

INSTITUTE OF INTERGOVERNMENTAL RELATIONS WORKING PAPER

A Tale of Two Ex-Dominions: Why the Procedures for Changing the Rules of Succession are So Different in Canada and Australia

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Working Paper 2013 - 05



Introduction

In October 2011, the leaders of the sixteen nations that have Queen Elizabeth as their head of state agreed to change the succession rules so as to eliminate gender bias and reduce the element of religious discrimination. There is almost universal agreement that the proposed changes are desirable, but there is disagreement over the correct procedure for implementing the reform. For reasons that will be explained below, changing the rules of succession requires the passage of legislation in Canada, Australia, and New Zealand as well as in the British parliament. In those of the Commonwealth Realms that are unitary states, the procedure for changing the rules of succession is quite straightforward. Canada and Australia are, however, federations which raises the question of whether their sub-national units (Canadian provinces and Australian states) should be involved in the process for changing the rules of succession. Australia has decided to include its states in the process. In Canada, the federal government adopted the view that the consent of the provinces under section 41s of the *Constitution Act, 1982*, was unnecessary and that approval by the provincial legislatures was therefore unnecessary.

This pattern is the exact opposite of what a comparison of the written constitutions of the two countries would suggest, for Canada's constitution explicitly requires the consent of all provincial legislatures whenever there are changes to the office of the monarch. Section 41a of the *Constitution Act, 1982* clearly requires the consent of all ten provincial legislatures and both Houses of Parliament before any change is made to "the office of the Queen, the Governor General and the Lieutenant Governor of a province."¹ Australia's constitution does not contain such a provision and it is unclear from the existing Australian jurisprudence whether the federal government would have to obtain the consent of the states before outright abolishing the monarchy.² Despite these facts, it was Australia, not Canada, that chose to involve its sub-national legislatures in the alteration of the rules of succession. The exclusion of Canada's provinces from the revision of the rules of succession is particularly anomalous because they have, in general, greater powers than those of the states in Australia's relatively centralized version of federalism. Moreover, one of Canada's provinces, Québec, is recognized as a "nation," a status claimed by no Australian state.³ If Australia's states have a say in the alteration of the rules that determine who is the Head of State, one would have thought

¹ *Constitution Act, 1982*, sec. 41.

² Section 7 (1) of the *Australia Act, 1986* states that state Governors are representatives of the Queen. It is unclear from previous rulings of the Australian High Court whether Australia's federal government would require the consent of the six state governments to abolish the monarchy. Successive Chief Justices of Australia have expressed contradictory opinions on this issue. Peter Boyce, *The Queen's Other Realms: The Crown and Its Legacy in Australia, Canada and New Zealand* (Sydney: Federation Press, 2009), 218. In 2008, Robert French, the current Chief Justice, suggested that unless the federal government obtained the consent of all the provinces, Australia could become a republic at the national level while retaining monarchical institutions in one or more states. Justice Robert French, "Dreams of a New Republic," <http://worldlii.austlii.edu.au/au/journals/FedJSchol/2008/10.html>.

³ The federal government's recognition of Québec as a nation is discussed in Nelson Wiseman, "The Quest for a Québec Constitution," *American Review of Canadian Studies* 40, no. 1 (2010): 56-70; Richard Simeon, "Reflections on Diversity in Canada: Competing Models," In *The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain*, edited by Alberto López Basaguren and Leire Escajedo San Epifanio (Berlin, Springer, 2013), pp. 331-340.

that Canada's provinces would also be participants in this transnational process. The government of Quebec certainly is of this view, which is why it is now participating in a legal challenge to the *Succession to The Throne Act, 2013*.⁴

This paper will explain why the Canadian federal government adopted a very different approach to changing the rules of succession than its Australian counterpart. It will attribute the rather surprising decision of the Canadian federal government to ignore the provinces in this matter to several factors. These include Canada's French-English dualism and the election of a separatist government in the Province of Québec in September 2012. Moreover, the approach taken by the Canadian federal government led by Stephen Harper reveals that its attitude to cooperative federalism is very different from that of former Prime Minister Julia Gillard's government in Australia.

The Canadian federal government's decision to not to involve the provinces is incompatible with the status the provinces acquired in the twentieth century, when cooperative federalism and executive federalism became central to Canadian politics. After 1945, gatherings of First Ministers (i.e., the Prime Minister and the provincial Premiers) became an important part of the Canadian political calendar. These meetings, which took place, on average, once every eleven months in the period between 1945 and 2006, dealt with constitutional and economic issues. The discussions also often centred on the management of the Canadian welfare state, constitutional responsibility for which was divided between the federal and provincial governments.⁵ Proposed constitutional changes were also discussed at many of these conferences. These meetings, which involved bargaining between different levels of government, placed the Prime Minister in the position of being first among equals. A strikingly similar tradition of First Ministers' meetings developed in Australia at approximately the same time.⁶ Such meetings were required in both countries because the advent of welfare states funded largely by federal taxation but delivered by the sub-national units blurred the lines between federal and provincial/state jurisdiction. This paper will suggest that the decision of the current federal government not to involve the provinces in changing the succession rules arguably reflects a desire to restore the state of affairs that existed before the rise of the welfare-state and cooperative federalism. Although it would be risky to make a general statement about the Harper government's view of federalism based on its approach to the

⁴ Rosemary Barton, "Royal baby bill challenge joined by Quebec attorney general: Challengers of new law believe provinces should be involved in any constitutional amendment" CBC News 22 July 2013 2:28 PM <http://www.cbc.ca/news/politics/story/2013/07/22/pol-barton-royalsuccession.html>

⁵ In this 61 year period, there were 67 First Ministers Conferences or Meetings, an average of one every 10.92 months. There were no meetings between 1957 and 1960, but there were years in which there was more than one meeting. For instance, there were three meetings in 1978. Canadian Intergovernmental Conference Secretariat (CICS) "First Ministers' Conferences, 1906-2004," http://www.scics.gc.ca/CMFiles/fmp_e.pdf.

⁶ Russell Lloyd Matthews, *Federalism in Australia and the Federal Republic of Germany: a Comparative Study* (Australian National University Press, 1980), 84-86; Martin Painter, "Multi-level governance and the emergence of collaborative federal institutions in Australia," *Policy & Politics* 29, no. 2 (2001): 137-150.

royal succession or any other single issue, its approach is consistent with a broader pattern that has been noticed by other observers.⁷

1. Background

The rules of succession that currently determine who can inherit the Crown contain a number of anachronistic features. The Crown is inherited via male primogeniture rather than absolute primogeniture. In other words, a monarch's daughter can inherit the throne only if she has no brothers. This requirement, which dates from the time of the Norman Conquest, is incompatible with modern ideas about gender equality. Moreover, the rules of succession also bar the monarch from either being or marrying a Roman Catholic. This rule, which dates from the aftermath of the Glorious Revolution of 1688, is a clear example of discrimination on the basis of religion, a practice prohibited by the European Convention on Human Rights (ECHR), to which the United Kingdom became a signatory in 1950. The ECHR has been incorporated into British law and has been used by the courts to strike down a wide variety of discriminatory laws and practices. Since 1950, the values informing the ECHR have also informed discussions of public policy in the United Kingdom.⁸

Since 1979, no less than thirteen private members bills were introduced into the British parliament to remove one or both of the discriminatory rules governing the inheritance of the Crown; however they all ultimately failed. After 1997, the leaders of the Labour Party indicated that, while they did not agree with these archaic rules, changing them was a low priority compared to the economy, health care, and other substantive matters.⁹ In 1999, Prime Minister Tony Blair was asked about the anti-Catholic rules of the succession by a Scottish Nationalist MP who identifies herself as a Roman Catholic.¹⁰ In his reply, Blair said that his government had no plans to legislate in this area:

The Government have a heavy legislative programme aimed at delivering key manifesto commitments in areas such as health, education, crime and reform of the welfare system. To bring about change to the law on succession would be a complex undertaking involving amendment or repeal of a number of items of related legislation, as well as requiring the consent of legislatures of member nations of the Commonwealth. It would

⁷ Don Lenihan, "Harper: the End of Classical Federalism?" iPolitics 26 March 2013

<http://www.ipolitics.ca/2013/03/26/harper-the-end-of-classical-federalism/>.

⁸ Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001).

⁹ Anne Twomey, "Changing the Rules of Succession to the Throne," *Public Law* (2011) 378-401; Norman Bonney and Bob Morris, "Tuvalu and You: The Monarch, the United Kingdom and the Realms," *Political Quarterly* 83, no. 2 (2012): 368-373.

¹⁰ *Scottish Herald*, "Does the SNP support Roseanna Cunningham's prejudices about the Adoption Bill?" 5 December 2006 <http://www.heraldscotland.com/sport/spl/aberdeen/does-the-snp-support-roseanna-cunningham-s-prejudices-about-the-adoption-bill-1.3042>.

*raise other major constitutional issues. The Government have no plans to legislate in this area.*¹¹

The April 2011 marriage of Prince William, who is second in the line to the throne, forced the issue of the succession rules up the agenda, as it was widely expected that he would soon become a father. At the Commonwealth Heads of Government meeting at Perth, Australia, on 28-30 October 2011, the leaders of the sixteen nations that have Queen Elizabeth as their head of state (the “Commonwealth Realms”) agreed to change the succession rules. The new rules will eliminate gender discrimination by allowing Prince William’s eldest child, irrespective of gender, to inherit the throne. They will also remove the ban of the marriage of the sovereign to a Roman Catholic, although the monarch will continue to be required to be in communion with the Church of England, which is effectively a prohibition on being a practising Roman Catholic.¹² In a joint communiqué, the leaders of the Commonwealth Realms indicated that it was important to modernize the law while retaining common rules of succession. In their statements to the media, support for a gender-blind succession law was expressed by Prime Ministers David Cameron of the United Kingdom, Julia Gillard of Australia, and Stephen Harper of Canada.¹³ The Prime Minister of New Zealand, who also approved of the principle, agreed to undertake the work of coordinating the passage of the relevant legislation in those Commonwealth Realms in which doing so is necessary.¹⁴

Not all of the Commonwealth Realms have decided that their parliaments are obliged to pass legislation to change their rules of royal succession. The constitution of the Solomon Islands states that the country’s head of state will be the monarch of the United Kingdom, whoever that may be. The decision of the Solomon Islands to delegate the task of formulating succession rules to Britain means that it does not need to pass its own legislation in this area. In all of the Caribbean Commonwealth Realms, it was also felt that the passage of domestic legislation to change to the succession rules was unnecessary. The constitutions of Belize and Jamaica explicitly leave the question of the royal succession to be decided under the laws of the United Kingdom. The other Caribbean Commonwealth Realms (Antigua and Barbuda, Barbados, the Bahamas, Grenada, Saint Lucia, Saint Vincent and the Grenadines, and Saint Kitts and Nevis) have no plans to introduce domestic legislation on this matter.¹⁵ It should be noted that many of these countries retain appeals to the Judicial Committee of the Privy Council, a

¹¹ United Kingdom, Hansard, House of Commons Debates, 13 December 1999, c57.

¹² United Kingdom, Parliament, “Succession to the Crown Act 2013, Explanatory Notes”

<http://www.legislation.gov.uk/ukpga/2013/20/notes/division/3>.

¹³ BBC News, “Girls equal in British throne succession,” 28 October 2011 <http://www.bbc.co.uk/news/uk-15492607>; Jane Taber, “Harper backs British PM’s plan to modernize royal succession,” *Globe and Mail*, 13 October 2011 <http://www.theglobeandmail.com/news/politics/ottawa-notebook/harper-backs-british-pms-plan-to-modernize-royal-succession/article618248/>.

¹⁴ Paul Bowers, “Succession to the Crown Bill 2012-13 Bill No 110 2012-13”, United Kingdom House of Commons Research Paper 19 December 2012, p. 6 www.parliament.uk/briefing-papers/RP12-81.pdf

¹⁵ Josh Hunter, “A More Modern Crown: Changing the Rules of Succession in the Commonwealth Realms,” *Commonwealth Law Bulletin* 38, no. 3 (2012): 423-466.

practice that has been abandoned by the four most populous Commonwealth Realms: Canada, Australia, New Zealand and Papua New Guinea.¹⁶

In the first three of these countries, domestic legislation to change the rules of the royal succession is necessary for several reasons. First, the 1931 Statute of Westminster, which ended the subordination of the parliaments of the so-called “Self-governing” Dominions to that of the United Kingdom, explicitly required the parliaments of the Dominions to pass concurrent laws whenever Britain changes its succession rules.¹⁷ The Statute of Westminster eventually applied to the following territories: “the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland.”¹⁸ The preamble of the Statute of Westminster declared:

*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.*¹⁹

The procedure outlined in the Statute of Westminster was followed during and immediately after the royal abdication crisis of 1936. This crisis had been triggered by the desire of King Edward VIII to marry an American divorcée, Wallis Simpson. Edward’s proposed marriage was opposed by the British establishment as well as by the Prime Ministers of the Dominions, especially Mackenzie King of Canada. Rather than abandon his plans to marry Simpson, Edward renounced the throne on 10 December 1936. This action was the first resignation of a British monarch in many centuries. Edward’s younger brother became King George VI.²⁰ On the following day, the British parliament hurriedly passed legislation to change the rules of succession and to deny Edward and any of his heirs the right to claim the throne. Equivalent legislation was soon passed by the parliaments of Canada and South Africa, and the two nations to which the Statute of Westminster already applied in 1936. The Canadian parliament retroactively approved the change in the rule in early 1937, once it was in session.²¹ The Canadian

¹⁶ Patrick Robinson, “The Monarchy, Republicanism and the Privy Council: The Enduring Cry for Freedom,” *The Round Table* 101, no. 5 (2012): 447-454.

¹⁷ Ireland and South Africa are now republics. The term “Self-governing” was in common usage in the first half of the twentieth century, although it did not appear in official documents. Carl J. Guarneri, “Mapping the Anglo-American Settler Empire,” *Diplomatic History* 35, no. 1 (2011): 33-37.

¹⁸ “Statute of Westminster, 1931” <http://www.legislation.gov.uk/ukpga/Geo5/22-23/4>.

¹⁹ *Ibid.*

²⁰ Frank Mort, “Love in a Cold Climate: Letters, Public Opinion and Monarchy in the 1936 Abdication Crisis,” *Twentieth Century British History* (2013) doi: 10.1093/tcbh/hwt011; Kent Fedorowich, “Dominion of New Zealand: Statesmen and Status 1907–1945,” *Journal of Imperial and Commonwealth History* (2009): 507-510.

²¹ Succession to the Throne Act 1937 (1 Geo. VI, c.16).

Cabinet had expressed approval of a change in the rules in an Order in Council on 10 December 1936.²² It was unclear to contemporaries, including the leader of the Co-operative Commonwealth Federation party, whether legislation by the Canadian parliament was required or whether the Canadian Crown was separate from that of the United Kingdom.²³

The Statute of Westminster did not apply to the parts of the British Empire/Commonwealth that had not yet acquired self-government in 1931. This quirk of constitutional history helps to explain why the Caribbean Realms were not required to pass their own laws to change the rules of the royal succession in 2013. Moreover, the constitutions of Canada, Australia, and New Zealand were changed in the 1980s so that subsequent legislation of the British parliament would be of no legal force in those countries. The *Constitution Act, 1982* states 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.”²⁴ Section 1 of the *Australia Act, 1986* states that “No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory.”²⁵ Similarly, the *Constitution Act, 1986* ended the right of the British parliament to legislate for New Zealand in any way.²⁶ These legislative actions helped to simplify the amendment process and to demonstrate to the world that the Dominions were now fully independent countries. On a deeper cultural level, the patriation of these constitutions illustrated the shifts in national identity that had taken place in the three former Dominions over the previous few decades: from one based on Britishness to the ‘new nationalism’, and then to multiculturalism in the case of Australia; from Britishness to the ‘new nationalism’ and then to bilingualism and multiculturalism in the case of Canada;²⁷ and Britishness to the ‘new nationalism’, and then to biculturalism (white and Maori) in New Zealand.²⁸

The 1931 Statute of Westminster, the precedent set during the Abdication Crisis of 1936-7, and the *Constitution Act (1982)*, *Australia Act (1986)* and *Constitution Act (1986)*, all compel the passage of separate statutes in each of the former “self-governing”

²² P.C. 3144 (1936) “Order in Council Regarding Canadian Request and Consent for Enactment of United Kingdom Legislation Altering Succession.” 10 December 1936.

²³ See R. I. Edward and F. C. Cronkite, “Canada and the Abdication,” *The Canadian Journal of Economics and Political Science / Revue canadienne d’économie et de science politique* Vol. 4, No. 2 (1938): 177-191.

²⁴ United Kingdom Parliament, “Canada Act, 1982” <http://www.legislation.gov.uk/ukpga/1982/11/contents>

²⁵ United Kingdom Parliament, “Australia Act, 1986” <http://www.legislation.gov.uk/ukpga/1986/2/contents>

²⁶ Government of New Zealand, “New Zealand’s constitution – past, present and future” <http://www.beehive.govt.nz/Documents/Files/NZ%20Constitution%20Cabinet%20Office%20background%20r.pdf>

²⁷ See Jatinder Mann, “The Introduction of Multiculturalism in Canada and Australia, 1960s-1970s,” *Nations and Nationalism* 18, no. 3 (2012): 483-503.

²⁸ See Stuart Ward, ‘The “New Nationalism” in Australia, Canada and New Zealand: Civic Culture In the Wake of the British World’ in Kate Darian-Smith, Patricia Grimshaw and Stuart Macintyre (Eds). *Britishness Abroad: Transnational Movements and Imperial Cultures*. Carlton, Vic.: Melbourne University Press, 2007.

Dominions to change the rules of succession.²⁹ Failure to pass such laws and to ensure their constitutional validity risks creating a constitutional crisis for future generations in which the Crowns of the various Commonwealth Realms are inherited by different individuals.

A bill to change Britain's succession law was introduced into the British parliament on 13 December 2012. After being passed by the House of Commons on 28 January and House of Lords on 13 March, it received Royal Assent on 25 April 2013. The *Succession to the Crown Act, 2013* will not come into force until the Commonwealth Realms covered by the Statute of Westminster have changed their rules of succession.³⁰ On 18 February 2013, a bill to change New Zealand's succession rules was introduced into that country's parliament. As of October 2013 it has not yet been passed.³¹

The equivalent Canadian legislation, Bill C-53, was introduced into the House of Commons on 31 January 2013. It was passed by that body on 4 February, approved by the Senate on 26 March 2013, then received Royal Assent on 27 March 2013. It is now known as the *Succession to The Throne Act 2013*. It should be noted that the Canadian statute does not enact changes to the law of succession as the New Zealand bill proposes to do. Instead, the Canadian statute merely assents to the British Succession to the Crown Bill 2013. At the time of the passage of Bill C-53, the Canadian government adopted the position that the rules of succession for the Canadian Crown were not part of Canadian law and were merely part of "UK law." The Attorney-General justified this view by saying that the monarch of the United Kingdom is automatically the monarch of Canada by virtue of the Preamble to the British North America Act, 1867, which stated that the colonies wished to be "federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland."³² This is a significant difference from what occurred in the aftermath of the 1936 Abdication Crisis, when many Canadians felt that Canada needed to change the rules of succession for the Canadian Crown through an act of parliament.

2. The Constitutional Nature of the Changes to Rules Governing the Royal Succession

This section of the paper will show that modifying the rules of the royal succession is a change to the constitution and a substantive alteration of the "office of the Queen."

²⁹ Anne Twomey, "Changing the Rules of Succession to the Throne" (October 12, 2011). Sydney Law School Research Paper No. 11/71. Available at SSRN: <http://ssrn.com/abstract=1943287>

³⁰ United Kingdom Parliament, "Explanatory Notes: Succession to the Crown Act 2013" http://www.legislation.gov.uk/ukpga/2013/20/pdfs/ukpgaen_20130020_en.pdf

³¹ New Zealand Parliament, Bills Digest "Royal Succession Bill 2015" <http://www.parliament.nz/NR/rdonlyres/5FCA9CC0-5528-40F4-8AC1-5206C4765DC4/262753/2015RoyalSuccession1.pdf>

³² "Statement by the Harper Government Welcoming Royal Assent of Bill C-53: Succession to the Throne Act," 2013 27 March 2013, <http://www.pch.gc.ca/eng/1364419530966>.

The *Constitution Act (1982)* in Canada clearly does not require the consent of the provincial legislatures to every conceivable minor alteration to offices of the Queen or her federal and provincial representatives. For instance, a Lieutenant-Governor is currently entitled to a fifteen-gun salute, whereas the Governor-General is entitled to a twenty-one-gun salute.³³ The federal government would be entitled to change these protocol rules unilaterally, if it so wished.

However, existing Canadian jurisprudence indicates that the proposed changes to the rules of the royal succession constitute a substantive change to the constitution. In his 2003 ruling in the cases of *O'Donohue v. Canada*, Justice Paul S. Rouleau of the Superior Court of Ontario decided that the rules of succession “are, in my view, part of the unwritten or unexpressed constitution.” The key sentence in Justice Rouleau’s decision declares that any changes to “the rules of succession... would, for all intents and purposes, bring about a fundamental change in the office of the Queen without securing the authorizations required pursuant to s. 41 of the *Constitution Act, 1982*.”³⁴ The case of *O'Donohue v. Canada* dealt with the constitutionality of the anti-Roman Catholic provisions of the rules of succession. This case had been brought by a private citizen of the Roman Catholic faith. Justice Rouleau’s ruling was accepted by both the Ontario and federal governments and was upheld on appeal in 2005.³⁵

Observers in other Commonwealth Realms have recognized that the succession rules are indeed part of the constitution. In Britain, the Royal Succession bill was the responsibility of Chloe Smith, the “Minister for Political and Constitutional Reform.” In February 2013, Ms. Smith discussed the changes to the royal succession in a document entitled “Reforming the Constitution and Political System.”³⁶ In his scholarly writings, Professor Vernon Bogdanor has described the royal succession rules as an integral component of the constitution.³⁷

During Second Reading of the Royal Succession bill in the British House of Commons, MPs frequently referred to the constitutional nature of the proposed legislation. Speaking in the House of Commons on 22 January 2013, Jacob Rees-Mogg, the Conservative MP for North East Somerset, declared that “We are discussing what may be the most important constitutional issue to which the House has ever turned its mind.” In his speech on the Royal Succession Bill, John Hemming, the Liberal Democrat MP for Yardly, alluded to the constitutional nature of the proposed change. Paul Flynn,

³³ Canadian Forces Administrative Order (CFAO 61-8, mod 8/84).

³⁴ *O'Donohue v. Canada*, 2003 CanLII 41404 (ON SC), <http://canlii.ca/t/6m2x>.

³⁵ *O'Donohue v. Canada*, 2005 CanLII 6369 (ON CA), <http://canlii.ca/t/1jxxl>.

³⁶ United Kingdom Parliament, “Reforming the constitution and political system” <https://www.gov.uk/government/policies/reforming-the-constitution-and-political-system/supporting-pages/changing-the-rules-of-royal-succession>

³⁷ Vernon Bogdanor, *The Monarchy and the Constitution* (Oxford: Clarendon Press, 1995), 42. Bogdanor is regarded as the greatest living authority on the British constitution. He taught David Cameron at Oxford University.

the Labour MP for Newport West, described the rules of succession as “part of the settled constitution of the land.”³⁸

3. Canada and Australia as Compound Monarchies

All but three of the nations that have Queen Elizabeth as their head of state are unitary states. Canada, Australia, and St. Kitts and Nevis, in contrast, are all federations and, in the words of the Canadian political scientist David E. Smith, “*compound monarchies*.”³⁹ Canada’s status as a compound monarchy means that Her Majesty and her heirs are not just the head of the Canadian federal state, but of the ten provinces as well. Elizabeth is the Queen in Right of Canada, but she is also the Queen in Right of Ontario, Queen in Right of Manitoba, and so forth. The status of the provincial Lieutenant-Governor as the representative of Her Majesty is a bulwark of provincial sovereignty and an important symbol of provincial autonomy.

Historically, the degree to which Canadian provincial Lieutenant-Governors were considered representatives of the monarch as opposed to simply representatives of the federal government has been closely connected to the issues of provincial sovereignty and decentralization.⁴⁰ Among historians of Canadian federalism, it is well known that the majority of the Fathers of Confederation envisioned that Canada’s federal system would be highly centralized: the constitutional plan developed by the Fathers between 1864 and 1867 was a compromise between those who advocated a unitary state along the lines of the United Kingdom (UK) and those who favoured a genuinely federal system similar to that of the United States (US). The allocation of powers between the federal and provincial governments in the *British North America Act, 1867* reflected the desire of the Fathers of Confederation and the British parliament to have a very strong central government.⁴¹

At the Quebec Conference of the fall of 1864, the Fathers of Confederation designed a constitution that differed from that of the US in that the central government was to have

³⁸ See speeches in “Succession to the Crown Bill (Allocation of Time)” UK Hansard, 22 January 2013 Column 186 to 225.

³⁹ David E. Smith, *The Invisible Crown: The First Principle of Canadian Government* (Toronto: University of Toronto Press, 1995), 8. In Europe, compound monarchies have existed for centuries. The personal union between Britain and Hanover that existed between 1714 and 1837 is an example of a compound monarchy. This personal union came to an end because the succession law in Hanover differed from that of United Kingdom: in 1837, Victoria inherited the British throne while her cousin Ernest Augustus became King of Hanover. Nick Harding, *Hanover and the British Empire, 1700-1837* (Woodbridge, UK: Boydell & Brewer, 2007).

⁴⁰ John T. Saywell, *The Office of Lieutenant-Governor: A Study in Canadian Government and Politics* (Toronto: University of Toronto Press, 1957).

⁴¹ Garth Stevenson, *Ex Uno Plures Federal-Provincial Relations in Canada, 1867-1896* (Montreal: McGill-Queen’s University Press, 1993), 3-23. Andrew Smith, *British Businessmen and Canadian Confederation Constitution-Making in an Era of Anglo-Globalization* (Montreal: McGill-Queen’s University Press, 2008), 64-91. Of course, not all authors have agreed with this view and in the twentieth century there were some adherents of the rival Compact Theory of Confederation. George FG Stanley, “Act or Pact? Another Look at Confederation,” in *Report of the Annual Meeting of the Canadian Historical Association*, vol. 35, no. 1 (1956), pp. 1-25.

much more power relative to that of the sub-national governments. The constitutional plan embodied in the Quebec Resolutions gave the central government the power to levy any type of tax it chose, while the taxation powers of the provinces were restricted. The long list of powers entrusted to the federal government included key aspects of economic policy, including banking, finance, telegraphs, ports and navigation, inter-provincial and other railways. The federal government was given the power to render uniform the commercial and property laws of the English-speaking provinces. The provincial governments were assigned a short list of responsibilities, many of which were connected to the embryonic welfare-state, which was then a branch of the government of trivial importance, at least judged as a percentage of GDP.⁴² The residuary power: jurisdiction over all subjects not explicitly declared as belonging to the provinces, was given to Ottawa. In the US constitution, all powers not explicitly granted to the national government rest with the states. Most importantly, the federal government was given the power to disallow provincial statutes that it found disagreeable.⁴³

The attitudes of George Brown of Toronto were fairly representative of those of the other English-speaking Fathers of Confederation. At the Quebec Conference, he advocated giving minimal powers to the provinces. The provinces, he said, should have the simplest sort of institutions and would be controlled by a single-chamber body. Brown thought that giving the provinces unicameral rather than bicameral legislatures would send the message that they were more like district councils than true Westminster-style assemblies. The provincial governments would be headed by a Lieutenant-Governor appointed by the Dominion, which would bring them into “harmony” with the wishes of the federal government. Brown also said that the provincial governments would be essentially apolitical and administrative entities, charged with “clerical and routine” activities. According to Brown the actual making, as opposed to delivery of policy, would rest with the national government.⁴⁴

In December 1864, shortly after the constitutional plan agreed by the Quebec Conference had leaked to the press, John A. Macdonald reassured a friend in Toronto that the federation would evolve into a unitary state within their lifetimes. He also stated that it would be impolitic to express this hope in public, since doing so might alienate political allies in Lower Canada.⁴⁵

⁴² Richard B. Splane, *Social Welfare in Ontario, 1791-1893: A Study of Public Welfare Administration* (Toronto: University of Toronto Press, 1965), 283.

⁴³ Stevenson, *Ex Uno Plures*, 14-19; “Report of the Discussion in the Quebec Conference” in *Confederation : Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act*, edited by Joseph Pope (Toronto : The Carswell Co. Ltd., 1895), 53-88.

⁴⁴ J.M.S. Careless, *Brown of the Globe* (Toronto: Macmillan, 1959), vol. 2, p. 167-9.

⁴⁵ Macdonald told Malcolm Cameron that if he lived to “the ordinary age of man”, he would “see both Local Parliaments & Governments absorbed in the General power”. Macdonald also said that “of course it does not do to adopt that point of view in discussing the subject in Lower Canada.” In his public statements, Macdonald professed to be very happy with the quasi-federal constitution designed by the Quebec Conference. Letter from Macdonald to Cameron, 19 December 1864, quoted in Ged Martin, “Archival Evidence and John A. Macdonald Biography” *Journal of Historical Biography* 1 (2007): 79-115, 91.

At the London Conference in the winter of 1866-67, a number of changes were made to the constitutional plan that had emerged from the Quebec Conference. Most of these modifications were intended to strengthen the power of the federal government relative to the provinces even further.⁴⁶ Several legislative subjects, such as fisheries and penitentiaries, were removed from the list of provincial powers and given to Ottawa. The efforts of Britain's Colonial Secretary, Lord Carnarvon, to increase the power of the federal government beyond this was, however, frustrated by the opposition of the French Canadian delegates in London. When Carnarvon met George-Etienne Cartier and Hector-Louis Langevin on 28 January 1867, he found them intransigent and unwilling to accept any further diminution in the power of the future province of Quebec.⁴⁷

In the period after 1867, Prime Minister John A. Macdonald worked to strengthen the power of the central government vis-à-vis the provinces. He imposed severe limitations on provincial power and frequently instructed Lieutenant-Governors to "reserve" provincial statutes to allow the federal government to decide whether they would go into effect. Historians such as Bruce Hodgins and Garth Stevenson have called the highly centralized political system of this period the "Macdonaldian constitution" or "Macdonaldian quasi-federalism."⁴⁸

The Macdonaldian constitution was short-lived. At the time of Confederation, opposition to centralization came mainly from French-speaking Lower Canada. In the 1880s and 1890s, the Province of Ontario became the main advocate of decentralization and provincial rights. Ontario's Premier between 1872 and 1896 was Oliver Mowat, who was, ironically, a member of George Brown's Liberal Party. Mowat fought with the Conservative administration of Sir John A. Macdonald over which level of government was going to regulate such matters as liquor licenses, natural resources, and navigable streams. Mowat served as his own Attorney-General, which involved visits to London to present Ontario's case for coordinate federalism before the British Empire's highest court of appeal, the Judicial Committee of the Privy Council in London (JCPC).⁴⁹

In a series of decisions after 1881, the JCPC sided with advocates of provincial autonomy in a number of key cases. The JCPC's rulings in *Citizen's Insurance Company of Canada v. Parsons* (1881), *Hodge v. The Queen* (1883), *McLaren v. Caldwell* (1884), and *St. Catharines Milling and Lumber Co. v. the Queen* (1888) established that provincial legislatures were sovereign in their areas of jurisdiction. The decision of the courts to transfer power from Ottawa back to the provinces undid part of the centralizing thrust of Confederation.⁵⁰

⁴⁶ Stevenson, *Ex Uno Plures*, 3-19.

⁴⁷ British Library Manuscripts Room, Carnarvon Papers, Carnarvon Diary, 28 January 1867.

⁴⁸ Bruce W. Hodgins, Don Wright, and W. H. Heick, *Federalism in Canada and Australia: The Early Years* (Waterloo: Wilfrid Laurier University Press, 1978), 8.

⁴⁹ Bruce Hodgins and Robert C. Edwards, "Federalism and the Politics of Ontario, 1867-1880" in *Federalism in Canada and Australia: The Early Years*, 61-96; Christopher Armstrong, *The Politics of Federalism: Ontario's Relations with the Federal Government, 1867-1942* (Toronto: University of Toronto Press, 1981).

⁵⁰ V.C Macdonald, "Judicial Interpretation of the Canadian Constitution" *University of Toronto Law Journal* 1 (1935): 260-285; Alan C. Cairns, "The Judicial Committee and Its Critics" *Canadian Journal*

Most of the key JCPC decisions that increased the power and dignity of the provinces did not directly involve the power of the Lieutenant-Governor. However, the case of *The Liquidators of the Maritime Bank of Canada v. The Receiver General of New Brunswick* did have a direct bearing on the constitutional status of the Lieutenant-Governor. This 1892 decision revolved around money the government of New Brunswick had deposited in the Maritime Bank, a financial institution that had subsequently failed. The bank's liquidators discovered that there were insufficient funds to repay all of the depositors in full, which raised the question of priority of payment. In British law, the Crown historically had first claim on funds in the event of bankruptcy. In its argument before the JCPC, the New Brunswick government argued that since the Lieutenant-Governor represented the Crown, the New Brunswick government should have first claim on the remaining resources of the bank. The opposing lawyer disputed that the provincial Lieutenant-Governor represented the Crown and challenged the idea that the provincial government had any sovereignty or any of the other attributes of the British Crown. He argued that provincial governments were mere "independent municipal institutions."⁵¹ This argument reflected the view that had long been espoused by Sir John A. Macdonald and the Colonial Office that since the Lieutenant-Governor was a "once-removed representation of the Queen" appointed by Ottawa, they had did not possess all of the prerogatives enjoyed by a monarch in Britain.⁵¹

Speaking for the JCPC, Lord Watson rejected this idea and denied that the provinces were entities of a municipal character or were subordinate to the federal government. He also declared the Lieutenant-Governor was in all respects the direct representative of Her Majesty and had all the prerogative powers of the Crown. These powers included first payment in cases of bankruptcy, which was the immediate issue in the case. Watson's decision stressed that Canada was a compound monarchy, although he did not use this term, and that the powers of the Crown were divided between the Governor-General in Ottawa and the provincial Lieutenant-Governors.⁵² Historian John T. Saywell summed up the implications of the JCPC's decision thusly:

In one classic stroke the Judicial Committee of the Privy Council repudiated the decision of the Colonial Office, the Law Officers, and the Supreme Court of Canada. Lord Watson presided at this hearing by the Judicial Committee and, as was his custom, repudiated the legal validity of the centralists' argument... The provincial governments derived none of their authority from the government of Canada; they possessed legislative powers in every sense of the word and within

of Political Science / Revue canadienne de science politique, 4 (1971): 301-345; John T. Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2002), 57-183.

⁵¹ John T. Saywell, *The Office of Lieutenant-Governor: a Study in Canadian Government and Politics* (Toronto: University of Toronto Press, 1957), 9.

⁵² *The Liquidators of the Maritime bank of Canada v The Receiver General of New Brunswick (Canada)* [1892] UKPC 34 (2 July 1892), p.3

URL: http://www.bailii.org/uk/cases/UKPC/1892/1892_34.html ; Edward Robert Cameron, *The Canadian Constitution, As Interpreted by the Judicial Committee of the Privy Council in Its Judgments* (Winnipeg: Butterworth & Co., 1915), 128-129.

their assigned sphere these powers were exclusive and supreme; and, finally, the Queen did form part of the provincial governments⁵³.

Watson's decision also confirmed that that Crown lands in the provinces belonged to the provincial governments. The JCPC's elevation of the office of Lieutenant-Governor proved to be of tremendous practical importance, as Crown lands include oil deposits and hydroelectric facilities.⁵⁴ Watson's decision was cited by the JCPC in 1925 in its ruling on *Toronto Electric Commissioners v. Snider*, in which Lord Haldane declared that Canadian provinces were "in a sense like independent kingdoms with very little Dominion control over them" and "should be autonomous places as if they were autonomous kingdoms."⁵⁵ No judge has ever compared the powers of an Australian state to that of an "independent kingdom."

The JCPC's 1892 ruling that the Lieutenant-Governor was the representative of the Queen, not the federal government, encouraged provincial leaders to seek the support of British politicians, as opposed to the JCPC, in their struggles with Ottawa. In the course of his lengthy struggle with the federal government over financial arrangements, Richard McBride, Premier of British Columbia between 1903 and 1915, travelled to London in 1907 to appeal directly to officials in the British Colonial Office. Although British political leaders such as Winston Churchill refused McBride's request to force Ottawa to increase the subsidy it paid to British Columbia's government, McBride concluded that his decision to go to London had helped to raise the profile of the issue and thus force Laurier to move to a compromise settlement.⁵⁶ The view that the provincial governments were directly linked to the British Crown, which had been endorsed by the JCPC, helped to legitimate the provinces' quest for greater deference from the federal government. A sign of the federal government's growing respect for the provinces was the creation of the Dominion-Provincial Conferences, later known as First Ministers' Conferences. The first of these conferences, which was chaired by Sir Wilfrid Laurier, took place in 1906. Over the course of the twentieth century, these gatherings of provincial and federal leaders became an important part of the Canadian political system. These conferences were similar to the Imperial Conferences at which the Prime Ministers of the Dominions met with their British counterpart to discuss issues of common concern.⁵⁷ Canada evolved a system of cooperative federalism characterized by collaboration between different levels

⁵³ Saywell, *The Office of Lieutenant-Governor*, 13.

⁵⁴ Ronald I. Cheffins, "The Royal Prerogative and the Office of Lieutenant Governor," *Canadian Parliamentary Review* Vol 23 no 1, spring 2000.

⁵⁵ *The Toronto Electric Commissioners v Colin G. Snider and others (Ontario)* [1925] UKPC 2 (20 January 1925) URL: http://www.bailii.org/uk/cases/UKPC/1925/1925_2.html. This case is discussed in Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism*, 161.

⁵⁶ Patricia Roy, *Boundless Optimism: Richard McBride's British Columbia* (Vancouver: University of British Columbia Press, 2012), 136-9.

⁵⁷ In 1907, Laurier blocked Canada's provinces from sending representatives to the Imperial Conference, arguing that the conference was for the First Ministers of the Dominions, not their subnational units. Thomas A. Levy, "Provincial International Status Revisited," *Dalhousie Law Journal* 3 (1976): 70. For the history of the imperial conferences see John Kendle, *The Colonial and Imperial Conferences, 1887-1911: A Study in Imperial Organization* (London: Published for the Royal Commonwealth Society by Longmans, 1967).

of government and frequent First Ministers Conferences, where the Prime Minister meets provincial Premiers to formulate plans of action for common challenges.⁵⁸

In the twentieth century, the federal government eventually came to accept this new concept of federalism and its power to disallow provincial statutes was allowed to fall into disuse. This power was last used in 1943, when Ottawa instructed the Lieutenant-Governor of Alberta to disallow a bill passed by the Alberta legislature.⁵⁹ These changes reflected the growing respect the federal government felt for the provincial governments and their respective democratic processes.

Australian state governments have considerably fewer powers than Canadian provincial governments. Many political scientists regard Australia as the most centralized of the federations in the industrialized world.⁶⁰ This pattern likely would have surprised political observers in the first decade of the twentieth century. The Canadian and Australian systems of federalism have experienced precisely opposite trends since their creation. Canada's federal system was initially quite centralized, as our earlier discussion of the Macdonaldian constitution indicates. Over time, Canada's provinces have gained greater power and more of the trappings of sovereignty. All provinces now have distinctive provincial flags and other symbols designed to create a sense of loyalty in their populations. Some provincial governments operate television networks, which further increases the distinctiveness of the provinces. Others have quasi-diplomatic representatives in foreign capitals, Québec being an extreme case.⁶¹ Australian states only have Agent-Generals in London and their primary function is advancing the trade interests of their respective states.⁶² Canadian federalism is now very different for the political system envisioned by the British parliament when it passed the *British North America Act, 1867*.⁶³

Similarly, the Australian constitution, which is also based on a statute of the British parliament, the *Commonwealth of Australia Act, 1900*, has evolved in a direction very different from that envisioned by its creators. In 1900, the founding fathers of Australia's federal system designed a constitution that would provide for significant decentralization. This reflected the strong identities of the different Australian colonies, particularly New

⁵⁸ Howard Cody, "The Evolution of Federal-Provincial Relations in Canada: Some Reflections," *The American Review of Canadian Studies* 7, no. 1 (1977): 55-8; Donald Smiley, "The Rowell-Sirois Report, Provincial Autonomy, and Post-War Canadian Federalism," *The Canadian Journal of Economics and Political Science / Revue Canadienne D'Economique Et De Science Politique*. 28, no. 1 (1962): 54-69; Jörg Broschek, "Historical Institutionalism and the Varieties of Federalism in Germany and Canada," *Publius: The Journal of Federalism*. 42, no. 4 (2012): 662-687.

⁵⁹ Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People* 3rd edition (Toronto : University of Toronto Press, 2004), 34-52.

⁶⁰ Alan Fenna, "The Malaise of Federalism: Comparative Reflections on Commonwealth-State Relations," *Australian Journal of Public Administration* 66:3 (2007): 298-306.

⁶¹ André Lecours, "Canadian Federalism and Foreign Relations: Quebec and Alberta," *Autonòmics* 70 (2010): 29; David Crikemans, "Regional sub-state diplomacy from a comparative perspective: Quebec, Scotland, Bavaria, Catalonia, Wallonia and Flanders," *The Hague Journal of Diplomacy* 5, no. 1-2 (2010): 1-2.

⁶² Government of Western Australia, European Office, "About Us," <http://www.wago.co.uk/index.php/about-us.html>.

⁶³ This process is discussed in Garth Stevenson, *Ex Uno Plures*.

South Wales and Victoria and the intense rivalry between them. An illustration of this is the different rail gauges these two colonies, and then states, had which meant you had to get off at the colonial, and then State border, and board another train. This only changed well into the twentieth century. It should be noted that in the constitutional meetings that preceded the creation of the Australian federation, many colonial politicians expressed dissatisfaction with features of Canada's constitution, the text of which they had studied. A number of speakers in the Australian constitutional conventions explicitly rejected the Canadian constitutional model because it gave the federal government too much power. These speakers, who were basing their remarks solely on the text of the *British North America Act, 1867*, do not appear have known about the JCPC decisions that had already transferred some power from the federal government back to the provinces. The drafters of the Australian constitution considered and rejected other features of the Canadian constitution, such as the unelected upper house.⁶⁴ They instead based their constitution in some ways more on the US, which they also studied. An elected second chamber which was meant to represent the States like the Senate in the US is an obvious example.

Australian political terminology still reflects the belief in decentralization of the creators of the Australian constitution. The Queen's representative at the state level in Australia is a "Governor," while the equivalent office in Canada is the "Lieutenant-Governor." The state legislatures in Australia are also known as "parliaments," a somewhat grander term than used in Canada's English-speaking provinces, where the provincial legislatures are generally known as "Legislative Assemblies."⁶⁵

The somewhat more elevated terminology used to describe state institutions in Australia obscures the fact that Australia's political system is more centralized than that of Canada. Australia's federal system experienced centralization as a result of the two world wars (especially increasing Federal control of finances) and the creation of the welfare state. In this respect, Canada's experience in the twentieth century was somewhat similar. In Canada, however, the presence of a province with its own distinctive language and culture served as a brake on centralization. Australia's states are, of course, linguistically homogenous and broadly similar in culture. Moreover, the social democratic tradition, which tends to favour centralization,⁶⁶ is somewhat stronger in Australia than it is in Canada. Until the 1960s, Australia's Liberal Party favoured "co-ordinated federalism" on the grounds that it would encourage the state governments to implement classical liberal economic policies. In the 1960s, it changed its position and came to support centralization as a tactical measure. It did so because the majority of state governments were then controlled by the opposing Labour Party, while the Liberal

⁶⁴ Helen Irving "Sister Colonies with Separate Constitutions: Why Australian Federationists Rejected the Canadian Constitution" in *Shaping Nations: Constitutionalism and Society in Australia and Canada* edited by Linda Cardinal and David Headon (Ottawa : University of Ottawa Press, 2002), 27-38.

⁶⁵ In Newfoundland, the legislature is called the "House of Assembly." In Ontario, the "Legislative Assembly" is sometimes referred to as the provincial parliament in official documents. Since 1938, members of Ontario's legislature have been known as "Members of the Provincial Parliament". Québec's legislature has been known as the "Assemblée nationale du Québec" since 1968, when the province adopted unicameralism.

⁶⁶ Brian Galligan and David Mardiste, "Labor's Reconciliation with Federalism," *Politics* 27, no. 1 (1992): 71-86.

Party appeared to have a firm grip on power at the federal level.⁶⁷ For these reasons, Australia's state governments gradually lost much of their power to the Commonwealth (i.e., federal) government.⁶⁸ Today, the Australian federation is, by many statistical measures, more centralized than that of Canada: in Canada, federal revenue represents 45% of all government revenue, while the equivalent figure in Australia is 67%. A greater proportion of the public sector workforce in Australia is employed by the federal government than is the case in Canada, where public-sector workers are more likely to be employed by sub-national governments.⁶⁹

The unwillingness of the Canadian federal government to consult with the provinces about the changes to the rules of succession has been criticized by a distinguished legal academic in Australia. Anne Twomey, a professor of law at the University of Sydney, has characterized the failure of the Canadian government to follow the correct parliamentary and constitutional procedures as a risky move that may produce complications for some future Canadian government in the event of the Royal Succession Act being deemed unconstitutional. She criticizes the Canadian Royal Succession Bill on two grounds. First, it does not actually change Canada's succession law. Instead, it merely assents to the British parliament's decision to change the succession laws governing the British Crown. She characterizes this aspect of the Canadian statute as a form of constitutional retrogression, or "de-patriation." Moreover, the Canadian government did not obtain the consent of the provinces for this change to the constitution. She writes:

It is likely that the Canadian Government took the gamble of this approach in order to avoid the hassle of obtaining the agreement of the Provinces while banking upon the likelihood that no one would have the standing or motive to challenge it. Moreover, if the Duchess of Cambridge has a first-born son, it will avoid the problem of having a female monarch of the United Kingdom and a younger brother who becomes the monarch of Canada. Hence, the chances of getting by with such a constitutionally shoddy arrangement are reasonable.

*Nonetheless, it shows a disappointing lack of understanding of the Crown and its divisible nature and a willingness on the part of Canadian politicians to sacrifice Canadian independence to avoid having to engage with the Provinces.*⁷⁰

⁶⁷ Robyn Hollander and Haig Patapan, "Pragmatic Federalism: Australian Federalism from Hawke to Howard," *Australian Journal of Public Administration* 66, no. 3 (2007): 280-297.

⁶⁸ Alan Fenna, "The Character of Australian Federalism," *eJournal of Tax Research* 10, no. 1 (2012): 12-20.

⁶⁹ Anthony Sayers and Andrew Banfield, "The Evolution of Federalism and Executive Power in Canada and Australia," in Arthur Benz and Jörg Broschek (eds.) *Federal Dynamics: Continuity, Change, and the Varieties of Federalism* (Oxford: Oxford University Press, 2013).

⁷⁰ Anne Twomey, "The royal succession and the de-patriation of the Canadian Constitution," University of Sydney Constitutional Research Unit blog, 4 February 2013, http://blogs.usyd.edu.au/cru/2013/02/the_royal_succession_and_the_d.html

Canadian legal academics have also noted the same flaws in the Canadian federal government's approach. In June 2013, two law professors in the Province of Québec launched a constitutional challenge against Canada's Succession to the Throne Act. Geneviève Motard and Patrick Taillon of Université Laval have argued that the law is unconstitutional on several grounds. First, they say that the federal law is a constitutional amendment and that the federal government failed to obtain approval of all the provinces as required by section 41. They also object to the fact that the Canadian legislation does not actually change the rules of succession and merely expresses approval of the British law that changed the rules of succession. They contend that this procedure means that Canadian law will be changed by a British statute that is written in English only, which is a violation of the provision in the Canadian constitution that states that all laws must be both English and French. They also note that even the revised rules of successions still bar a Roman Catholic from ascending to the throne, which is a violation of the guarantee of freedom of religion contained in the Charter of Rights and Freedoms, which is part of the Canadian constitution.⁷¹ At first, Québec's Parti Québécois government was neutral on the subject of the rules of the royal succession and was not initially involved in the court case launched by Motard and Taillon.⁷² In July 2013, the Quebec government requested intervener status in the case.⁷³

Despite the relatively centralized nature of the Australian federation, Australia's Prime Minister at the time, Julia Gillard felt compelled to obtain the support of the state governments for the change to the rules governing the royal succession. The fact that she headed a minority government in the federal parliament and relied on several independents for her government's survival could very well have influenced her decision to consult the states. In contrast, Canada's Prime Minister, Stephen Harper did not, for reasons that are discussed below. He headed a majority government, one that he achieved after some years of minority rule. The unwillingness of the Canadian federal government to work with the provinces on this issue is a particularly interesting phenomenon when one considers that virtually all political actors in all of the Commonwealth Realms agree with the principle that if there is to be a monarchy, the rules of succession should be amended so as to eliminate the anachronistic element of gender and religious discrimination.

4. Australia's Procedure for Changing the Rules of the Royal Succession

As was established above, the Canadian federal government has recently passed a bill that purports to address the issue of the Royal Succession. It did so without consulting with the provinces. In contrast, the federal government of Australia did feel the need to obtain the explicit consent of the state parliaments. The process of arranging the passage

⁷¹ Geneviève Motard and Patrick Taillon v. Attorney General of Canada, Requête introductive d'instance, déposée au Greffe de la cour supérieure du Québec, le 6 juin 2013.

⁷² Rhéal Séguin, "Changes to royal succession face legal fight in Quebec," *Globe and Mail* 7 July 2012 <http://www.theglobeandmail.com/news/politics/changes-to-royal-succession-face-legal-fight-in-quebec/article12401224/>

⁷³ Rosemary Barton, "Royal baby bill challenge joined by Quebec attorney general: Challengers of new law believe provinces should be involved in any constitutional amendment" CBC News 22 July 2013 2:28 PM <http://www.cbc.ca/news/politics/story/2013/07/22/pol-barton-royalsuccession.html>

of legislation in the state parliaments is, as of June 2013, currently underway. Like Canada, Australia is a compound monarchy in which the powers of the Crown are divided between the Governor General at the national level and Queen's representative in each state (or provincial) capital. As we shall see below, Australian legal and public opinion is somewhat divided as to what constitutes formal approval by the state parliaments. However, the necessity of obtaining their consent is recognized by all concerned. In sharp contrast to the Harper government's unilateral approach to amending the succession rules in Canada, Australia's state governments have been involved in every stage of the process.

The involvement of the state governments in changing the rules of the Royal Succession began with the Council of Australian Governments (COAG) meeting on 25 July 2012. The functions of COAG are similar to that of a First Ministers' conference in Canada. COAG was created in 1992 and includes the Prime Minister, state Premiers, the "Chief Ministers" of the two territories (Northern Territory and Australian Capital Territory), as well representatives of the Australian Local Government Association. COAG replaced the First Ministers' conferences, participation in which had been restricted to just the Prime Minister and the state premiers. The new organisation of COAG is certainly more inclusive compared to its Canadian counterpart. COAG meets at least once per year.⁷⁴ The meetings of COAG are an important part of the Australian political calendar, although the requirement that the Prime Minister attend COAG meetings is not entrenched in the country's constitution.⁷⁵

The resolutions of COAG are published. One of the resolutions of the meeting of 25 July 2012 dealt with the proposed change to the Royal Succession. It read:

*Leaders confirmed Australia's support for changes to the rules for Royal Succession agreed by leaders of the Realms on 28 October 2011 which would: allow for succession regardless of gender; and, remove the bar on succession for an heir and successor of the monarch who marries a Catholic.*⁷⁶

The COAG meeting of 25 July was chaired by former Prime Minister Julia Gillard, who was then the leader of the Australian Labour Party, the main centre-left political party in that country.⁷⁷ At this meeting, it was agreed that each Australian state

⁷⁴ Martin Painter, "The Council of Australian Governments and Intergovernmental Relations: A Case of Cooperative Federalism," *Publius: The Journal of Federalism* 26, no. 2 (1996): 101-120.

⁷⁵ Paul Kildea and Andrew Lynch, "Entrenching 'cooperative federalism': Is it time to formalise COAG's place in the Australian federation?" *Federal Law Review* 39, no. 1 (2011): 103-129.

⁷⁶ "Communique" COAG Meeting, 25 July 2012 <http://www.coag.gov.au/node/431>

⁷⁷ In August 2010, Gillard expressed her hope that Australia would become a republic. *Daily Telegraph*, "Julia Gillard wants Australia to become a republic at end of Queen's reign." 17 August 2013

<http://www.telegraph.co.uk/news/uknews/theroyalfamily/7949751/Julia-Gillard-wants-Australia-to-become-a-republic-at-end-of-Queens-reign.html> She has not expressed republican sentiments since then.

parliament would pass “request” legislation, which are short bills asking the Commonwealth parliament to amend Australia’s rules of succession.⁷⁸

Subsequent to this meeting, the government of one state, Queensland, decided to adopt a somewhat different procedure: in addition to passing request legislation, Queensland’s parliament passed a bill changing the succession rules for the Crown of the State of Queensland. Queensland is known in Australia for being quite a conservative state. It was the last Australian state to extend legal protection to homosexuals, and was the home of Pauline Hanson’s ‘One Nation’ Party – a right-wing, populist organisation. Many of the state’s residents view environmentalism as a threat to its economy, which is based on natural resource extraction. Moreover, Queensland is remote from the major population centres of the country and the capital of Canberra, which makes its population somewhat sceptical of the national government and centralization. The current Premier of Queensland, Campbell Newman of the Liberal National Party, repeatedly clashed with Prime Minister Gillard, which may explain why his government decided to draft its own royal succession bill.⁷⁹

During the debate on this bill, Anastacia Palaszczuk, the leader of the official opposition in Queensland, the Australian Labour Party, questioned the need for this separate legislation.⁸⁰ Andrew Cripps, a minister in the governing Liberal National Party, replied that a separate bill for Queensland was necessary to reinforce the point that there were “separate crowns” in “each of the Australian States... the Australian Crown took on a federal function or character, where the Sovereign acts on the advice of Ministers from individual jurisdictions within the federation in relation to matters concerning that jurisdiction.” Cripps also declared “that Queensland has a demonstrable and enduring relationship with the Crown and is a sovereign State within the Commonwealth of Australia that has the perfect legal right to pass this legislation.” He then congratulated “the Attorney-General on bringing the bill to the House and the Premier for standing up for Queensland’s legitimate, sovereign and constitutional interests at the Council of Australian Governments Meeting. It should give Queenslanders comfort to know it finally has a State Government that is committed to doing so and will not be the irrelevant, compliant, lap dog of the Federal Government.”⁸¹

In other Australian states, the procedure for changing the rules of succession was much more straightforward and has not involved partisan rancour. However, all states plan to pass appropriate legislation in their parliaments. At a meeting of COAG,

⁷⁸ Judith Ireland, “Queensland warned for dragging heels on royal succession changes,” *Sydney Morning Herald*, 18 April 2013 <http://www.smh.com.au/opinion/political-news/queensland-warned-for-dragging-heels-on-royal-succession-changes-20130417-2i0lb.html#ixzz2WkbmxCCV>.

⁷⁹ Georgia Waters, “Face it Queensland, we’re conservative,” *Brisbane Times* 24 August 2010 <http://www.brisbanetimes.com.au/federal-election/face-it-queensland-were-conservative-20100823-13ftu.html#ixzz2WkcKqMan>.

⁸⁰ See speech by Anastacia Palaszczuk in *Queensland Hansard*, 2 May 2013, p.1442

⁸¹ See statement by Andrew Cripps in *Queensland Hansard*, 2 May 2013, p.1442-1444.

Australia's First Ministers declared that they were satisfied with this "hybrid" approach, which allows Queensland to pass its own bill.⁸²

For Canadians, the important lesson to be taken away from the procedure for altering the royal succession in Australia is that it was understood by all levels of government and all political parties that the involvement of the state parliaments in some fashion would be required. Australians merely disagreed about the precise form the state parliaments' action should take. The requirement that the state governments be involved was recognized by COAG at their meeting in July 2012 and their subsequent meetings.

5. Why Did the Canadian Federal Government Ignore the Provinces?

Canada's Prime Minister and federal Attorney-General were likely aware that Australia's state governments were involved in the process, since the resolutions of COAG are placed online and are reported by the Australian media (and both countries have always kept a keen eye on what the other was doing as they are quite similar culturally, economically and in some ways politically). Moreover, the Prime Minister of New Zealand has been acting as a go-between to coordinate the passage of current legislation in the Commonwealth Realms. More importantly, they were certainly aware of section 41 of the Canadian constitution, which clearly states that the legislatures of all ten provinces must vote in favour of any changes to the "office of the Queen" before they can be effected. For several reasons that will be discussed below, Canada's federal government decided to ignore the Australian precedent.

It is probable that the decision of the Canadian federal government to exclude the provincial governments from the process related to the changes to the rules of the succession was informed by the change in government in Québec that took place after the September 2012 Québec general election. Between 1976 and 1985 and then again between 1994 and 2003, Québec was governed by the Parti Québécois, a nationalist political party that favours independence for the province. During these two periods, "national unity" (i.e., keeping Québec within the federation) became an issue of overriding importance in Canadian politics. Between 2003 and 2012, Québec was governed by the Liberal Party, a staunchly federalist party that believes that Québec should remain part of the Canadian federation. During this period, the issue of Québec independence was essentially dormant. The return of the Parti Québécois to power in September 2012 caused the issue of national unity to surface again, even though the leader of the party indicated that she was not planning to initiate a third referendum on independence in the immediate future (especially since opinion polls show that most Quebecers do not see independence as a priority compared to other pressing issues such as the economy). Québec is the centre of republican sentiment in Canada and a Parti Québécois government might oppose a measure designed to reform rather than outright abolish the monarchy. There was also the possibility that one or more of the provinces would ask for another constitutional amendment in return for supporting this change. One

⁸² Council of Australian Governments Meeting – Communiqué 19 April 2013
http://www.coag.gov.au/sites/default/files/COAG_Communique_190413.pdf.

can, therefore, see why the Canadian federal government opted for a procedure for changing the rules of succession that did not involve talking to any of the provinces.

Another possible factor that influenced the decision of the federal government not to involve the provinces is the apparent hostility of its leadership to cooperative federalism and First Ministers' Meetings. Canada's current Prime Minister, Stephen Harper, has called for a return to "classical federalism" of the sort that existed during (an unspecified period in) Canada's past. In effect, this would involve reverting to an earlier stage in Canadian constitutional history, when gathering of First Ministers were rare and the federal government was not involved in healthcare, education, social services, and other welfare-state activities. The Harper government's theory of federalism has been connected to its neo-liberal policy goals.⁸³ Since the Harper government came into office in 2006, just one and rather brief First Ministers' Meeting has been held.⁸⁴ In contrast, Prime Minister Jean Chrétien chaired seven First Ministers' Meetings during his ten years in office.⁸⁵

The current federal government's efforts to roll back the clock to an earlier period of constitutional history has been part of a broader effort to revive traditions, symbols, and practices that Canadian governments in recent decades have either de-emphasized or discarded. For instance, Canada's current government is enthusiastic about the monarchy and other features of the Canadian political system that date from the heyday of the British Empire. In its eagerness to revive traditions related to the monarchy, it has reversed decisions by previous governments that were intended to create greater symbolic distance between Canada and Britain. For instance, it has revived the names "Royal Canadian Navy" and "Royal Canadian Air Force," names that were abolished in the 1960s in deference to the sensibilities of the Francophone Quebecers, post-war immigrants from continental Europe, and other people of non-British ancestry.⁸⁶ The current federal government has also tried to use the budget for museums and other heritage programs to promote historical values such as "Britishness",⁸⁷ loyalty to the Crown, and military prowess.⁸⁸ The federal government's treatment of the provinces in the matter of the rules of succession is also reminiscent of the Macdonaldian constitution, when Canada's provinces were treated as truly subordinate bodies by the federal government.

⁸³ Tom Kent, "The Harper Peril for Canadian Federalism," *Policy Options*, February 2008; Brooke Jeffrey, "Prime Minister Harper's Open Federalism: Promoting a Neo-liberal Agenda?" in Gordon DiGiacomo and Maryantonett Flumian, editors *The Case for Centralized Federalism* (Ottawa: University of Ottawa Press, 2010), 108-136.

⁸⁴ Don Lenihan, "Harper: the End of Classical Federalism?" iPolitics 26 March 2013.

<http://www.ipolitics.ca/2013/03/26/harper-the-end-of-classical-federalism/>.

⁸⁵ Canadian Intergovernmental Conference Secretariat (CICS) "First Ministers' Conferences, 1906-2004," http://www.scics.gc.ca/CMFiles/fmp_e.pdf.

⁸⁶ José E. Igartua, *The Other Quiet Revolution: National Identities in English Canada, 1945-71* (Vancouver: UBC Press, 2006).

⁸⁷ It should be pointed out that the Harper government's efforts in no way compare to the "Britishness" that formed the foundation of English-speaking Canada's national identity from the late nineteenth century to the 1960s.

⁸⁸ These efforts to revive symbols of Britishness are discussed by Ian McKay and Jamie Swift in *Warrior Nation: Rebranding Canada in an Age of Anxiety* (Toronto: Between the Lines, 2012).

Conclusion

It remains to be seen whether the courts will determine whether the current Canadian government's approach to changing the rules of succession is constitutionally valid. The Superior Court of Québec is set to hear a constitutional challenge to the *Succession to The Throne Act 2013* in October 2013.⁸⁹ It is also unclear whether the electoral defeat of the Labour Party by Tony Abbott's Liberal-National coalition on 7 September 2013 will affect the legislative timetable for changing the rules of the royal succession in that country.⁹⁰ Tony Abbott was born in the United Kingdom, moved to Australia as a child, and is a fervent monarchist.⁹¹ However, it should be noted that republicanism is an issue that divides all of the other major political parties in Australia, including his own Liberal Party.⁹² The passage of the relevant legislation in Australia could be derailed by the new Coalition government which was elected on 7 September 2013, which means that the process of changing the rules of the royal succession may be prolonged.

What is clear, however, is that constitutional questions raised by changes to the rules of the royal succession have not gone away with the birth of Prince William's first child, Prince George Alexander Louis in July 2013. Students of comparative politics may, therefore, have additional opportunities to use the question of the rules of monarchy to study more fundamental differences between the Australian and Canadian federalism.

⁸⁹ Rhéal Séguin, "Changes to royal succession face legal fight in Quebec," *Globe and Mail* 7 July 2012 <http://www.theglobeandmail.com/news/politics/changes-to-royal-succession-face-legal-fight-in-quebec/article12401224/>.

⁹⁰ BBC News, "Australia's PM-elect Tony Abbott starts power transition" 9 September 2013 <http://www.bbc.co.uk/news/world-asia-24012338>.

⁹¹ Australian Monarchist League Inc, "Tony Abbott" <http://www.monarchist.org.au/tony-abbott.html>.

⁹² Peter Boyce, *The Queen's Other Realms: The Crown and Its Legacy in Australia, Canada and New Zealand* (Sydney: Federation Press, 2009), 218-220; *Daily Telegraph*, "Kevin Rudd vows to make Australia a republic," 8 April 2008 <http://www.telegraph.co.uk/news/worldnews/1584378/Kevin-Rudd-vows-to-make-Australia-a-republic.html>.