ‘Queen of the United Kingdom’.<sup>106</sup> Again, if this were the case, then the Queen of the United Kingdom could only take advice from her United Kingdom Ministers, regarding Canadian matters. To an Australian constitutional lawyer it would seem inconceivable that a Canadian court would interpret references to the Queen in such a manner. Certainly, in Australia, the High Court has reinterpreted all such references to the Queen in the Australian Constitution as meaning the ‘Queen of Australia’.<sup>107</sup>

The High Court of Australia explained its interpretative approach as follows:

The constitutional term “subject of the Queen” must be understood in the light of the development and evolution of the relationship between Australia and the United Kingdom and the United Kingdom and those other countries which recognise the monarch of the United Kingdom as their monarch. In particular, the expression “subject of the Queen” can be given meaning and operation only when it is recognised that the reference to “the Queen” is not to the person but to the office. That recognition necessarily entails recognition of the reality of the independence of Australia from the United Kingdom.<sup>108</sup>

As Justice Kirby has noted, the Constitution has adapted to ‘the practical and statutory change in the position of the Queen as Queen of Australia’ and that this has been recognised in many cases.<sup>109</sup>

Canada, too, has become independent from the United Kingdom, and there is a separate office of the Queen of Canada which is governed by Canadian law. As Hunter has argued, to the extent that references to the Queen would otherwise be interpreted as mean-

106. Note that the Leader of the Government in the Canadian Senate went further to state that ‘The Constitution provides that the Queen of the United Kingdom is also the Queen of Canada’: *Debates of the Senate*, 41st Parl, 1st Sess, No 148 (26 February 2013) at 3307.

107. *Pochi v Minister for Immigration & ethnic Affairs* (1982) 151 CLR 101 ¶109 (Gibbs CJ); *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 ¶184 and ¶186 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ); *Sue v Hill* (1999) 199 CLR 462 ¶ 57 (Gleeson CJ, Gummow and Hayne JJ), and ¶ 169 (Gaudron J); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 ¶48 (Gaudron J); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 ¶ 51-52 (McHugh J); ¶ 97 (Kirby J); [177] (Callinan J); *Singh v Commonwealth* (2004) 222 CLR 322 ¶35, 39-41, 57-58, 133 (McHugh J); ¶ 263 (Kirby J).

108. *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 ¶ 14 (Gleeson CJ, Gummow and Hayne JJ).

109. *Singh v Commonwealth* (2004) 222 CLR 322 ¶263 (Kirby J).

ing the Sovereign of the United Kingdom, the ‘express disavowal of future [British] legislative authority over Canada would almost certainly... constitute a “contrary intention”... and thus displace’ any such presumption.<sup>110</sup>

It has also been suggested that there is a constitutional requirement of ‘symmetry’ across the Realms that the Sovereign of each Realm must be the person who is the Sovereign of the United Kingdom under the one British succession law.<sup>111</sup> If there ever was such a symmetry requirement, it was destroyed in 1936 when different persons were King in the different Dominions from 10-12 December 1936. Of all the Dominions that were made subject to the *Statute of Westminster* 1931, the only one that considers that such a requirement of symmetry exists is Canada. South Africa and the Irish Free State never did, as they deliberately recognised as their King a person who was not King of the United Kingdom in the period 10-12 December. Moreover, Australia and New Zealand have both long recognised their own separate Crowns and that the laws of succession to that Crown have been incorporated in their own domestic laws. They have voluntarily agreed to change their own succession laws to accord with British changes.<sup>112</sup> Neither has accepted a constitutional requirement of symmetry or an automatic rule of recognition.

Ultimately, there is no textual support in the preamble or the text of the Canadian Constitution for the assertion of an automatic rule of recognition and nor is there any historic support for such a proposition. It appears, from an outsider’s point of view, that this newly created doctrine of automatic recognition is the child of political convenience arising from an unwillingness to engage in inter-

110. Josh Hunter, “A More Modern Crown: Changing the Rules of Succession in the Commonwealth Realms” (2012) 38:3 Commonwealth L Bull 423 at 446 [Hunter].

111. The original source of the symmetry argument appears to be a confused discussion in *O’Donohue supra* note 24 at para 33-34 where Rouleau J on the one hand seemed to regard the rule of symmetry as requiring each Realm to maintain its own laws of succession in a manner consistent with the British laws of succession (implicitly recognising that there is no rule of automatic recognition) but on the other hand seemed to regard any Canadian change to its laws of succession as purporting to change those of all the Realms. These propositions are inconsistent. Canadian legislation amending the *Act of Settlement* as part of the law of Canada would not purport to alter the *Act of Settlement* as part of the law of the United Kingdom or any other Realm, just as Canadian legislation to repeal s 4 of the *Statute of Westminster* did not alter the *Statute of Westminster* in any other Realm.

112. See: *Royal Succession Act* 2013 (NZ) (royal assent 17 December 2013). In Australia, as noted above, the process continues underway, with five of the six States so far passing the relevant request legislation.

governmental negotiations and to confront the possibility of a need to undertake constitutional change through s 41 of the *Constitution Act* 1982 (Can).<sup>113</sup>

### IS THE CANADIAN GOVERNMENT'S DECISION TO 'ASSENT' TO BRITISH CHANGES TO THE RULES OF SUCCESSION SUPPORTED BY PRECEDENT?

One of the explanations given by the Canadian Government for 'assenting' to British changes to the rules of successions was that it was acting in accordance with precedent. The Minister for Justice and Attorney-General stated in evidence to the Senate Standing Committee on Legal and Constitutional Affairs that the Canadian *Succession to the Throne Bill* 2013, in simply assenting to the enactment of British legislation, followed the precedent in relation to the abdication of Edward VIII and the precedents of 1947 and 1953 in relation to the royal style and titles.<sup>114</sup> In this, it would appear, that he was poorly advised because on none of those occasions did Canada simply assent to the enactment of British legislation.

When it came to the abdication, the Canadian Government requested and consented to the application of *His Majesty's Declara-*

113. Note that this chapter does not seek to deal with the further constitutional issue of whether s 41 of the Constitution is engaged by changes to the law of succession to the Canadian Crown. For discussion on this issue see: Margaret Banks, "If the Queen were to Abdicate: Procedure Under Canada's Constitution" (1990) *Alta L Rev* 535 at 537-539; Hunter, *supra* note 110 at, 445-448; Andrew Smith & Jatinder Mann, "A Tale of Two Ex-Dominions: Why the Procedures for Changing the rules of Succession are So different in Canada and Australia" Institute of Intergovernmental Relations Working Paper, Queen's University, 2013: <http://www.queensu.ca/iigr/WorkingPapers/NewWorkingPapersSeries/workingpaper052013smithandmann.pdf>; Hogg, "Succession to the Crown", *supra* note 103 at 92-94; Philippe Lagassé and James Bowden, "Royal Succession and the Canadian Crown as a Corporation Sole: A Critique of Canada's *Succession to the Throne Act, 2013*" (2014) 23:1 *Const Forum Const* 17 at 22-3; Robert Hawkins, "The Monarch is Dead; Long Live the Monarch": Canada's Assent to Amending the Rules of Succession" (2013) 7:3 *Journal of Parliamentary and Political Law* 593-610. Note, however, the Canadian Supreme Court has twice recently rejected the Harper Government's view that the s 41 amending procedure does not apply to particular laws: *Reference re Supreme Court Act, ss 5 and 6* [2014] SCC 21; and *Reference re Senate Reform* [2014] SCC 32.

114. Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence* (21 March 2013) online: <[http://www.parl.gc.ca/Content/SEN/Committee/411/lcjc/32ev-50040-e.htm?Language=E&Parl=41&Ses=1&comm\\_id=11](http://www.parl.gc.ca/Content/SEN/Committee/411/lcjc/32ev-50040-e.htm?Language=E&Parl=41&Ses=1&comm_id=11)>. See also: Rob Nicholson, "Changing the Line of Succession to the Crown" (Summer 2013) 36:2 *Canadian Parliamentary Review* 8.

*tion of Abdication Act 1936 (UK) as part of Canadian law.* It did not accept that whoever was the Sovereign of the United Kingdom was automatically the Sovereign of Canada. There was no acceptance of any 'automatic recognition rule'. The Canadian Prime Minister, Mackenzie King, insisted on 10 December 1936 that the draft preamble to the Act be altered to make it clear that Canada was giving its request and consent pursuant to s 4, not general assent.<sup>115</sup> He stated in a telegram to the British Government:

Under the terms of section 4 United Kingdom Parliament cannot legislate for Canada unless it is expressly declared in Act that Canada has requested and consented to the enactment thereof or in other words Canada must, as regards necessary legislative procedure have taken initiative by formally requesting such action and expressed its consent to terms of draft Act.<sup>116</sup>

He therefore insisted upon the inclusion in the preamble of reference to Canada's request and consent under s 4. The Canadian Prime Minister clearly saw the British Act as legislating for Canada and becoming part of Canadian law. Request and consent under s 4 was only necessary and applicable if the UK law were to 'extend to a Dominion as part of the law of that Dominion' – not if there was a rule of recognition that required the King of Canada to be the same person who was King of the United Kingdom.

Canada's subsequent parliamentary assent in the *Succession to the Throne Act 1937 (Can)* refers in its preamble to the request and consent of Canada pursuant to s 4 of the *Statute of Westminster*. This shows both that assent under convention 2 was regarded as something additional to, rather than in substitution for, the request and consent required by s 4. It also shows that Canada had a law regarding succession and that this law was altered in 1936 by a further statute on the succession which was applied as part of the law of Canada and remains part of the law of Canada.

The precedent, therefore, from 1936 is that the Canadian law of succession to the throne required change, either through the enactment of independent Canadian legislation or, as occurred, a request and consent to the application of the British Act as part of Canadian

---

115. Telegram from UK High Commissioner in Canada (10 December 1936): PRO: DO 121/33.

116. Telegram from UK High Commissioner in Canada to the Secretary of State for Dominion Affairs (9 December 1936), conveying the message of the Canadian Prime Minister: PRO: DO 121/33.

law. As Banks has noted, the ‘procedure followed in 1936-37 would not be correct today’ since the passage of the *Canada Act 1982*.<sup>117</sup> The only option that this leaves is the enactment of substantive Canadian legislation implementing the relevant changes as part of Canadian law.

Nor is it the case that the changes to the royal style and titles, made pursuant to the same convention in the preamble to the *Statute of Westminster*, simply assented to the application of a United Kingdom law.<sup>118</sup> In 1947 the Canadian *Royal Style and Titles Act (Canada) 1947* assented to the alteration of the King’s royal style and titles to exclude his title as Emperor of India. It did not assent to the enactment of legislation in the United Kingdom. Instead, it was ‘agreed that the omission should be made effective *as regards Canada* by means of an Order in Council’.<sup>119</sup> The source of power for the Canadian Order in Council was expressed to be the *Royal Style and Titles Act (Canada) 1947*,<sup>120</sup> not any British Act of Parliament.

The *Royal Style and Titles Act 1953 (Canada)* assented to the Queen, as Queen of Canada, under the Great Seal of Canada, adopting a royal style and title with respect to Canada. It did not assent to the enactment of United Kingdom legislation. The actual proclamation of that royal style and title was made by the Queen on the advice of her Canadian Privy Council, under the Great Seal of Canada.<sup>121</sup>

It is clear in relation to every precedent concerning succession to the throne and changes to the royal style and titles from 1931 to 2012, that Canada did not simply assent to the enactment of British laws. In 1936, it gave request and consent to the application of the British law as part of Canadian law. In 1947 it enacted Canadian legislation which authorised a Canadian order-in-council. In 1953 it enacted Canadian legislation authorising the Queen of Canada, acting on the advice of the Canadian Privy Council, to make a proclamation under the Great Seal of Canada. It was not until 2013, that the Canadian Government decided that it no longer had a role in relation to succession or royal style and titles, apparently abdicating these matters to the United Kingdom.

---

117. Banks, *supra* note 102 at 537.

118. See also: Garry Toffoli & Paul Benoit, “More is Needed to Change the Rules of Succession for Canada” (2013) 36:2 Canadian Parliamentary Review 10 at 10-11.

119. Canada, Order in Council, PC 2828, 1948 [emphasis added].

120. Canada, Order in Council, PC 2828, 1948; and *The Canada Gazette*, Vol LXXII, No 5, 22 June 1948.

121. *Canadian Gazette*, Vol LXXXVII, No 6, 29 May 1953.



## CONCLUSION

This chapter has argued that there is no automatic rule of recognition and that Australia and Canada must each make substantive changes to the laws of succession as they apply as part of their respective laws. The Canadian Parliament, by declining to amend the *Act of Settlement* and other laws governing the succession to the Canadian Crown that apply as part of the law of Canada, has undermined the personal union of Crowns by retaining a law of succession that will be out of step with the law applying to the Crowns of the United Kingdom and the other Realms.

It is sometimes claimed that Canada has taken the more 'conservative' and pro-monarchist approach and that Australia was driven in its actions by underlying republicanism. The potential outcomes show otherwise. If there is any doubt about which is the legally correct course, Australia has taken the more conservative and rational approach. The Australian Commonwealth Government has respected the States and the constitutional role of the Sovereign in each of the States. It has done this by negotiating with them and reaching an agreement with them that involves legislation in each State Parliament. By doing so, it has avoided federal disharmony and litigation. If it is ever held by a court in the future that the Commonwealth was wrong and that there *is* a constitutional rule of automatic recognition in Australia, then the Commonwealth and State legislation would be invalid, but the outcome in terms of the succession to the Australian Crown would be the same, because the same rules would apply in the United Kingdom in determining who is Sovereign.

Canada, however, by taking the opposite approach has excluded the provinces from involvement in a matter of fundamental constitutional importance, causing federal disharmony and resulting in litigation. If the Canadian Government is wrong and there is no constitutional rule of automatic recognition, then the outcome will be that different rules of succession apply to Canada than apply in all the other Realms with the consequence that Canada could potentially end up with a different monarch from the United Kingdom, terminating the personal unity of the Crown.

The Australian approach has been conservative, respectful of the role of the monarchy in the States and concerned to maintain the personal unity of the Crown. The Canadian approach has put at risk the personal unity of the Crown, potentially undermining the monarchy and has undermined the federal system by denying the provinces

their rightful constitutional role in relation to changes concerning the Crown. From an Australian perspective, it seems a potentially very high price to pay for the short-term advantage of avoiding the bother of intergovernmental negotiations.