
The Constitutional Requirements for the Royal Morganatic Marriage

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This article examines the constitutional implications, for Canada and the other members of the Commonwealth, of a morganatic marriage in the British royal family. The Germanic concept of "morganatic marriage" refers to a legal union between a man of royal birth and a woman of lower status, with the condition that the wife does not assume a royal title and any children are excluded from their father's rank or hereditary property.

For such a union to be celebrated in the royal family, the parliament of the United Kingdom would have to enact legislation. If such a law had the effect of denying any children access to the throne, the laws of succession would be altered, and according to the second paragraph of the preamble to the *Statute of Westminster*, the assent of the Canadian parliament and the parliaments of the Commonwealth that recognize Queen Elizabeth II as their head of state would be required.

However, the declaration included in the *O.D.L. Report* of 1930, the alteration of the laws of succession in 1936-37 and that of the royal style and titles in 1947 and 1952 suggest that the second paragraph of the preamble to the *Statute* should be considered a constitutional convention rather than a rule of strict law. The lack of assent to a morganatic marriage by the Canadian parliament or any other Commonwealth parliament would have no legal effect.

Cet article analyse les implications constitutionnelles, pour le Canada et les autres pays membres du Commonwealth, d'un mariage morganatique au sein de la famille royale britannique. Le concept de «mariage morganatique», d'origine germanique, renvoie à une union légale entre un homme de descendance royale et une femme de statut inférieur, à condition que cette dernière n'acquière pas un titre royal, ou encore qu'aucun enfant issu de cette union n'accède au rang du père ni n'hérite de ses biens.

Afin qu'un tel mariage puisse être célébré dans la famille royale, une loi doit être adoptée par le parlement du Royaume-Uni. Or si une telle loi devait effectivement interdire l'accès au trône aux enfants du couple, les règles de succession seraient modifiées et il serait nécessaire, en vertu du deuxième paragraphe du préambule du *Statut de Westminster*, d'obtenir le consentement du Canada et des autres pays qui reconnaissent la reine Élisabeth II comme chef d'état.

Toutefois, tant la déclaration formulée dans le *O.D.L. Report* de 1930 que la modification des règles de succession en 1936-37 et celle de la désignation et des titres royaux en 1947 et 1952 nous amènent à conclure que le deuxième paragraphe du préambule du *Statut* ne devrait pas être considéré comme une règle de droit strict, mais plutôt comme une convention constitutionnelle. Le défaut de consentement du parlement canadien ou des autres parlements du Commonwealth à un mariage morganatique ne pourrait donc pas être sanctionné juridiquement.

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Introduction

Upon proclamation of the *Constitution Act, 1867*,¹ Canada became a federal state. Canada only became a sovereign state, however, in 1931, when the *Statute of Westminster* endowed Canada with unrestricted powers in matters of external affairs (section 3 of the *Statute*).² The *Statute of Westminster* also abolished the *Colonial Laws Validity Act*³ (subsection 2(2) of the *Statute*), which had until then emphasized the preponderance of the laws of the parliament of the United Kingdom to the detriment of Canadian laws in cases where they came into conflict. Even after 1931, the British parliament retained the power to amend the most substantial parts of the Canadian constitution, by virtue of section 7 of the *Statute of Westminster*. Notwithstanding the provisions of section 7, amendment of the Canadian constitution by the British parliament had to be made upon the basis of request and consent from the Dominion of Canada, as required by section 4 of the *Statute*. From my perspective, this specific provision may be interpreted as confirming Canada's sovereignty over its own affairs, regardless of whether they were of a constitutional nature or not. And, furthermore, by this means the United Kingdom parliament was reduced to the status of a "fiduciary" partner with respect to the Canadian constitution.

It was only in 1982, when Canada patriated its own constitution, that the British parliament's power to proceed to such amendments was finally revoked. Patriation notwithstanding, however, Canada continues to owe allegiance to the Crown. In practical terms, this means that Queen Elizabeth II continues to fulfill the role of a constitutional monarch and head of the Canadian state, even if Her Majesty's position is ceremonial and symbolic. Furthermore, with some modifications, the *Statute of Westminster* is itself still part of the constitution of Canada, by virtue of paragraph 52(2)(b) and the schedule to the *Constitution Act, 1982*.⁴

The purpose of this study shall be to analyze the scope and the constitutional implications of the second paragraph of the preamble to the *Statute of Westminster* on a morganatic marriage in the royal family. Indeed, royal marriage serves as a useful tool for exploring larger issues including the application of the *Statute of Westminster* in Canada today. For the past few years, there have been persistent rumours that a morganatic marriage might be pending between Prince Charles, heir apparent of the House of Windsor and heir to the British Throne,⁵ and his companion, Mrs. Camilla

¹ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

² *Statute of Westminster, 1931* (U.K.), 22 & 23 Geo. V, c. 4 [*Statute of Westminster*].

³ *Colonial Laws Validity Act, 1865* (U.K.), 28 & 29 Vict., c. 63.

⁴ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act, 1982*].

⁵ For a current and general analysis of the constitutional qualities required of the Prince of Wales in order to confirm him as a candidate for the throne, see Rodney Brazier, "The Constitutional Position of the Prince of Wales" (1995) P.L. 401.

Parker Bowles. Although it does not appear that the marriage between Prince Charles and Mrs. Parker Bowles was a morganatic one, all of these rumours show the relevance of the concept of morganatic marriage to today's British monarchy.

A morganatic marriage is commonly defined as a legal marriage in which a member of a royal or noble family marries someone of lower status on the understanding that neither the spouse nor the children will have any claim in the inherited rank or property of the parent of higher status. The question for the purposes of this paper is whether Canada would have to give its assent to such a union, since Canada and the United Kingdom are united by common allegiance to the British monarchy.

The second paragraph of the preamble of the *Statute of Westminster*, which remains unimpaired by the *Constitution Act, 1982* and which, therefore, is still part of the Canadian constitution, provides as follows:

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 [including the Dominion of Canada] as of the Parliament of the United Kingdom.⁶

A morganatic marriage, specifying that the heirs could not legitimately inherit their parent's title of dignity, would alter the laws of the succession to the throne and would therefore require the application of the second paragraph of the preamble to the *Statute of Westminster*.

If the traditional rules of succession are changed, it will be imperative to determine whether the consent required by the second paragraph of the preamble to the *Statute* is merely political or whether it is invested with the full force of law. To answer this question, we must consider the nature of the second paragraph of the preamble and establish whether it should be regarded as a strict rule of law or as a convention. A rule of law can characteristically be acknowledged, accepted, and applied by courts in the determination of a dispute.⁷ A convention, however, is defined as a rule elaborated empirically by political agreement, not sanctioned by courts, but nonetheless accepted and respected by parties because of a sentiment of necessity.⁸

⁶ *Supra* note 2, Preamble, para. 2.

⁷ See K.C. Wheare, *The Statute of Westminster and Dominion Status* (Oxford: Oxford University Press, 1953) at 124; A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1965) at 23-24.

⁸ See Henri Brun & Guy Tremblay, *Droit Constitutionnel*, 4th ed. (Cowansville: Yvon Blais, 2002) at 44.

Finally, the issue of Canada's assent gives rise to the question of whether all fifty-three parliaments of the Commonwealth of Nations would have to give their assent, or only the parliaments of the sixteen members that have Queen Elizabeth II as their head of state.

I. Morganatic Marriage

A. Definition

The term “morganatic marriage” derives from the phrase *matrimonium ad morganaticum*, which became current in the lexicon of the late Roman Empire. Literally signifying a “marriage on the morning gift” or “early morning marriage”, the phrase underwent an onomastic transformation during the centuries following the fall of the Roman Empire in the West and prior to the founding of the Germanic kingdoms that established themselves in the former territories of the western empire. In this context, the term became associated with Germanic ideas of social status and rank. Hierarchy of birth assumed numerous applications in Germanic Salic law—particularly in the Frankish kingdoms. Parties to many kinds of transactions were required to possess the same social standing.⁹

According to the *Oxford Companion to Law*, a morganatic marriage is “[a] legally valid marriage between a male member of royal, or princely, family, and a woman of lower birth or rank with the conditions that she does not acquire his rank and that any children are not to succeed to his rank, dignity or hereditary property.”¹⁰ This is the Germanic definition of the expression; this institution was apparently not always formally recognized in England.¹¹

However, the 1866 case of *Kynnaird v. Leslie*¹² gives us an idea of the form morganatic marriage could take in England. Judges Keating and Montague Smith used the German definition of morganatic marriage, viewing it as a union that denied children the right to claim their father's rights, although they are considered as legitimate members of their mother's family, and as such can inherit from one another.¹³ The judges concluded by saying that “if such marriages did exist [in

⁹ See David M. Walker, *The Oxford Companion to Law* (Oxford: Clarendon Press, 1980) at 856.

¹⁰ *Ibid.* See also John Burke, *Jowitt's Dictionary of English Law*, 2nd ed. (London: Sweet & Maxwell, 1977) s.v. “morganatic marriage” (where the definition of morganatic marriage also disinherits the wife and the children).

¹¹ Prince George Augustus Frederick (1762-1830), who ascended to the throne of Great Britain and Hanover as King George IV in 1820, got secretly and “morganatically” married to Maria Anne Fitzherbert, a Roman Catholic, in 1785. The marriage was denied in Parliament by Charles James Fox in order to secure parliamentary settlement of the Prince's enormous debts. The marriage was considered as illegal and was ignored after his union with Caroline of Brunswick in 1795.

¹² (1865-66), L.R. 1 C.P. 389.

¹³ *Ibid.* at 401.

England], no doubt they would be accompanied by a similar provision to that found in Germany".¹⁴

B. Implication of the Definition

If a morganatic marriage in the British royal family is accompanied by provisions comparable to those found in Germanic law, the law respecting the succession to the throne would need to be altered to deny any hypothetical heirs access to the British throne. The *Bill of Rights, 1688*¹⁵ as well as the events surrounding the abdication of King Edward VIII in 1936 suggest that legislation enacted by the British parliament would be the most appropriate vehicle to fulfill this change.

Following James II's de facto abdication and flight from the kingdom in 1688, Parliament sought to prevent divisions that might arise by reason of any pretended titles to the Crown. In order to preserve certainty in the succession, Parliament passed the *Bill of Rights*, which states the following:

All which their Majestyes are contented and pleased shall be declared enacted and established by authoritie of this present Parliament and shall stand remaine and be the law of this realme for ever And the same are by their said Majesties by and with the advice and consent of the lords spirituall and temporall and commons in Parlyament assembled and by the authoritie of the same declared enacted and established accordingly.¹⁶

Ever since, all matters concerning the office of the sovereign and the rules of succession can be altered or limited by Act of the Lords Spiritual and Temporal and Commons at Westminster. This principle was applied during the official abdication of King Edward VIII.

In 1936, Edward VIII abdicated the throne in order to marry a twice-divorced American commoner, Mrs. Wallis Warfield Simpson. King Edward surrendered his title and his throne in order to marry. The next in line of succession, his brother, the former Duke of York and the father of the present Queen, took his place.¹⁷

The parliament at Westminster assumed that an Act would be necessary in order to effect His Majesty's abdication and provide that His Royal Highness the Duke of

¹⁴ *Ibid.*

¹⁵ *Bill of Rights, 1688* (U.K), 1 Will. & Mar. Sess. 2, c. 2 [*Bill of Rights*].

¹⁶ *Ibid.*, s. 1.

¹⁷ For the story of the abdication crisis, see generally R. T. E. Latham, *The Law and the Commonwealth* (Westport: Greenwood Press, 1970) at 616-30 (Appendix); John G. Plumptre, "Five Days in December: Churchill and the Abdication", online: The Churchill Centre <<http://www.winstonchurchill.org/i4a/pages/index.cfm?pageid=719>>; "Mr. Baldwin's Memorable Speech" *The Guardian* (11 December 1936), online: Guardian Century <<http://www.guardiancentury.co.uk/1930-1939/Story/0,6051,127059,00.html>>; "King Edward Renounces the Throne" *The Guardian* (11 December 1936), online: Guardian Century <<http://www.guardiancentury.co.uk/1930-1939/Story/0,6051,127047,00.html>>.

York should succeed to the throne. At the time, succession to the throne was governed by the *Act of Settlement, 1700*,¹⁸ which made no provision for abdication or for succession consequent upon abdication. It was also necessary to amend that act in order to give effect to the abdication and to eliminate Edward VIII and his issue from the succession.¹⁹

An Act of Parliament was also thought necessary in order to exempt Edward VIII and his descendants from the application of the *Royal Marriage Act, 1772*.²⁰ That Act provides a measure of control over the marriages of those who might succeed to the throne by forbidding the descendants of King George II from marrying without the imprimatur of royal assent, authorized under the Great Seal of the Realm and declared and sworn in council. It would have been considered inappropriate to apply those provisions to Edward VIII and his descendants after they ceased to have any right in the succession.²¹

In the course of negotiations between Edward VIII and the government, the king proposed that the crisis could be resolved by legislation authorizing a morganatic union between himself and Mrs. Simpson. The prime minister at the time, Stanley Baldwin, refused to reply to the request directly, telling the king that further consultation would be required between the cabinet and the first ministers of the dominions. But in the meantime, he did not think the British parliament would ever agree to pass such a bill.²²

At the king's insistence, Mr. Baldwin proceeded to frame a formal examination of the question of morganatic marriage. He presented the first ministers of the dominions with three possibilities. The first of these was a "conventional" union, the second a "morganatic" union, and the third the king's abdication and replacement. This proposal was communicated to the dominion governments on 27 November 1936. By 2 December, Mr. Baldwin had his answer. The British cabinet had met and decided against legislation allowing a morganatic union. The first ministers of the dominion governments were also opposed to such a marriage. The Canadian government declared itself in favour of the king retaining his throne—without, of course, marrying Mrs. Simpson. Australia, South Africa, and New Zealand, as well as the cabinet of the Baldwin government, declared themselves in favour of abdication if Edward married a twice-divorced commoner. Eamon de Valera of Ireland argued for the first option, on the basis that as divorce was legal, King Edward should have been allowed to marry a divorcee.

¹⁸ *Act of Settlement, 1700* (U.K.), 12 & 13 Will. III, c. 2 [*Act of Settlement*].

¹⁹ See *House of Commons Debates*, 18th Parl., 2nd sess., vol. I (19 January 1937) at 66-67 (Right Hon. W.L. Mackenzie King) [*H.C. Debates*, 18th Parl.].

²⁰ *Royal Marriage Act, 1772* (U.K.), 12 Geo. III, c. 11 [*Royal Marriage Act*].

²¹ See *H.C. Debates*, 18th Parl., *supra* note 19 at 67.

²² For a peculiar explanation of the various attempts made by the government at Westminster to deal with the abdication crisis, see S.M. Cretney, "The Divorce Law and the 1936 Abdication Crisis: A Supplemental Note" (2004) 120 Law Q. Rev. 163.

The king, greatly offended by the position of the United Kingdom government and the majority of dominions, declared that he regarded the matter as closed. He abdicated voluntarily on 10 December 1936 and *His Majesty's Declaration of Abdication Act, 1936*²³ was passed.

As discussed above, if a morganatic marriage had the effect of denying any children access to the throne, the laws of succession would be altered. An Act of Parliament would be required to amend these laws. The second paragraph of the preamble to the *Statute of Westminster* would therefore apply. If the morganatic marriage were to disinherit only the spouse and not the children, however, then it would not affect the succession to the throne and would not require the application of the second paragraph of the preamble to the *Statute*. As a result, the consent of Canada and of the other members of the Commonwealth would not be required, either legally or conventionally.

When Prince Charles married Lady Diana Spencer, the Queen's Privy Council in Canada met briefly on 27 March 1981. Chief Justice Laskin (acting in his capacity as deputy governor general) presided over the meeting, which was attended by Prime Minister Trudeau, nine ministers, one Conservative member of Parliament, and one member of Parliament from the New Democratic Party. The chief justice read a message from the Queen in which she stated that she approved of the marriage. The Queen's Privy Council in Canada simply took note accordingly.²⁴ Unlike Edward VIII's Marriage, Prince Charles's marriage to Lady Diana Spencer did not affect the succession to the throne. There was therefore no question of Canada and the other dominions giving their consent pursuant to the second paragraph of the preamble to the *Statute of Westminster*.²⁵

Before proceeding to an analysis of the second paragraph of the preamble to the *Statute* and qualifying the assent that may need to be given to such legislation, it is important to put the *Statute* in context.

II. The *Statute of Westminster* and Its Preamble

Three conferences held in 1926, 1929, and 1930 sought to redefine the status of the dominions within the context of the British Empire. The report of the Inter-imperial Relations Committee, Imperial Conference of 1926, asserted that Great Britain and the dominions were "autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic

²³ *His Majesty's Declaration of Abdication Act, 1936* (U.K.), 1 Edw. VIII & 1 Geo. VI, c. 4 [*Abdication Act*].

²⁴ P.C. 1981-879, National Archives of Canada.

²⁵ *Supra* note 2. For further studies about potential situations that may affect the rules touching succession to the throne, see Rodney Brazier, "Skipping a generation in the line of succession" (2000) P.L. 568 and Joseph Jaconelli, "Regency and parliamentary sovereignty" (2002) P.L. 449.

or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.”²⁶

The Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation of 1929 discussed the matter of incompatibility and repugnancy between dominion legislation and United Kingdom legislation contemplated by the *Colonial Laws Validity Act, 1865*.²⁷ It recommended “that no law passed by a dominion should be void or inoperative for repugnancy to United Kingdom legislation and, in positive terms, that a dominion parliament should have the power to repeal any United Kingdom Act so far as it was part of the law of the dominion.”²⁸

The Imperial Conference of 1930 saw the adoption of two resolutions. The first regarded the approval of the report of the Conference on the Operation of Dominion Legislation of 1929 (“*O.D.L. Report*”).²⁹ The objective of the 1929 conference was to be an in-depth follow-up on the 1926 Imperial Conference that considered removing the legislative and conventional inequalities subsisting between the United Kingdom and the dominions by means of enactment of reciprocal statutes based upon consultation and agreement.³⁰ The recommendations made by these conferences confirmed that it is “the interaction and co-operation of law with convention which is characteristic of the constitutional structure of the British Commonwealth,” rather than the isolation of one from the other.³¹

The second resolution recommended the enactment by the United Kingdom of the *Statute of Westminster*, which embodied the positive proposals arising from the proceedings of 1926 and 1930. The *Statute of Westminster* was adopted and received assent on 11 December 1931.

For Canada, the *Statute* outlined the inauguration of new powers for Parliament and the legislatures. By virtue of sections 2, 4, and 7, the *Statute* ended Canada’s obligation to have legislation compatible with Westminster’s and abolished British legislative supremacy over other dominion statutes, except where amendment of the constitution was concerned. Furthermore, it left the dominions with full authority over their foreign affairs. This last competence, combined with some of the other constitutional provisions dating from 1867, gave Canada the power to institute its own highest court of last resort (in 1933 for criminal matters and 1949 for all other matters) instead of going to the Judicial Committee of the Privy Council.

²⁶ As reprinted in Arthur Berriedale Keith, ed., *Speeches and Documents on the British Dominions 1918-1931: From Self-government to National Sovereignty* (Oxford: Oxford University Press, 1966) at 161.

²⁷ *Supra* note 3. See *ibid.* at 183-86.

²⁸ *House of Commons Debates*, 17th Parl., 2nd sess., vol. III (30 June 1931) at 3196 (Right Hon. R.B. Bennett) [*H.C. Debates*, 17th Parl.].

²⁹ As reprinted in Keith, *supra* note 26 at 173.

³⁰ See *ibid.* at 166.

³¹ Wheare, *supra* note 7 at 124. See also “The Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929”, reprinted in Keith, *supra* note 26 at 188.

The *Statute* was not applied universally. Canada adopted it³² although an exception was provided under section 7, which left amendment of the constitution of Canada under the authority of the UK parliament. Australia and New Zealand adopted portions of the legislation, but delayed its complete adoption until 1943 and 1947 respectively.³³ They also had protective provisions similar to Canada's added to the *Statute*. South Africa and Ireland not only adopted the *Statute*, but also interpreted it to be even more generous than it was intended to be.³⁴

The second paragraph of the preamble to the *Statute of Westminster* is particularly pertinent for our purposes. The preamble is not part of the substantive body of the legislation, but it provides the *Statute's* only explicit reference to the nature of the relationship between the United Kingdom and the dominions in the matter of the succession to the throne and the royal style and titles. Recall that the second paragraph states 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."³⁵

Before we can understand the nature of this requirement of assent, we must first determine the existing law respecting the succession to the throne and the royal style and titles. In particular, does the word "law" in this paragraph include both statutes and customary rules of descent, or only statutes?

A. *The Law respecting the Succession to the Throne*

Only a few statutes address the rules of succession to the throne, including certain provisions regarding the descent of the throne, the regency, and the Protestant succession to the throne. The *Bill of Rights, 1688*³⁶ proclaimed William III, Prince of Orange, and his wife Mary, Princess of Orange and daughter of the deposed King James II, King and Queen of England. The *Bill of Rights* also treated the posterity of the monarch and the power of Parliament to legislate regarding the Crown.

The subsequent *Act of Settlement*³⁷ further entrenched Parliament's power to determine title to the throne. Section 1 asserted that only Protestant descendants of Princess Sophia, the Electress of Hanover and the granddaughter of James I, would be

³² Canada requested the adoption of the *Statute of Westminster* through a joint address passed by the House of Commons on 30 June 1931 and by the Senate on 6 July 1931. See *H.C. Debates*, 17th Parl., *supra* note 28 at 3191; *Senate Debates*, 17th Parl., 2nd sess., (6 July 1931) at 321. Today, the *Statute* is part of the Canadian constitution by virtue of paragraph 52(2)(b) of the *Constitution Act, 1982*, *supra* note 4.

³³ *Statute of Westminster Adoption Act 1942* (Cth.); *Statute of Westminster Adoption Act 1947* (N.Z.), 1947/38, 11 RS 393.

³⁴ For an in-depth study of the status of each dominion, see Wheare, *supra* note 7 at 176-276.

³⁵ *Statute of Westminster*, *supra* note 2, Preamble, para. 2.

³⁶ *Supra* note 15.

³⁷ *Act of Settlement*, *supra* note 18.

eligible to succeed to the throne.³⁸ The *Union with Scotland Act, 1706*,³⁹ as well as *Princess Sophia's Precedence Act*⁴⁰ reinforced these provisions while uniting England and Scotland under a single Crown. The *Act of Union* stipulated furthermore that the sovereign had to be in communion with the Church of England, to swear to preserve the Churches of England and Scotland, and finally to promise to observe and uphold the Protestant succession. These principles were confirmed in subsequent statutes.⁴¹

While certain rules touching the succession to the throne have thus been enacted since the Revolution of 1688, others are still confined to common law principles. The ancient feudal principle of primogeniture⁴² dictates that men have precedence over women, in a direct line from the sovereign, in order of succession to the throne. This rule originates in the feudal path of descents to land. The Crown too descends lineally to the issue of the reigning monarch, and the preference of males over females is strictly adhered to. Upon failure of the male line, the Crown descends to the female issue, but among the females, it descends by right of primogeniture to the eldest daughter only and not, as in common inheritances, to all the daughters at once.⁴³

By constitutional custom, these laws and principles are part of a system that is *sui generis*.⁴⁴ The amalgamation of these statutes and customary principles constitute the office of the sovereign as well as the rules of succession. Sir William Blackstone wrote that the

³⁸ The Superior Court of Ontario in *O'Donohue v. Canada* (2003), 109 C.R.R. (2d) 1, [2003] O.T.C. 623 recently rejected an application that aimed to declare certain provisions of the *Act of Settlement, 1700* of no force or effect as they were considered to discriminate against Roman Catholics in violation of the equality provisions of subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, *supra* note 4 [*Charter*]. Justice Rouleau concluded that the rules of succession to the Crown are necessary for the proper functioning of the Canadian constitutional monarchy and are part of the Canadian constitution (*O'Donohue v. Canada*, *ibid.* at para. 37). Therefore, they are not subject to *Charter* scrutiny. After highlighting that the *Act of Settlement* is a key element of the rules governing succession to the British Crown, Mr. Justice Rouleau affirmed the following:

[I]t is clear that Canada's structure as a constitutional monarchy and the principle of sharing the British monarch are fundamental to our constitutional framework. In light of the preamble's clear statement that we are to share the Crown with the United Kingdom, it is axiomatic that the rules of succession for the monarchy must be shared and be in symmetry with those of the United Kingdom and other Commonwealth countries. One cannot accept the monarch but reject the legitimacy or legality of the rules by which this monarch is selected (*ibid.* at para. 27).

³⁹ *Union with Scotland Act, 1706* (U.K.), 6 Anne, c. 11, Article II [*Act of Union*].

⁴⁰ *Princess Sophia's Precedence Act, 1711* (U.K.), 10 Anne c. 8.

⁴¹ See *e.g. Accession Declaration Act, 1910* (U.K.), 10 Edw. VII & Geo. V, c. 29, s. 1.

⁴² See P. W. Noonan, *The Crown and Constitutional Law in Canada* (Calgary: Scripnoon Publications, 1998) at 30.

⁴³ See William Blackstone, *Commentaries on the Laws of England*, vol. 1 (Oxford: Clarendon Press, 1765; reprinted Chicago: University of Chicago Press, 1979) at 186-87.

⁴⁴ See Henry John Stephen, *Commentaries on the Law of England*, vol. 2 (London: Butterworths & Co., 1914) at 550.

fundamental maxim upon which the *jus coronae*, or right of succession to the throne of these kingdoms, depends, I take to be this: “that the crown is, by common law and constitutional custom, hereditary; and this in a manner peculiar to itself: but that the right of inheritance may from time to time be changed or limited by act of parliament; under which limitations the crown still continues hereditary”.⁴⁵

The phrase “law touching the Succession to the Throne” in the second paragraph of the preamble to the *Statute of Westminster* therefore refers to statutes as well as customary rules of descent. Some of these provisions would necessarily be affected by a morganatic marriage that denies the children access to the throne. The second paragraph of the preamble would apply to *any* attempt to alter the rules of descent, accession or succession.

B. The Royal Style and Titles

The sovereign is described according to her royal style and titles in legislation, proclamations, and treaties. Queen Elizabeth II, who acceded to the throne on 6 February 1952, was proclaimed at that time in Canada as “our only lawful and rightful Liege Lady Elizabeth the Second by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas, QUEEN, Defender of the Faith, Supreme Liege Lady in and over Canada ...”.⁴⁶

Before 1952, the Crown rested on the principle of indivisibility and unity and was for all the members of the Commonwealth described and proclaimed by the same title. But after events such as the independence of Ceylon from the British Empire in 1947, the secession of the Republic of Ireland from the Commonwealth in 1949, the adoption by India of a republican constitution in 1950 and the acknowledgement of the diversity of religious and secular countries among the Commonwealth, the adoption of a suitable and appropriate form of title for each country in the Commonwealth was desired. The use of the words “British Dominions beyond the Seas” was also the source of several objections.⁴⁷

In order to recognize the particular circumstances of each government while retaining a substantial common element,⁴⁸ the British parliament passed the *Royal Titles Act*⁴⁹ in 1953. A royal proclamation⁵⁰ was issued the same year, reciting the altered style and titles of the Crown. Each monarchy of which the queen was sovereign was to enact its own legislation, allowing the queen to adopt a title suitable

⁴⁵ Blackstone, *supra* note 43 at 184.

⁴⁶ Proclamation, 6 February 1952, C. Gaz. I.322.

⁴⁷ See e.g. S.A. de Smith, “The Royal Style and Titles” (1953) 2 I.C.L.Q. 263 at 267-68.

⁴⁸ See William Dale, *The Modern Commonwealth* (London: Butterworths, 1983) at 36.

⁴⁹ *Royal Titles Act, 1953* (U.K.), 1 & 2 Eliz. II, c. 9 [*Royal Titles Act*].

⁵⁰ Elizabeth R., Proclamation, 29 May 1953, *London Gazette* (No. 39873, 26 May 1953, 11th Supp.), online: London Gazette <<http://www.gazettes-online.co.uk>>.

to the country but with a common element symbolizing the role of the sovereign as a unifying factor in the Commonwealth.

Canada fulfilled this obligation with the *Royal Style and Titles Act*,⁵¹ which received assent on 11 February 1953. The form became the following: Elizabeth II, by the Grace of God of the United Kingdom, Canada, and her other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith.

If it were decided to celebrate a morganatic marriage in the royal family, a bill adopted to give effect to such a union would not necessarily alter the royal style and titles. If a morganatically married prince were to succeed to the throne, a title suitable to the new king and a royal style would be assumed upon his accession. The monarchy would continue, the royal style and titles would not be altered, the *Statute of Westminster* would not apply and the assent of the Commonwealth members' governments would not be required.

C. Assent

The legislation enabling a morganatic marriage would not necessarily have to include any specific reference to heirs. Nevertheless, a bill describing a marriage as morganatic could logically be interpreted to imply that the issue of the union could not legitimately inherit his or her parent's title of dignity. The preamble to the *Statute of Westminster* would certainly apply in such a case. The parliaments of the United Kingdom and the Commonwealth members would have to assent to such legislation. If the legislation sought to disinherit only the spouse and not the children, however, then the morganatic marriage would not affect the succession and therefore would not require the application of the preamble to the *Statute*: neither Canada's assent nor that of any of the other Commonwealth members would be required on a legal or a political basis.

If the customary manner in which monarchs succeed to the throne changes, it shall be imperative to determine whether the consent required by the *Statute of Westminster* is merely conventional, or whether it is invested with the full force of law. As stated previously, rules of strict law "possess the distinguishing formal characteristic that they are those rules recognized, accepted, and applied by the courts in the determination of disputes."⁵² Conventions, on the other hand, are rules elaborated empirically by political agreement and not sanctioned by courts. Conventions can take the form of declarations, unwritten principles, or precedents. It is primarily governments themselves that sanction conventions.

The preamble to most statutes is merely declaratory. Preambles are considered ancillary to the interpretation of rules of strict law; they indicate the spirit in which

⁵¹ R.S.C. 1985, c. R-12. This Act came into force on 28 May 1953.

⁵² Wheare, *supra* note 7 at 1. See also Dicey, *supra* note 7 at 23-24.

laws should be understood. For example, the preamble to the *Constitution Act, 1867*⁵³ has had a substantial impact upon the interpretation of the mandatory provisions of that document. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*,⁵⁴ the Supreme Court of Canada held that the preamble to the *Constitution Act, 1867* was of utility inasmuch as it could be used to identify implicit rights and privileges that could be integrated within the canon of strict law.

In my view, the second paragraph of the preamble to the *Statute of Westminster* should be regarded as a mere convention, ascertaining “the established constitutional position of all the members of the Commonwealth.” It has the irresolute status of a declaration and not the binding effect of a rule of strict law.

On 30 June 1931, in an address to His Majesty, the Canadian parliament asked the British parliament to enact the second paragraph of the preamble to the *Statute* as a rule of strict law. In the text of the address, Prime Minister R.B. Bennett stated that

in the vital matter of succession to the common throne, action by all the dominion parliaments as well as the United Kingdom parliament should be required to effect a change. ... It was desirable that in legislating in the matter of succession to the common throne we should make a declaration that no change in respect to that matter should be had unless by the common action of all concerned.⁵⁵

But the parliament at Westminster declined to enact the preamble as an operative clause, being of the opinion that the convention expressed in its second paragraph “should not be enacted in the main body of the Statute itself.”⁵⁶

The British response was in conformity with a resolution adopted and included in the *O.D.L. Report* adopted at the 1930 Imperial Conference.⁵⁷ This resolution held that it is the constitutional duty of Commonwealth parliaments (or at least the United Kingdom parliament) not to alter the law touching the succession to the throne or the royal style and titles unless the other Commonwealth parliaments have first given their assent, but that where such legislation is urgently necessary and prior consultation is impracticable, subsequent assent is sufficient.

The parliament of the United Kingdom therefore has the plain authority to adopt an Act altering the succession to the throne or the royal style and titles without the

⁵³ *Supra* note 1.

⁵⁴ [1993] 1 S.C.R. 319. For a concise and detailed analysis of a constitutional convention, see *Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753. This is the leading Canadian (and perhaps Commonwealth) case on the subject.

⁵⁵ *H.C. Debates*, 17th Parl., *supra* note 28 at 3196. By “the common action of all concerned”, the prime minister referred to monarchies of which the United Kingdom’s king was sovereign.

⁵⁶ Wheare, *supra* note 7 at 149. By way of contrast, South Africa included the second paragraph of the *Statute* in the Schedule to the *Status of the Union Act, 1934*, No. 69 of 1934. Wheare writes: “[T]he rule became, for the Union [of South Africa], not only a convention, but also a rule of strict law” (*supra* note 7 at 279).

⁵⁷ See *supra* note 29 and accompanying text.

previous assent of the Commonwealth parliaments. This is the spirit in which the second paragraph of the preamble to the *Statute* must be considered. The assent required in the second paragraph is not compulsory and is merely the expression of a constitutional convention.

But as argued by Professor Wheare, the preamble to the *Statute of Westminster* could have more than a conventional impact in some circumstances when supplemented by the rule of construction enacted in terms of strict law.⁵⁸ For example, the rule affirmed in paragraph 3 of the preamble could be supplemented by the rule of strict law enacted in section 4 of the *Statute*. Paragraph 3 reads as follows:

And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion.⁵⁹

While section 4 announces that

[n]o 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.⁶⁰

In other words, where an Act of the parliament of the United Kingdom would extend to a dominion as part of its law, meaning that the parliament of the United Kingdom would legislate for the dominion, the consent of the dominion would be requested in order to *expressly* declare and include in that Act that the dominion has consented to its enactment. Therefore, the assent required from the dominion would be compulsory and no Act of the parliament of the United Kingdom would extend to a dominion without its express consent. It is the combination of paragraph 3 of the preamble with section 4 that would find application: the assent here would have the effect of a rule of strict law.

If the assent of the dominions were requested only to *confirm* any modification in the laws of succession or the royal style and titles, the assent would have no legal effect. It is the emerging conventional force of the preamble itself which would apply, not the binding effect of paragraph 3 combined with section 4.

1. Application of the *Statute* in 1936-37, 1947, and 1952

On 10 December 1936, the House of Commons of the United Kingdom received King Edward VIII's declaration of abdication. The same day, *An Act Respecting His Majesty's Declaration of Abdication*⁶¹ was introduced into the House of Commons.

⁵⁸ Wheare, *supra* note 7 at 278-81.

⁵⁹ *Supra* note 2, Preamble, para. 3.

⁶⁰ *Ibid.*, s. 4.

⁶¹ *Supra* note 23.

The Canadian parliament did not have time to meet, so the dominion government delegated its power to the imperial government through an order in council in the form of a cable sent to Westminster.⁶² The order asked the imperial parliament to pass legislation declaring the sovereignty of George VI in Canada and in the British Isles, and expressly including Canada's request and consent. The UK parliament did this in accordance with paragraph 3 of the preamble and section 4 of the *Statute of Westminster: His Majesty's Declaration of Abdication Act, 1936* includes in its preamble the communication of the Dominion of Canada's request and consent to its enactment.⁶³

As a second step, the Canadian parliament convened on 19 January 1937 to give assent to the British *Abdication Act* by adopting another new item of legislation: *An Act Respecting Alteration in the Law Touching the Succession to the Throne*.⁶⁴ It was designed, according to Prime Minister Mackenzie King, "to carry out the constitutional convention expressed in the preamble to the Statute of Westminster" even though, as recognized by Mackenzie King himself, the preamble "is not an operative part of the statute."⁶⁵

Therefore, despite the fact that the established procedure was not followed and events did not occur in the order they should have, we can assume that *An Act Respecting Alteration in the Law Touching the Succession to the Throne* was enacted merely on the basis of the constitutional convention expressed in the second paragraph of the preamble to the *Statute*. Such a bill was required to indicate Canada's assent to the alteration of the law touching the succession to the throne brought about by the adoption of the *Abdication Act* in the UK.

The preamble to the *Statute of Westminster* was applied again in 1947, when the Canadian parliament gave effect to the omission from the royal style and titles of the words "*Indiae Imperator*" and "*Emperor of India*". The Canadian House of Commons assented to the alteration of His Majesty's titles as defined in the British *Royal and Parliamentary Titles Act, 1927*.⁶⁶ Paragraph 3 of the preamble and section 4 of the *Statute* did not apply in this case because royal proclamation was the vehicle

⁶² See *H.C. Debates*, 18th Parl., *supra* note 19 at 71.

⁶³ *Abdication Act*, *supra* note 23. Subsection 1(1) provided that the instrument of abdication would take effect and Edward VIII would cease to be king. By the same time, there would be a demise of the Crown, and "the member of the Royal Family then next in succession to the Throne [would] succeed thereto." Subsection 1(2) deprived Edward VIII and his descendants of any title to the throne. Subsection 1(3) freed him and his descendants from the operation of the *Royal Marriage Act*, *supra* note 20: in other words, Edward was allowed to marry without the consent of the new king.

⁶⁴ S.C. 1937, c. 16, which received assent on 31 March 1937. This Act contained Canada's assent relative to the enactment of the British *Abdication Act*, *ibid*.

⁶⁵ *H.C. Debates*, 18th Parl., *supra* note 19 at 67.

⁶⁶ (U.K.), 17 & 18 Geo. V, c. 4. This assent was affirmed in *The Royal Style and Titles Act (Canada)*, 1947, S.C. 1947, c. 72, which was assented to on 17 July 1947 and went into force on 22 June 1948.

giving effect to the alteration.⁶⁷ As a result, there was no statute to extend to Canada and no request and consent to express. The *Royal Style and Titles Act (Canada), 1947* was required by the conventional force of the second paragraph of the preamble to the *Statute of Westminster*.

As we have seen,⁶⁸ during the Commonwealth Conference of 1952, Her Majesty's governments agreed that the royal style and titles needed to be altered to more adequately reflect their recognition of the Crown as the symbol of their free association and of the sovereign as the head of the Commonwealth. When the British parliament passed the *Royal Titles Act*⁶⁹ in 1953, a royal proclamation was declared for Canada providing for such an alteration. Canada satisfied its obligation to allow the queen to alter her title in a suitable manner by enacting the *Royal Style and Titles Act*.⁷⁰ Once more, paragraph 3 of the preamble and section 4 of the *Statute* did not apply because the alteration was done through a royal proclamation. Again, there was no statute to extend to Canada and no enforced request and consent to express.

It is therefore not the legal force of the preamble which effected the adoption of the bill to secure the assent to the changes in the laws of succession and the royal style and titles, but rather the emerging convention that the preamble describes.

2. Application of the *Statute* after 1982

The *Statute of Westminster* is still a valid part of Canada's constitution. If a morganatic marriage were celebrated today, the UK parliament would have to enact legislation and Canada would have to give its assent to that legislation.

Nevertheless, the manner in which the *Statute of Westminster* would apply today would differ in some ways from its application in 1936-37, 1947, and 1952. Since 1982, sections 4 and 7(1) have been repealed by the adoption of the *Canada Act 1982*,⁷¹ which patriated Canada's constitution. The *Canada Act* aimed to make the parliament of Canada and the legislatures of the provinces the only authorities competent to amend the constitution of Canada. The patriation of the Canadian constitution therefore had the effect of abrogating section 4 of the *Statute of Westminster* as it applies to Canada, since no law enacted by the parliament of the United Kingdom will apply to Canada even if the latter requests and consents to its application.

⁶⁷ George R., Proclamation, 22 June 1948, *London Gazette* (No. 38330, 22 June 1948), online: [London Gazette <http://www.gazettes-online.co.uk>](http://www.gazettes-online.co.uk).

⁶⁸ See text accompanying note 49. See Dale, *supra* note 48.

⁶⁹ *Supra* note 49.

⁷⁰ *Supra* note 51.

⁷¹ *Canada Act 1982* (U.K.), 1982, c. 11. Readers will recall that the *Constitution Act, 1982*, *supra* note 4, was enacted as Schedule B to the *Canada Act*.

In the eventuality of a royal morganatic marriage, the second paragraph of the preamble to the *Statute* will apply. Based upon what happened in 1936-37, 1947, and 1952, by constitutional convention, Canada's parliament⁷² would adopt a bill to secure the assent required to alter the laws of succession—but no enforceable request and consent would have to be given to extend any United Kingdom legislation to Canada.

III. The Commonwealth

In 1931, the *Statute of Westminster* applied to only a few countries in the British Empire. Aside from the United Kingdom itself, these included the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa and the Irish Free State.⁷³ All were freely associated members of the Commonwealth, united by a common allegiance to the Crown.

Today, the Commonwealth consists of fifty-three countries. Thirty-two of these countries are republics, sixteen have constitutional monarchies with Queen Elizabeth II as their head of state, and five have national monarchies of their own.⁷⁴ In the event of a royal morganatic marriage, one question that may arise is whether the convention expressed in the second paragraph of the preamble to the *Statute of Westminster*

⁷² In my view, a morganatic marriage would not require the amendment of Canada's constitution. Paragraph 41(a) of the *Constitution Act, 1982*, (*ibid.*) which provides for the unanimous consent of Parliament and the ten provincial legislatures, applies only when an amendment affects the office of the queen, the governor general, or the lieutenant governor of a province. This paragraph covers the existence of these offices and major changes to their nature such as those affecting power, authority, or functions. It seems clear that paragraph 41(a) does not apply to the conditions under which a royal marriage is being made. I could find no constitutional rule or convention that requires the consent of the provinces in the case of a royal marriage, be it morganatic or not. This leads to the conclusion that only Parliament has to act if Canada's consent is required in accordance with the second paragraph of the preamble to the *Statute of Westminster*, and not the legislatures of the provinces.

However, I do not wish at present to comment regarding either the existence of a convention requiring the consent of the provinces or the strict application of paragraph 41(a), in the case of any change to the rules governing the succession to the throne or the royal style and titles that either do not result from a marriage or that would be more fundamental than the ones discussed in this essay. It is possible that such a change could be of such a nature or extent that it would affect the office of the queen, the governor general and the lieutenant governor of a province, and therefore require a constitutional amendment under 41(a). Needless to say, if Canada breaks symmetry with Great Britain and recognizes a different monarch than Great Britain's or abolishes monarchy altogether, paragraph 41(a) would have to be applied.

⁷³ *Statute of Westminster*, *supra* note 2, s. 1.

⁷⁴ See Commonwealth Secretariat, *Development & Democracy: Report of the Commonwealth Secretary-General 2003* (London: Commonwealth Secretariat, 2003) at 44, online: Commonwealth Secretariat <http://www.thecommonwealth.org/Templates/Internal.asp?Node_ID=36135> [*Development & Democracy*]. A fifty-fourth member, Zimbabwe, left the Commonwealth in December 2003: see Commonwealth Secretariat, "Zimbabwe's Withdrawal from the Commonwealth", online: Commonwealth Secretariat <<http://www.thecommonwealth.org/Templates/Internal.asp?NodeID=35505>>.

requires all fifty-three countries to assent to the alteration, or only the sixteen monarchies that are united by common allegiance to Queen Elizabeth II.

For a proper understanding of the terms “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” in the second paragraph of the preamble,⁷⁵ it is appropriate to remember the principle which governs the descent, accession and succession to the Crown. As mentioned earlier, the *Bill of Rights* established parliamentary control over the succession to the throne.⁷⁶ As a result, United Kingdom legislation altering the succession to the throne would have effect in the dominions.

With the adoption of the *Statute of Westminster*, the dominions became autonomous with regard to their domestic and external affairs, no longer subordinated to the United Kingdom. But the convention that declared the parliament at Westminster the only authority with power to alter the succession to the throne and the royal style and titles applies equally to the dominions: it has become part of the constitutional principles regulating the office of the sovereign in each state. This was decided upon consultation at the Conference on the Operation of Dominion Legislation of 1929 and included in the *O.D.L. Report*:

59. As, however, these freely associated members are united by a common allegiance to the Crown, it is clear that the laws relating to the succession to the Throne and the Royal Style and Titles are matters of equal concern to all.

60. We think that appropriate recognition would be given to this position by means of a convention similar to that which has in recent years controlled the theoretically unfettered powers of the Parliament of the United Kingdom to legislate upon these matters.⁷⁷

The laws of succession or the royal style and titles could still be altered merely by the adoption of a bill by the parliament at Westminster. However, since the United Kingdom no longer has power to legislate for members of the Commonwealth, I consider that the constitutional convention expressed in the second paragraph of the preamble was meant to be recognized and applied only to the sixteen members of the Commonwealth that are united by a common allegiance to the Crown and where the office of the sovereign is determined by statute.

Upon this basis, I also argue that the *Statute of Westminster* would apply beyond the six jurisdictions that were originally enumerated at section 1 of the *Statute*. One of the primary objectives leading to the adoption of the *Statute* was the desire for reciprocal status based on consultation and agreement with the United Kingdom. This has created a protocol of cooperation and interaction of law and convention similar to

⁷⁵ *Statute of Westminster*, *supra* note 2, Preamble, para. 2.

⁷⁶ See text accompanying note 15.

⁷⁷ *O.D.L. Report*, reprinted in Keith, *supra* note 26 at 188-89.

that which controls the powers of the parliament of the United Kingdom to legislate upon matters touching the Crown.

I argue that these objectives remain important unifying characteristics of the sixteen member nations of the Commonwealth.⁷⁸ This minority of nations would be constitutionally and domestically concerned by an alteration of the laws of succession. They would therefore be required, in the conventional sense, to give their assent to any change in the rules of descent, accession, and succession of the monarch. But none of them would be legally obliged to give it.

Conclusion

The *Statute of Westminster* and the other historical documents examined in this article are essential to any interpretation of the complex interplay of rules and conventions that give Canada a voice in significant changes affecting the monarchy.

The issue of a morganatic marriage has been a useful tool to analyze the constitutional bearing of the second paragraph of the preamble to the *Statute*. Given the conventional impact of this preamble, the assent of Canada and the fifteen other members of the Commonwealth that recognize Queen Elizabeth II as their head of state would be required in order to effect any change touching the succession to the throne or the royal style and titles. Such assent would be necessary in order to uphold their common allegiance to the Crown, their free association as members of the British Commonwealth, as well as their tradition of cooperation.

⁷⁸ The members of the Commonwealth that recognize Queen Elizabeth II as Head of their state are: Antigua and Barbuda, Australia, Bahamas, Barbados, Belize, Canada, Grenada, Jamaica, New Zealand, Papua New Guinea, Solomon Islands, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Tuvalu, and the United Kingdom as a Realm of the Commonwealth (see *Development & Democracy*, *supra* note 74 at 44).