Guest Editorial

Democracy in the 21st Century: The Future of the Crown in Canada

In 1936 British Prime Minister, Stanley Baldwin, actively consulted with the Prime Ministers of the older Dominions and was able, in the result, to cite the very strong objections of Mackenzie King as grounds for his own refusal to sanction a marriage between King Edward VIII and a twice divorced U.S. citizen, thereby inducing the King to abdicate. In 2005 the civil marriage of the heir to the British throne to his long-time companion – both parties having been divorced from previous spouses – was apparently not discussed by the British government with the Canadian government, nor did the Canadian government offer any advice, this notwithstanding that constitutional doubts involving the succession to the British throne and allegedly requiring British and Commonwealth legislation to "correct" had been raised by some British jurists. Why the difference between 1936 and today?

Community attitudes towards divorce for persons holding public office have changed dramatically and that is clearly relevant. But more importantly for Canadians today, fundamental changes in the constitutional balance between Great Britain and her former Dominions, occurring through developing custom and Convention, have rendered the constitutional precedents applied in 1936 essentially out-of-date and irrelevant in contemporary terms. In the case of the Prince of Wales' remarriage, the Governor General of Canada, accepting the invitation of the British Lord Chamberlain, attended the religious blessing service conducted by the Archbishop of Canterbury in the Royal Chapel in Windsor Castle, immediately after the civil marriage ceremony in a civil registry office. She also attended the reception offered by the Queen, and presented a wedding gift on behalf of the Canadian people – a pewter bowl designed and made by a contemporary Newfoundland artist. The Governor General did not attend the civil marriage ceremonies, not having been invited. It was all done gracefully and in accord with diplomatic protocol requirements and formalities applying between two sovereign states entertaining close, friendly relations, – this apart from past Imperial constitutional ties.

The constitutional reality today is that, with the transformation – really, transmogrification – of the old British Empire and British Commonwealth into a plain, un-prefixed, multi-cultural Commonwealth of Nations, – symbolized in the 1949 Declaration of the Commonwealth Prime Ministers and in Indian Prime Minister Nehru's later generous initiative to have the Queen accepted as ceremonial "Head of the Commonwealth", the historical, governmental-institutional legal ties between Canada and Imperial Britain, codified in part in the original *British North America Act of 1867*, have progressively withered away. In particular, with the "Canadianisation" of the office of Governor General whose incumbent, for more than half a century, has been selected by the Canadian Prime Minister of the day without the necessity of any prior, by-your-leave or courtesy advance consultation with London, we have had, *de facto*, a wholly Canadian titular head-of-state in whom the once immense residual, Reserve, Prerogative powers of the Crown, detailed in our Constitution of 1867, are now vested. To be sure, these powers are now constrained by their own new, Conventional constitutional limitations as to their application in concrete cases; but these are new Canadian constitutional Conventions, developed experientially and drawing, in measure, on flexible and imaginative new glosses worked out, in cognate practice, in new states like the Republic of India that had opted deliberately, in their post-Decolonisation constitutions, for a British, "Westminster" style Parliamentary executive, with the dualism of separate head-of-state and head-of-government functions very similar to the system that we "received" from Great Britain in 1867. One leaves to one side, for the moment, the extra constitutional refinement that the titular head-of-state in India is chosen by a form of (indirect) election and is styled as President (of a Republic) and not as Governor General. The distinction is one of constitutional nomenclature and not of substance.

On empirical examination, the only apparent vestigial survival today for Canada of the constitutional trappings of the Imperial past is that our Prime Minister's choice and appointment of the Governor General is still subject to formal proclamation by the Queen-in-Council in London. It

could as easily be done in Canada by Canadian Order-in-Council, signed by the Chief Justice who is ordinarily the Governor General's Deputy. That would have the incidental advantage of sparing the British government from unnecessary, gratuitous involvement in internal Canadian partisan political conflicts, of the sort that have sometimes threatened to erupt in other Commonwealth countries in feuds between titular heads-of-state and head-of-government when either political player has been tempted to try to involve Buckingham Place in the solution.

In the extended constitutional debate over renewal of the Canadian constitution and federal system, local political leaders often considered trying to tidy up the dossier on London-Ottawa relations and achieving a contemporary restatement of the constitutional actuality. Prime Minister Trudeau came closest to grasping the nettle in his constitutional Patriation project, 1980-2, but eventually decided that it was best to allow constitutional change to continue to be effected on a gradualist, step-by-step, incremental basis. In the end, his earlier proposals were reduced, in his *Constitution Act* as finally adopted in 1982, to a single mention of the "office of the Queen", which is not otherwise defined, in a sub-paragraph of the new, all-Canadian procedures for formal amendment of the Constitution. There remains a sting in the tail of this: any future proposed amendment touching the "office of the Queen" would have to be achieved through Resolutions of both Houses of the federal Parliament and of the legislative Assembly of each Province. But what, if anything, remains to be changed that cannot continue to be achieved, as in the past, by the Conventional route rather than by formal, legislative amendment?

Unless and until the present much respected Queen should decide to retire or should pass away, it is unthinkable that any political party in Canada would wish to start a public debate on the constitutional rôle of the Crown in Canada today or, even more, on the British rules as to Royal succession. Not for us the Australian constitutional choice of 1999 of a nation-wide public referendum vote on "replacing" the Queen by a President in the "establishment of the Commonwealth of Australia as a Republic": it would be inelegant, to say the least, in constitutional and international law terms, to ask the Canadian electorate to take part in a popularity contest vote on the titular head-of-state of another friendly sovereign state. Not for Canadian courts, either, to blunder into politically-induced rulings on the English laws on Royal succession, as an Ontario Provincial court was asked to do several years ago at the instance of marginal Canadian Republican groups! There are adequate enough arguments in contemporary British law and also in the new European law to which Great Britain is now subject, for striking down those sections of the *Act of Settlement of 1701* devoted to the Anathematisation of the Papacy and the Church of Rome; but surely that is better left to British courts if and when the issue of a Roman Catholic succession should arise concretely, in the future?

Canadians seem to have recognized, easily enough, that the impact of the Prince of Wales' second marriage on the English Royal succession rules is a matter for the British people to determine. We are aware that the special affection that Canadians hold for the present Queen will not necessarily carry over to any future successor. The nature of our Canadian community has changed significantly, and continues to change, from the original Deux Nations, British and French, on which, together with the Imperial connection, the *Constitution Act of 1867* was predicated. In the new Canadian community of communities, it is both logical and inevitable that new generations may choose to re-examine the basic premises of the Dominion of Canada founded at that time. In strictly constitutional-legal terms, there is really nothing much left to change so far as the Imperial connection is concerned. The Gordian Knot has long since been cut, on a basis of mutual consensus and joint, reciprocal action between London and Ottawa, and always with goodwill and full cooperation in the historical evolution.

There are some who now suggest that we should take the process of constitutional disengagement still further by replacing the Governor General by a President. If all that is involved, is changing the title, without affecting the constitutional incidents and attributes of the office in any way, it could be done easily enough, legally, by Resolutions of both Houses of the federal Parliament. Anything beyond this, however would require the extremely difficult amending formula of Resolutions not merely of the two federal Houses but of the legislatures of all of the Provinces, under our present Constitution.

Our eminent Constitutionalist, the late Eugene Forsey, once complained of the federal Government's decision quietly to abolish the prefix "Dominion" given to Canada in the *Constitution Act of 1867*, and used on official proclamations and documentation. It has, by now, disappeared. Was the term Dominion servile, and redolent of Colonial Status? Senator Forsey did not think so. Any political judgment call on changing from Governor General to President in the styling of our head-of-state can sensibly be left to be sorted out among other competing priorities for community action. One can be certain, in any case, that no one in London will lose any sleep over what is a matter for Canadians themselves to agree on.

Beyond the constitutional-legal, what is left from the centuries-old rich association with Great Britain is in the domain of the heart. It cannot be established by legislative Fiat. Several years ago when the late Queen Mother Elizabeth approached her 100th birthday, Canada Post, at the instance of a number of war veterans, decided to issue a special stamp in commemoration of the occasion-breaking with the existing departmental guide-lines and precedents that limited this type of recognition to the actual, reigning monarch. The stamp itself, described at the time as a symphony in green and gold, was officially unveiled in Victoria, B.C., before a cheering assembly of people, very many of whom had served, from British bases, in the War. In the most recent celebrations of the centennials of the Provinces of Saskatchewan and Alberta, the War veterans and their families have been joined by a very large proportion of young people who have flocked to greet the Queen and her husband at every stop during their visit. The older element of personal magic – the sentimental tie – evidently continues strongly, even as the formal legal connections have receded into history past.

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