More is Needed to Change the Rules of Succession for Canada

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This article argues that, since the 1931 Statute of Westminster, Canada has developed its own distinct process for amending its constitution. Altering the rules of succession to the Throne, which are fundamental to our constitution, are part of that process. The Succession to the Throne Act, 2013, is an important first step, but one that does not satisfy our current constitutional requirements.

The intent behind the Succession to the *Throne Act, 2013*, passed by the Parliament of Canada is not at issue. Canadians generally agree with the citizens of the Queen's other realms in supporting the changes to the laws of succession, hence the unanimous support in the House of Commons and the Senate.

The problem with the act is not what it does but what it does not do. While it gives moral support to the Parliament of the United Kingdom, its assent is not legally necessary for the British Parliament to change the laws of succession for the United Kingdom, and its assent to a British act does not actually change the laws of succession for Canada. So the act is an acceptable first step as it confirms that Canada agrees with the changes, but more needs to be done.

The assumptions that this act is all that is necessary are:

> (1) that it follows the precedents of 1937, 1947 and 1953;
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> (2) that, although the Act asserts in its preamble[1] that the Crown of Canada is separate from the Crown of the United Kingdom, the Government claims that the monarch of the United Kingdom is automatically the monarch of Canada by virtue of the preamble to the *Constitution Act, 1867*;
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> (3) that there is no law of succession for Canada;

(4) because of the first three, changes to the laws of succession are determined solely by United Kingdom legislation.

None of these assumptions are supported by the facts of Canadian history, constitutional development or law. It should be noted that of the four oldest and major realms of the Queen, three (the United Kingdom, Australia and New Zealand) have determined that they must change their domestic laws. Canada is the odd country out.

Let us consider the "precedents" of 1937, 1947 and 1953. Instead of following what happened in those years, the *Succession to the Throne Act, 2013* is fundamentally different because it gives assent to an act of the Parliament of the United Kingdom which it acknowledges does not extend to Canada.

When King Edward VIII abdicated in 1936 the Canadian Government passed an order-in-council requesting and consenting that the United Kingdom Parliament extend its legislation into the laws of Canada, a power held by Westminster at the time but repealed in 1982. Otherwise the abdication would not have applied to Canada.[2] Therefore, when the Canadian Parliament passed the *Succession to the Throne Act, 1937* it did not merely assent to the passage of the British act. It complemented and confirmed the original request and consent by the Canadian Government that the British act be extended into the laws of Canada. The 2013 act cannot do that because we now have a different formula for consenting under the *Constitution Act, 1982*.

In 1947 the Canadian Parliament did not give its assent to an act of the U.K. Parliament at all. It gave its assent directly to the King to his changing his royal style

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and titles. The U.K. Parliament and the parliaments of the other realms also gave parallel assents to the King. The King then proclaimed the change on behalf of all his realms in one single action.

In 1953 the divergence of the realms was further recognised. The Canadian Parliament gave its assent for a new royal style and titles directly to the Queen solely as Queen of Canada, not as the Commonwealth's shared Queen. The other realms also acted unilaterally. The Parliament of the United Kingdom was not involved with the Canadian action at all.

So, since 1931, when the Statute of Westminster recognised the equality of Canada, and the other realms, with the United Kingdom, there has been no example of the Canadian Parliament assenting to an act of the United Kingdom Parliament affecting the Crown for Canada, without it having to become part of Canadian law.[3]

Secondly, is the monarch of Canada in fact determined solely by whoever is the monarch of the United Kingdom? In 1936, King Edward VIII sent a separate instrument of abdication to the Canadian Government from the one he sent to the British Government, with his original signature, not a copy; and he sent it directly to the Governor-General, not through the British Government.[4] In 1952 the Queen's Privy Council for Canada proclaimed Queen Elizabeth II's accession as Sovereign of Canada before she was proclaimed Sovereign of the United Kingdom. Neither of those procedures would have been possible if the Canadian monarch was determined by whoever was the British monarch and not by Canadian law.

Nor does the preamble of the *Constitution Act, 1867* in fact establish that the Queen of Canada is whoever is the Queen of the United Kingdom. It does not refer to a Queen of Canada at all, because in 1867 the British North American provinces were colonial provinces being federated into a self-governing colonial dominion. There was no concept then that the one Crown of 1867 might multiply into the now sixteen Crowns of the Commonwealth, as happened in the twentieth century. The preamble states rather that Canada is subject to the sovereignty of the United Kingdom. Either the preamble has been redefined by constitutional evolution and statutory enactments to mean that Canada is now under the sovereignty of its own Crown, or Canada is still a colony under the Crown of the United Kingdom. Either the Crown of the United Kingdom has constitutionally evolved into the Crown of Canada, for all purposes of Canada, or there is no Crown of Canada. There is no provision in Canadian or British law that created a second "Canadian" Crown determined by, or subject to, the United Kingdom Crown, as is now being implied.

In 1949 the Parliament of the United Kingdom passed the *British North America Act (No. 2), 1949*, which amended the *BNA Act, 1867* by adding a new Section 91 (1) transferring from the Parliament at Westminster to the Parliament at Ottawa the authority to amend the Constitution of Canada in matters of Dominion jurisdiction. In 1953 the Canadian Parliament utilised this new authority to effectively amend the preamble of the 1867 act. Citing in its preamble that it was taking the action necessary to "secure the appropriate constitutional approval", the *Royal Style and Titles Act, 1953* provided for altering the *Interpretation Act* of Canada to define "the Crown" in all laws in force in Canada as it was now being defined by the Sovereign of Canada and the Canadian Parliament, i.e. as the Crown of Canada, not as it was defined previously by the Sovereign of the United Kingdom and the United Kingdom Parliament.

Louis St Laurent's 1953 speech in the House of Commons, stating that the Sovereign of the United Kingdom was recognised as the Sovereign of Canada, was quoted by the Minister in his testimony to the Senate. But the next sentence in Mr St Laurent's speech stated, "It is not a separate office."[5] This is critical to understanding Mr St Laurent's position. If the Queen of Canada and the Queen of the United Kingdom are in fact separate offices, then his contention that the Queen of the United Kingdom is recognised as the Queen of Canada loses its validity. In 2013 it is clearly understood, and it has been maintained by the Government and Parliament of Canada for decades, that, as a result of the constitutional evolution of Canada, particularly after the 1953 act was passed, and culminating in the patriation of the Constitution in 1982, the Queen of Canada and the Queen of the United Kingdom are indeed separate offices, though held by one person.

The changes to the laws of succession affect the office of the Queen much more than they affect the person of the monarch since they are meant to liberalise access to the office. Each jurisdiction of the Queen must therefore take responsibility for enacting those liberalising changes in accordance with its own amending provisions.

Is there a succession law in Canada to amend? The Ontario Superior Court of Justice, in 2003, upheld by the Court of Appeal of Ontario in 2005, maintained that the *Act of Settlement* and other laws of succession are indeed part of the constitutional law of Canada by the principle of received law. In addition, by the extension

of the amendments to the laws of succession into the laws of Canada in 1937, the *Canadian Succession to the Throne Act, 1937* created a Canadian law of succession by Canadian statute if one did not already exist by received law.

Therefore, unless and until the domestic laws of Canada governing succession to the Throne are altered, either by the Senate and House of Commons in conjunction with the legislative assemblies of the Provinces under section 41(a), or by the Parliament of Canada alone under Section 44, of the *Constitution Act, 1982*, the rules of succession to the Throne for Canada remain unchanged by passage of the *Succession to the Throne Act, 2013*, even though they are amended by the United Kingdom and other Commonwealth realms for their own countries.

It would therefore be a real possibility, in a future generation, that a different member of the Royal Family would succeed to the Throne of Canada than succeeds to the Throne of the United Kingdom. Then the person, as well as the office, of the Sovereign would become separate, despite the present Government's contention that the Canadian monarch must always be the British monarch.

Notes

1 "Whereas representatives of the Realms of which Her Majesty is Sovereign agreed on October 28, 2011 to change the rules of succession to, and possession of, **their respective Crowns**..."

2 Order in Council (PC 3144) of the King's Privy Council for Canada, December 10, 1936 reads as follows:

"a) That the enactment of legislation by the Parliament at Westminster, following upon the voluntary abdication of His Majesty the King, providing for the validation thereof, the consequential demise of the Crown, succession of the heir presumptive and revision of the laws relating to the succession to the throne, and declaring that Canada has requested and consented to such enactment, be hereby approved;

"b) That the proposed legislation, in so far as it extends to Canada, shall conform as nearly as may be to the annexed draft bill;

"c) That the legislation, enacted as aforesaid, shall be submitted to the Parliament of Canada, immediately after the opening of the next session, so as to enable the Parliament of Canada to take appropriate action pursuant to the provisions of the Statute of Westminster;

"d) That His Majesty's Government in the United Kingdom shall be informed accordingly."

3 The differences between the assents given by the Parliament of Canada in 1937, 1947 and 1953 are evident in the wordings of the relevant sections of each act.

a) The *Succession to the Throne Act, 1937*; Section 1. "The alteration in the law touching the Succession to the Throne set forth in the *Act of the Parliament of the United Kingdom* entitled 'His Majesty's Declaration of Abdication Act, 1936' is hereby assented to."

Schedule 2 of the Canadian act, being the text of the British act, states: "And whereas, following upon the communication to His Dominions of His Majesty's said declaration and desire, the Dominion of Canada pursuant to the provisions of section four of the Statute of Westminster, 1931 has requested and consented to the enactment of this Act, … Be it therefore enacted …"

b) The *Royal Style and Titles Act (Canada), 1947*; Section 2. "The assent of the Parliament of Canada is hereby given to the omission from the Royal Style and Titles of the words 'Indiae Imperator' and 'Emperor of India'"

c) The *Royal Style and Titles Act, 1953;* Section 1. "The assent of the Parliament of Canada is hereby given to the issue by Her Majesty of Her Royal Proclamation under the Great Seal of Canada establishing for Canada the following Royal Style and Titles, namely …"

4 "… It was early on the morning of the day following, Thursday, December 10, that we received the actual word from Buckingham Palace that the King had executed an instrument of abdication and had communicated his intention to renounce the throne for himself and his descendants. That word was sent from Buckingham Palace to His Excellency the Governor General by cable. It was immediately communicated by His Excellency to his ministers. Subsequently that information was sent by mail also from His Majesty the King. Both the instrument of abdication and the communication were signed in His Majesty's own hand. … Perhaps I should make it clear that His Majesty sent the original of the abdication and the original of his communication announcing his intention, not only to both houses of parliament at Westminster, but to each of the governments of the self-governing dominions. The documents which came to Canada are now in the safe custody of the privy council." William Lyon Mackenzie King in Canada, House of Commons, Debates, January 14, 1937.

5 Canada, House of Commons, *Debates*, February 2, 1953.