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Bill C-53: Succession to the Throne Act, 2013

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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Legislative Summary of Bill C-53
(Legislative Summary)

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LEGISLATIVE SUMMARY OF BILL C-53: SUCCESSION TO THE THRONE ACT, 2013

1 BACKGROUND

On 31 January 2013, the Honourable Rob Nicholson, Minister of Justice and Attorney General of Canada, introduced Bill C-53, An Act to assent to alterations in the law touching the Succession to the Throne (short title: Succession to the Throne Act, 2013) in the House of Commons. The purpose of the bill is to express the Canadian Parliament's assent to a British legislative proposal to change the rules of succession to the Throne by making succession no longer dependent on gender and by ending the disqualification that results from marrying a Roman Catholic.

Upon introducing Bill C-53, the Minister of Justice and Attorney General informed the House that the Crown had granted Royal Consent to the legislative proposal "as far as Her Majesty's prerogatives may be affected."[1] Royal Consent, which is not to be confused with Royal Assent or Royal Recommendation, is an element of Canada's unwritten parliamentary rules and customs. Any legislative proposal affecting the royal prerogative requires Royal Consent.[2]

On 4 February 2013, the House of Commons adopted, by a single motion, Bill C-53 at all stages without any debate. On 5 February 2013, it was introduced and read a first time in the Senate. Bill C-53 was debated at all stages in the Senate and referred to the Standing Senate Committee on Legal and Constitutional Affairs. The bill received Royal Assent on 27 March 2013.

1.1 CONTEXT

The preamble to the *Constitution Act, 1867* expresses the desire of the Canadian provinces "to be federally united into One Dominion *under the Crown of the United Kingdom of Great Britain and Ireland*" [author's emphasis].[3]

The rules of succession to the British Throne originate in the common law and statutes of the United Kingdom, namely the *Bill of Rights*, 1689, and the *Act of Settlement*, 1701, adopted in the aftermath of the Glorious Revolution and the accession to the Throne of William III and Mary II. These rules were designed to secure a Protestant succession to the Throne by prohibiting the monarch from being or marrying a Roman Catholic, and by similarly removing from the line of succession anyone who marries a Roman Catholic. Succession to the Throne was also based on the "male preference primogeniture" system whereby male heirs take precedence over female heirs regardless of their age, and older heirs prevail over younger heirs.

The 1689 *Bill of Rights* confirmed the ascension to the Throne of William III and Mary II, and the succession to their heirs. However, Mary II died childless in 1694, and the only child of her sister Anne (who was next in the line of succession after William III) died in 1700. In the prospect of the absence of any Protestant heirs after the death of William III and Princess Anne (later Queen Anne), Parliament adopted the *Act of Settlement* in 1701, passing the Crown to Princess Sophia, Electress of Hanover (and granddaughter of James I), and to her Protestant heirs at the death of William III and Queen Anne and their hypothetical heirs. Queen Anne succeeded William III at his passing in 1702. At her death, the Throne passed to George I, the son of Princess Sophia.

However, in 1936, the U.K. Parliament adopted *His Majesty's Declaration of Abdication Act 1936*,[4] in order to give effect to King Edward VIII's *Instrument of Abdication*.[5] The Act caused a demise of the Crown, passing the Throne to the next heir in the line of succession, Edward VIII's brother Prince Albert, who ascended to the Throne as George VI on 11 December 1936. The Act also excluded the descendants of Edward VIII, if any, from the line of succession to the Throne.[6] At the time, the Canadian government, by an order in council, had expressed Canada's consent to the British bill before its adoption,[7] based on the *Statute of Westminster, 1931*.[8] The Canadian Parliament also subsequently adopted *An Act respecting alteration in the law touching the Succession to the Throne*[9] to declare its assent to the Act. The abdication of Edward VIII and the relevant provisions of the *Statute of Westminster* are discussed further in section 3 of this paper.

On 28 October 2011, a Commonwealth Heads of Government Meeting was held in Perth, Australia, and attended by the prime ministers of the 16 Commonwealth nations[10] of which Her Majesty The Queen, Elizabeth II, is Head of State. At that time, an agreement was reached on a common approach respecting changes to the rules of succession in order to end the system of male preference primogeniture and to remove the disqualification that results from marrying a Catholic. The heads of government agreed "that they will each work within their respective administrations to bring forward the necessary measures to enable all the realms to give effect to these changes simultaneously."[11]

In accordance with the agreement reached in Perth, the United Kingdom government introduced the Succession to the Crown Bill in the U.K. House of Commons on 13 December 2012. This bill makes three distinct changes to the rules of succession. Firstly, the bill removes the male preference rule for the succession to the Throne. This provision would not change the current line of succession to the Throne, as the new rule applies to heirs born after 28 October 2011, the date of the agreement (clause 1). Secondly, the bill removes the current disqualification for a person marrying a Roman Catholic (clause 2). In addition, the bill repeals the *Royal Marriages Act 1772*,[12] which rendered null and void the marriage of any member of the Royal Family contracted without the consent of the reigning king or queen. From now on, such consent will be necessary only for the six persons next in the line of succession to the Throne (clause 3).[13] The Succession to the Crown Bill was enacted by the U.K. Parliament on 25 April 2013.[14]

2 DESCRIPTION AND ANALYSIS

The purpose of Bill C-53 is to express the Canadian Parliament's assent to two changes made by the U.K. Succession to the Crown Bill: the end of the system of male preference primogeniture, and the repeal of the disqualification that results from marrying a Roman Catholic.

2.1 PREAMBLE

The first recital of the preamble refers to the *Constitution Act, 1867* in providing that the "executive government and authority of and over Canada is vested in Her Majesty the Queen."[15] The second recital refers to the agreement among the Commonwealth heads of government reached in Perth, Australia, on 28 October 2011. The third recital reproduces the second recital of the *Statute of Westminster*:

> 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.

In that regard, on the day Bill C-53 was introduced the government stated that: "[t]he legislation … is in keeping with the Preamble to the *Statute of Westminster, 1931*, which provides that any changes to the laws governing succession require the assent of Dominion Parliaments."[16]

Finally, the last recital of Bill C-53 refers to the U.K. Succession to the Crown Bill.

2.2 SHORT TITLE (CLAUSE 1)

Clause 1 provides the short title of the Act: the Succession to the Throne Act, 2013.

2.3 ASSENT (CLAUSE 2)

Clause 2 gives the assent of the Parliament of Canada to the alteration in the law with respect to succession to the Throne set out in the U.K. Succession to the Crown Bill.

2.4 COMING INTO FORCE (CLAUSE 3)

Bill C-53 will come into force on a day to be fixed by the Governor in Council (Clause 3).

3 COMMENTARY

The actual alterations to the rules of succession proposed by the U.K. Succession to the Crown Bill, as assented to by Bill C-53, have not generated any significant controversy in Canada. However, the Canadian government's decision to give effect to those changes by means of an Act of the Canadian Parliament assenting to the changes proposed in the United Kingdom has come under scrutiny by some academics[17] and commentators[18] who suggest that a formal constitutional amendment could be required.

This section contains a discussion of some of the constitutional issues relating to Bill C-53.

3.1 THE *STATUTE OF WESTMINSTER* AND THE ABDICATION OF EDWARD VIII

In 1931 the U.K. Parliament adopted the *Statute of Westminster* to confirm through legislation the declarations and resolutions adopted at the Imperial Conferences of 1926 and 1930, which recognized the independence and autonomy of the British Dominions, including Canada. For example, the *Balfour Declaration of 1926* had referred to the United Kingdom and the Dominions as "self-governing communities" and stated that:

> [t]hey are 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.[19]

The *Statute of Westminster*, acting upon this principle, ended the supremacy of imperial laws over domestic laws, and authorized the Dominions to repeal or amend imperial statutes.[20] It also stated that no future Act of the U.K. Parliament could extend to a Dominion as part of its laws, unless the Dominion expressly requested it and the U.K. Act expressly mentioned the consent of the Dominion.[21] However, an exception was made for constitutional statutes in Canada,[22] as the Canadian Constitution had not yet been patriated.

The second recital of the *Statute of Westminster*'s preamble (reproduced above) also stated the "established constitutional position" that amendments to the U.K. law touching the succession to the Throne require the assent of the parliaments of all the Dominions. The third recital of the *Statute of Westminster*'s preamble stated "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." In line with that third recital, section 4 of the *Statute of Westminster* 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 Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

The provisions of the *Statute of Westminster* were first "tested" in 1936 when King Edward VIII expressed the desire to abdicate from the Throne in order to marry Wallis Simpson, a divorcee whose two ex-husbands were still alive. The British Cabinet opposed the intended marriage. While the Throne was passed to the heir next in the line of succession – Edward's brother Albert (later George VI) – an Act of the U.K. Parliament was required to trigger a demise of the Crown, as the monarch cannot unilaterally abdicate under British law, and to exclude Edward VIII's descendants, if any, from the succession to the Throne as they would have otherwise been included in accordance with the *Act of Settlement*, 1701, as descendants of Princess Sophia. On 10 December 1936, Edward VIII declared in an *Instrument of Abdication* his "irrevocable determination to renounce the Throne" for himself and his descendants. On the same day, the provisions of section 4 of the *Statute of Westminster* were invoked by the Canadian government when it issued an order in council consenting to the British Act, which was adopted later that day. The order in council of 10 December 1936 stated the intention of the government to proceed both by order in council and by an Act of Parliament to fulfill both the legal requirement of, and the constitutional convention embodied in, the *Statute of Westminster*:

> That in order to ensure that the requirements of the fourth section of the [*Statute of Westminster*] are satisfied, it is necessary to provide for the request and consent of Canada to the enactment of the proposed legislation; and, in order to insure compliance with the constitutional convention expressed in the second recital to the preamble …, it is necessary to make provision for securing the assent of the parliament of Canada thereto.[23]

As the Canadian Parliament was prorogued at the time, it only actually adopted *An Act respecting alteration in the law touching the Succession to the Throne* when back in session in 1937.[24]

The decision to comply with both the legal and conventional requirements was criticized by scholars at the time. It was argued that section 4 should not be linked with the second recital of the *Statute of Westminster* (alteration in the law touching the succession to the Throne), but rather only with the third recital regarding U.K. Acts of Parliament extending to the Dominions. According to this opinion, laws touching succession to the Throne were never intended to fall under the legal obligation found in section 4, but to be subject only to the constitutional convention set out in the second recital.[25] Therefore, the Act of Parliament alone was sufficient to comply with the constitutional convention set out in the second recital, while the third recital and its enabling provision, section 4, should never have come into play.

The merit of the 1936 abdication precedent is of some significance for the constitutional foundation of Bill C-53, as the third recital and section 4 of the *Statute of Westminster* were repealed in so far as they apply to Canada in 1982 with the patriation of the Constitution.[26] They were replaced by a formal termination of the authority of the U.K. Parliament over Canada: section 2 of the U.K. *Canada Act*, which is part of the Canadian Constitution, provides that: "No Act of the Parliament of the United Kingdom passed after the Constitution Act, 1982 comes into force shall extend to Canada as part of its law." [27] The second recital was not, however, repealed and is expressly part of the Constitution of Canada.[28]

If compliance with the mechanism established in section 4 of the *Statute of Westminster* was unnecessary in 1936 and the assent of Parliament alone was sufficient pursuant to the constitutional convention embodied in the second recital of the *Statute of Westminster*, then Bill C-53 seems sufficient as it is enacted pursuant to the second recital of the *Statute of Westminster*, which is still in force for Canada. However, questions may arise if compliance with the section 4 mechanism was a legal necessity in 1936, as it is unclear how the 1982 U.K. *Canada Act* (the U.K. Act embodying patriation of the Canadian Constitution) would, therefore, address those issues.

3.2 THE CONSTITUTION OF CANADA

As noted above, academics and commentators have questioned Bill C-53 on the basis that the changes contemplated should have been made by means of a formal constitutional amendment under the unanimity procedure (that is, with the consent of both houses of Parliament and of the 10 provincial legislative assemblies), as the proposed alterations relate to "the office of The Queen." In its backgrounder on Bill C-53, the Government of Canada explains:

> The changes to the laws of succession do not require a constitutional amendment. The laws governing succession are UK law and are not part of Canada's constitution. Specifically, they are not enumerated in the schedule to our *Constitution Act, 1982* as part of the Constitution of Canada. Furthermore, the changes to the laws of succession do not constitute a change to the "office of The Queen," as contemplated in the *Constitution Act, 1982*. The "office of The Queen" includes the Sovereign's constitutional status, powers and rights in Canada. Neither the ban on the marriages of heirs to Roman Catholics, nor the common law governing male preference primogeniture, can properly be said to be royal powers or prerogatives in Canada. As the line of succession is therefore determined by UK law and not by the Sovereign, The Queen's powers and rights have not been altered by the changes to the laws governing succession in Canada.[29]

Ultimately, legislation that relates to the "office of The Queen" does not necessarily require a constitutional amendment unless it contemplates an amendment to the Constitution of Canada.[30] The *Constitution Act, 1982* lists the Acts and orders that are part of the Constitution,[31] and neither the *Act of Settlement* nor the *Bill of Rights* is expressly mentioned. However, this is not necessarily conclusive as to the non-constitutional status of these statutes, as it is unclear whether the enumeration of the *Constitution Act, 1982* is exhaustive or not. Some courts have unequivocally qualified the enumeration of the *Constitution Act, 1982* as exhaustive.[32] However, the Supreme Court of Canada has left the door open as to whether other documents could be added to the list,[33] and has, on occasion, referred to that list as non-exhaustive when emphasizing that the Constitution includes unwritten, as well as written, rules.[34]

In fact, there seems to be only one case that sought specifically to add a written document to the Constitution of Canada. Interestingly, that lower court case pertained to the constitutional status of the rules of succession to the Throne and the *Act of Settlement*.

In *O'Donohue v. Canada*,[35] the Ontario Superior Court of Justice dismissed an application for a declaration that the provisions of the *Act of Settlement* were of no force or effect as they discriminated against Roman Catholics and were contrary to the equality provisions of the *Canadian Charter of Rights and Freedoms*. The Court dismissed the application on a preliminary motion, as the issues raised were non-judiciable. In reaching this decision, the Court held that the challenged provisions were constitutional in nature, and were therefore not subject to the Charter, as one part of the Constitution cannot abrogate another. However, it is unclear what norm the Court held to be constitutional in nature: the *Act of Settlement*, the symmetry of the rules of succession with those of the United Kingdom, or the fundamental aspects of the constitutional monarchy. According to Peter Hogg, the Court "struck out the application on the basis that the Act of Settlement was part of the Constitution of Canada and was not subject to the Charter of Rights."[36] However, this interpretation is potentially at odds with the Court's finding that "the rules of succession are [not] part of the written constitution, but they are … part of the unwritten or unexpressed constitution and are therefore not subject to the *Charter*."[37] Other passages of the *O'Donohue* decision suggest rather that it is the principle of symmetry of the Crown between Canada and the United Kingdom, based notably on the preamble to the *Constitution Act, 1867*, that is part of the Constitution, and that it is the departure from this principle and unilateral change to the rules of succession that would require a formal constitutional amendment.[38]

3.3 Monarchy and the Residual Power

Fundamental aspects of the monarchy are reflected in both the written and unwritten parts of Canada's Constitution. Any amendments to these constitutional norms would likely require a formal constitutional amendment, as they would modify the Constitution of Canada. However, some constitutional experts suggest that the residual legislative power of the Parliament of Canada over peace, order and good government[39] grants it authority over those matters related to the monarchy that are not explicitly entrenched in the Constitution.[40] The residual power over the monarchy would, for example, be the current constitutional authority for the federal *Royal Style and Titles Act*.[41]

Based on that assumed residual power over the monarchy, it is conceivable that Parliament could have the power to unilaterally make changes to the rules of succession to the extent that such changes do not have an impact on dispositions explicitly entrenched into the Constitution – as then a constitutional amendment, presumably under the unanimity procedure, would be required. Amendments to the rules of succession that would make the necessary adjustments so that they still reflect those of the United Kingdom would presumably fall within Parliament's authority, as they would not be contrary to the Constitution but would rather uphold the constitutional principle of symmetry of the Crown.

It has also been suggested that while section 4 of the *Statute of Westminster* has been repealed, its preamble, including its second recital, which is expressly part of Canada's Constitution, could be seen as the legislative basis on which the Canadian Parliament may assent to changes to the rules of succession.[42]

3.4 Study of the Standing Senate Committee on Legal and Constitutional Affairs

As mentioned above, Bill C-53 was adopted at all stages by the House of Commons through a single motion and therefore was not the object of extensive scrutiny in House debates or committee proceedings. In the Senate, however, the bill was debated and referred to committee for examination.

The study of the Standing Senate Committee on Legal and Constitutional Affairs provided a forum for discussing the constitutional issues relating to Bill C-53, although no witness questioned the constitutionality of the bill itself.[43]

The Honourable Rob Nicholson, Minister of Justice and Attorney General, restated that the substance of the bill was to assent to changes to the rules of succession made by U.K. laws that are wholly within the legislative authority of the U.K. Parliament. In referring to the preamble and section 9 of the *Constitution Act, 1867*, he stated that the King or Queen of the United Kingdom is also at the same time King or Queen of Canada. Mr. Nicholson noted that Bill C-53 does not amend the Constitution in relation to the office of The Queen as "her powers, rights and prerogatives under the Constitution are not affected."[44] He informed the Committee that the bill was in line with the constitutional convention embodied in the second recital of the *Statute of Westminster* and relevant precedents. The fact that the Canadian government had proceeded, when King Edward VIII abdicated in 1936, both by order in council (based on provisions of the *Statute of Westminster* that are now repealed) and by an Act of Parliament, was briefly discussed by a Privy Council official appearing with the Minister. The official indicated that time pressures and the fact that the Canadian Parliament was not in session at the time of the abdication may have prompted the government to proceed by order in council.

Andrew Heard, Associate Professor at Simon Fraser University, qualified Bill C-53 as fulfilling a "political conventional requirement" and stated that the U.K. Act would have effect regardless of the adoption of Bill C-53. He indicated that Canadian law "incorporates present and future U.K. legislation on royal succession. In short, the Canadian law governing our head of state is that whoever is the British monarch is our head of state."[45]

Benoît Pelletier, Professor at the University of Ottawa, stated that Bill C-53 fell within the residuary power of the Canadian Parliament to pass laws concerning the line of succession to the throne. He further stated that the bill does not affect the constitutional status, powers and rights of the office of The Queen and that, consequently, there is no requirement for a formal constitutional amendment or any other provincial consultation or consent.

The Canadian Royal Heritage Trust, a national educational charity dedicated to preserving, presenting and enhancing the royal heritage of Canada, did not oppose Bill C-53 or question its validity; the Trust's representatives stated that the bill merely provides a courtesy assent to a British bill and has no legal effect in Canada. They suggested that a change in the rules of succession requires a change in Canada's domestic law. This is necessary because the succession rules are now part of Canadian law: the use of provisions of the *Statute of Westminster* has extended into

Canadian law the U.K. *His Majesty's Declaration of Abdication Act 1936*, and, by necessary implication, the *Bill of Rights*, 1689, and the *Act of Settlement*, 1701.

3.5 Challenges

On 6 June 2013, two Laval University constitutional law professors, Geneviève Motard and Patrick Taillon, filed a motion for declaratory judgment with the Quebec Superior Court challenging the constitutional validity of Bill C-53.[46] They argue that the bill is unconstitutional as it amends the Constitution of Canada on matters related to the Queen, and her representatives the Governor General and Lieutenant Governors, without the consent of all the provincial legislative assemblies allegedly required pursuant to section 41 of the *Constitution Act, 1982*. They also argue that if Bill C-53 is not part of the Constitution it is then subject to it and invalid, as it is contrary to the right of freedom of conscience and religion and the equality right guaranteed by the *Canadian Charter of Rights and Freedoms* inasmuch as Bill C-53 maintains a prohibition on persons of Catholic faith from becoming King or Queen. They further allege that Bill C-53 is unconstitutional based on section 133 of the *Constitution Act, 1867* and section 16 of the *Canadian Charter of Rights and Freedoms*, as it assents to the U.K. Succession to the Crown Bill written in English only.

The Quebec Superior Court has yet to decide the matter, and its decision, when rendered, could be appealed to the Court of Appeal and, eventually, to the Supreme Court of Canada.

NOTES

1. House of Commons, *Debates*, 1st Session, 41st Parliament, 31 January 2013.
2. Audrey O'Brien and Marc Bosc, eds., *House of Commons Procedure and Practice*, 2nd ed., House of Commons, Ottawa, 2009, p. 755.
3. *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3 (R.-U.), Preamble.
4. *His Majesty's Declaration of Abdication Act 1936* (U.K.), 1 Edw. VIII & 1 Geo. VI, c. 3.
5. Edward VIII's *Instrument of Abdication* is reproduced in the Schedule to *His Majesty's Declaration of Abdication Act 1936* (U.K.).
6. Edward VIII, then Duke of Windsor, died in 1972 with no children.
7. The order in council is reproduced in its entirety in House of Commons, *Debates*, 18 January 1937, p. 41.
8. *Statute of Westminster, 1931* (U.K.), 22 & 23 Geo. V, c. 4.
9. *An Act respecting alteration in the law touching the Succession to the Throne*, 1 Geo. VI, c. 16.
10. The 16 realms are: United Kingdom, Canada, Australia, New Zealand, Jamaica, Antigua and Barbuda, the Bahamas, Barbados, Grenada, Belize, St. Kitts and Nevis, St. Lucia, Solomon Islands, Tuvalu, St. Vincent and the Grenadines, and Papua New Guinea.
11. Commonwealth Heads of Government Meeting 2011, *Agreement in Principle among the Realms*, Perth, Australia, 28 October 2011.

12. *Royal Marriages Act 1772* (U.K.), 12 Geo. III, c. 11.

13. The bill also makes necessary consequential amendments to other Acts of the U.K. Parliament, including the *Bill of Rights* and *Act of Settlement* (clause 4), and makes provisions in respect of its coming into force, on a day or days to be fixed by the government, and short title (clause 5).

14. *Succession to the Crown Act 2013* (U.K.), c. 20.

15. The *Constitution Act, 1867*, section 9, provides: "The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen."

16. Canadian Heritage, "Introduction of Line of Succession Legislation," Backgrounder, Ottawa, 31 January 2013.

17. Philippe Lagassé, "The Queen of Canada is dead; long live the British Queen," *Maclean's*, 3 February 2013; Patrick Taillon, "Projet de loi sur la succession au trône d'Angleterre – Une occasion de sauver ce qui reste du veto du Québec!," *Le Devoir* [Montréal], 2 February 2013.

18. James W. J. Bowden, "Canada cannot assent to British law," *Ottawa Citizen*, 5 February 2013.

19. Inter-Imperial Relations Committee, *Imperial Conference, 1926*, Report, Proceedings and Memoranda, 1926, p. 3.

20. *Statute of Westminster, 1931*, s. 2.

21. Ibid., s. 4.

22. Ibid., s. 7.

23. House of Commons, *Debates*, 18 January 1937, p. 41.

24. Parliament resumed its session on 14 January 1937, and *An Act respecting alteration in the law touching the Succession to the Throne* was adopted on 13 March 1937.

25. W. P. M. Kennedy, "Canada and the Abdication Act," *University of Toronto Law Journal*, Vol. 2, No. 3, 1937, p. 117; see also F. C. Cronkite, "Canada and the Abdication," *Canadian Journal of Economics and Political Science*, Vol. 4, No. 2, 1938, p. 177.

26. *Constitution Act, 1982*, Schedule, Item 17(*a*).

27. *Canada Act, 1982* (U.K.), c. 11, s. 2.

28. *Constitution Act, 1982*, Schedule, Item 17.

29. Canadian Heritage (2013).

30. *Constitution Act, 1982*, s. 41.

31. Ibid., s. 52(2) and Schedule.

32. See, for example, *Dixon v. British Columbia* (1986), 31 D.L.R. (4th) 546 (B.C. S.C.).

33. *British Columbia (Attorney General) v. Canada (Attorney General); An Act respecting the Vancouver Island Railway (Re)*, [1994] 2 S.C.R. 41, p. 94 (Justice Iacobucci for the majority of the Court):

> It is not necessary, of course, to discount completely the possibility that documents not listed in s. 52(2) of the *Constitution Act, 1982* might yet be considered constitutional in certain contexts. That issue does not fall to be resolved in this case.

34. *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, p. 378 (Justice McLachlin [as she then was], concurring opinion in the majority):

> I accept the spirit of the remarks of Hogg that additions to the 30 instruments set out in the schedule referred to in s. 52(2) of the *Constitution Act, 1982* might have grave consequences given the supremacy and entrenchment that is provided for the "Constitution of Canada" in ss. 52(1) and 52(3). However, as Hogg himself concedes, s. 52(2) is not clearly meant to be exhaustive. That established, I would be unwilling to restrict the interpretation of that section in such a way as to preclude giving effect to the intention behind the preamble to the *Constitution Act, 1867*, thereby denying recognition to the minimal, but long recognized and essential, inherent privileges of Canadian legislative bodies.

See also *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3, para. 90 (Chief Justice Lamer, for the majority); and *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, p. 239:

> The "Constitution of Canada" certainly includes the constitutional texts enumerated in s. 52(2) of the *Constitution Act, 1982*. Although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also "embraces unwritten, as well as written rules," as we recently observed in the *Provincial Judges Reference*, *supra*, at para. 92.

35. *O'Donohue v. Canada*, 2003 CanLII 41404 (Ont. S.C.J.); and appeal dismissed by the Court of Appeal for Ontario: *O'Donohue v. Canada*, 2005 CanLII 6369 (Ont. C.A.).

36. Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Suppl., Vol. 1, Carswell, Toronto, 2007, p. 1-10.

37. *O'Donohue v. Canada* (2003), para. 28.

38. Ibid., para. 33.

39. *Constitution Act, 1867*, s. 91.

40. Margaret A. Banks, "If the Queen Were to Abdicate: Procedure Under Canada's Constitution," *Alberta Law Review*, Vol. 28, 1990, pp. 535–539; Anne Twomey, "Changing the Rules of Succession to the Throne," *Public Law Review*, 2011, pp. 378–401; Hogg (2007), pp. 3-2 and 4-13.

41. *Royal Style and Titles Act*, R.S.C., 1985, c. R-12. This argument is put forward in Hogg (2007), pp. 3-2 and 4-13.

42. Josh Hunter, "A more modern crown: changing the rules of succession in the Commonwealth Realms," *Commonwealth Law Bulletin*, Vol. 38, No. 3, 2012, pp. 447–448.

43. Senate, Standing Committee on Legal and Constitutional Affairs, *Proceedings*, 1st Session, 41st Parliament, Issue No. 32, 20–21 March 2013.

44. Ibid., p. 32:40.

45. Ibid., pp. 32:24 and 32:9.

46. Geneviève Motard and Patrick Taillon, "Motion to institute proceedings for declaratory judgment," 6 June 2013, S.C.Q. # 200-17-018455-139.