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SUCCESSION TO THE THRONE AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

*Christopher Cornell**

THIS article looks at the legal challenge raised in *Teskey v. Canada (Attorney General)* (*Teskey*) against the pending changes to the legal rules governing succession to the thrones of the sixteen countries of which Queen Elizabeth II is monarch, at least as far as they apply to Canada,¹ as well as the pending changes themselves.** Part I explains the motivation to change the rules governing succession. Part II discusses the current rules governing succession to the throne and the background of those rules. Part III discusses the agreement that led to the pending changes to the rules of succession. Part IV discusses *Teskey's* Charter challenge to the proposed changes to the line of succession and the relevant legal background information. Part V concludes.

I. IMPETUS FOR CHANGE

The rules governing the succession to the thrones of the sixteen kingdoms of which Queen Elizabeth II (the Queen) is monarch have developed over the centuries in a manner that has left them with certain aspects that can charitably be described as unnecessarily unfair or discriminatory.² Concerns over those discriminatory provisions governing the succession to their shared monarchy led David Cameron, Prime Minister of The United Kingdom, to convene a meeting of all sixteen of the

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** Editor's Note: As this issue went to press it was announced that the legal and legislative process to implement the changes to the line of succession discussed in this article had been completed and that the changes would go into effect on March 26, 2015. *E.g.*, Commencement of Succession to the Crown Act 2013: Written Statement - HCWS490, 24 Mar. 2015, PARL. DEB., H.C. (2015) 171WS; The Succession to the Crown Act 2013 (Commencement) Order 2015, SI 2015/894 (U.K.).

1. *Teskey v. Canada (Attorney General)*, 2013 ONSC 6386, paras. 1-4 (Can. Ont. Sup. Ct. J.), *aff'd.*, 2014 ONCA 612 (Can. Ont. C.A.).

2. *See* HOUSE OF COMMONS LIBRARY, SUCCESSION TO THE CROWN BILL 2012-2013, 2012-3, H.C. 12/81, at 6 (U.K.).

Queen's prime ministers during the 2011 Commonwealth Heads of Government Meeting in Perth, Australia.³ This meeting in turn led to the Perth Agreement—a unique sixteen-party agreement by the governments of the countries that share the Queen as their Head of State.⁴ The Perth Agreement represents a coordinated effort by all sixteen of the Queen's governments to remove some of the discriminatory provisions governing the succession to the throne.⁵

II. LEGAL HISTORY AND DEVELOPMENT OF THE RULES OF SUCCESSION AND THE SHARED MONARCHY

A. ORIGINS OF THE CURRENT RULES GOVERNING THE SUCCESSION

The rules of succession to the shared crown are derived primarily from the common law and three pieces of seventeenth and eighteenth century English and British legislation: The Bill of Rights, The Act of Settlement, and The Royal Marriages Act, 1772.⁶

At the present, common law rules of succession to the throne operate along the same lines as feudal rules on hereditary land inheritance.⁷ To illustrate, the Crown goes from the reigning monarch to his or her children (or those children's descendants) in the following order: oldest son to youngest son, and then oldest daughter to youngest daughter.⁸

The Bill of Rights, amongst other things, sets out the rule that the monarch may not be a Roman Catholic or married to a Roman Catholic by providing for the automatic removal from the line of succession of any person who was Roman Catholic, became a Roman Catholic, or married a Roman Catholic, while any non-Roman Catholic children of such marriages remain in the line of succession.⁹ As far as it affects succession, The Act of Settlement reiterates the restrictions on Roman Catholics from The Bill of Rights, limits succession to the legitimate Protestant descendants of Sophia, Electress of Hanover, and requires that the monarch become a member of the Church of England if not already a member at the time of his or her ascension to the throne.¹⁰ It bears pointing out that

3. *Id.*

4. *See id.*

5. *See id.*

6. *See infra* notes 7-17.

7. *See* CABINET OFFICE, SUCCESSION TO THE CROWN BILL EXPLANATORY NOTES, 2012-3, H.L., at 5 (U.K.).

8. *See id.*

9. *See* The Bill of Rights, 1688, 1 W. & M. c. 2 (Eng.); *see also* Claim of Right Act 1689, W. & M. c. 28 (Scot.). While certain provisions of The Bill of Rights regulate succession to the throne in most of the U.K. and all of the other realms, within the U.K. nation of Scotland The Bill of Rights is not the law and instead those areas of the succession governed by The Bill of Rights elsewhere are governed in Scotland by substantially similar language in the pre-union Scottish Parliament's Claim of Right Act 1689. *See* Claim of Right Act 1689, *supra*.

10. The Act of Settlement, 1700, 12 & 13 Will. 3 c. 2 (Eng.); *see also* Union with England Act 1707, Ann. c. 7 (Scot.). Similarly to the situation with The Bill of Rights, those provisions of The Act of Settlement regulating succession to the throne in most of the U.K. and all of the other realms are not the law within the U.K. nation

while the restrictions on the religion of the spouses of persons in the line of succession only apply to and discriminate against Roman Catholics,¹¹ the restrictions on the religion of persons in the line of succession, while originally aimed at Roman Catholics, are actually discriminatory against all non-Protestants because in order to be in the line one must be a Protestant.¹² Further, the provisions affecting the monarch individually are even more restrictive as the monarch must belong to the Church of England.¹³

The Royal Marriages Act, 1772, applies to all descendants of George II (which after nearly 250 years for all intents and purposes includes everyone with any real chance of inheriting the throne) except his female descendants who marry into foreign families and the current monarch.¹⁴ The act stipulates that there are only two legal ways for affected persons to marry: (1) they must either receive the monarch's permission for the marriage to occur, or (2) if they are over the age of twenty-five and have been refused the monarch's permission, they may still marry if they declare to the Privy Council an intention to go through with their proposed marriage and twelve months pass without both houses of the U.K. Parliament passing measures declaring their disapproval.¹⁵ The legal consequences for marrying against the Act are rather interesting: a marriage entered into in violation of the act by any descendant of George II to whom the act applies—including Roman Catholics, who cannot even inherit the throne—will legally be considered to have never occurred and therefore the position of any violator in the line of succession will not be affected.¹⁶ Their spouses, on the other hand, will have no legal recognition, and any children of a violating marriage will be considered illegitimate and, amongst other things, be unable to be in the line of succession.¹⁷

of Scotland and instead those areas of the succession governed by The Act of Settlement elsewhere are governed in Scotland by substantially similar language in the pre-union Scottish Parliament's Union with England Act 1707. The one technical difference between the two is that under The Act of Settlement the monarch has to join the Church of England, while under the Union With England Act 1707 the monarch must, in Scotland, preserve and maintain the Presbyterian Church of Scotland. See Union with England Act 1707, *supra*.

11. See The Bill of Rights, *supra* note 9.

12. See The Act of Settlement, *supra* note 10.

13. *Id.*

14. Royal Marriages Act, 1772, 12 Geo. 3 c. 11 (Gr. Brit.).

15. *Id.*

16. See *id.*; see also VERNON BOGDANOR, THE MONARCHY AND THE CONSTITUTION 55 (1995) (discussing the restrictions of the act on Roman Catholic descendants of George II). One notable example of the restrictions in the act actually protecting the royal involved occurred in 1785 when the then Prince of Wales was secretly married, without permission being sought or granted, to Mrs. Fitzherbert who was Roman Catholic. If not for the Royal Marriages Act 1772 voiding his marriage, the Prince of Wales would have been barred by The Bill of Rights and The Act of Settlement from succeeding his father as George IV. See BOGDANOR, *supra* note 16, at 55.

17. See Royal Marriages Act 1772, *supra* note 14.

B. LEGAL HISTORY OF THE SHARED MONARCHY

The historical and legal origin of the shared monarchy can be traced to the passage of the Statute of Westminster 1931 (the Statute), an act of the U.K. Parliament that established the legal framework that enabled Britain's self-governing colonies (then called "dominions") to take complete control of their domestic and international affairs.¹⁸ The Statute itself was largely limited to ensuring that the U.K. Parliament could not pass legislation that was binding on any dominion unless the government of a dominion asked for such legislation.¹⁹ But the Statute also effectively established that the dominions were from that point largely independent. It also led to the later passage of domestic and U.K. legislation making the dominions fully independent, and helped to establish the model for British colonial possessions to transition into fully independent nations (referred to as realms) with their own separate crowns linked via a shared monarch.²⁰ It should also be noted that in discussing the implementation of the agreement there has also been some mention of the Statute's preamble, which purports to set out a requirement that any changes to the laws regarding the line of succession or royal titles must be approved by the parliaments of all of the realms, not just the U.K. Parliament.²¹ The U.K. Government has, however, sidestepped this question in its entirety by pointing out that as the Statute of Westminster is an act of the U.K. Parliament, the preamble and its text cannot impose any legal requirements, though this would not be the case if the requirements in the preamble were part of the body of the statute.²² The Statute of Westminster and its related, subsequent developments can thus be seen as leading to the present shared monarchy where Elizabeth II is the queen of the sixteen fully sovereign nations commonly known today as the Commonwealth Realms.²³

From a legal perspective, there is no disagreement that each of the realms maintains the option to unilaterally break its link with the monarchy and adopt another form of government of its choosing.²⁴ But disa-

18. See PETER BOYCE, *THE QUEEN'S OTHER REALMS* 26-27 (2008).

19. Statute of Westminster, 1931, 22 & 23 Geo. 5 c. 4 (U.K.).

20. See BOYCE, *supra* note 18, at 27-29.

21. 13 Mar. 2013, *PARL. DEB.*, H.L. (5th ser.) (2013) 309 (U.K.).

22. See *id.*

23. The sixteen Commonwealth Realms are the United Kingdom, Australia, New Zealand, Canada, Jamaica, Antigua and Barbuda, Belize, Papua New Guinea, St. Christopher and Nevis, St. Vincent and the Grenadines, Tuvalu, Barbados, Grenada, Solomon Islands, St. Lucia, and The Bahamas. See, e.g., The Royal Household, *What is a Commonwealth Realm?*, OFFICIAL WEBSITE BRIT. MONARCHY, <https://www.royal.gov.uk/MonarchAndCommonwealth/QueenandCommonwealth/WhatisaCommonwealthRealm.aspx> (last visited Apr. 24, 2015).

24. An early example of such a break would be India's transition from colony to dominion upon independence in 1947 when George VI officially became King of India until the Indian Constitution had been drafted and entered into force in 1950, at that point India changed overnight from a kingdom to a republic and its official link with the king and the monarchy was unilaterally severed. See Pamela White, *India*, in *COLUMBIA CHRONICLES OF ASIAN HISTORY AND CULTURE* 312-15 (John S. Bowman ed., 2000).

greement exists as to whether a realm may retain the monarchy while unilaterally changing some aspect of the institution, for instance, the rules governing the line of succession, without doing so simultaneously with the governments of the other realms (though to date, no such change has been attempted).²⁵

The one historical example of a fully implemented multilateral change to the nature of the shared monarchy is the legal process to implement the abdication of Edward VIII and the subsequent ascension of George VI to the throne.²⁶ In that instance Edward VIII signed an instrument of abdication that was given legal effect when the His Majesty's Declaration of Abdication Act, 1936 was enacted by the United Kingdom, and with the consent of their governments, for Canada, Australia, New Zealand, and South Africa on December 11, 1936.²⁷ The abdication was given legal effect in The Irish Free State the following day with the enactment by the Irish Oireachtas (parliament) of the Executive Authority (External Relations) Act, 1936.²⁸

From the time of the abdication to the present, reform of various aspects of the monarchy connected to the succession has been a topic of intense discussion and even legislative proposals in the United Kingdom, including a pledge to work for such change by then-Prime Minister Gordon Brown's Labour Party in its manifesto for the 2010 U.K. General Election.²⁹ But it was not until October 28, 2011 that any concrete progress was made in the push for reform. David Cameron and his fellow realm prime ministers held the discussion at the Commonwealth Heads of Government Meeting in Perth. This ultimately resulted in their agreement to the common program of reforms to the nature of the monarchy now referred to as the Perth Agreement.³⁰

III. THE PERTH AGREEMENT, SUBSEQUENT DEVELOPMENTS, AND THEIR LEGAL IMPLEMENTATION

A. CHANGES TO BE BROUGHT ABOUT FOLLOWING THE PERTH AGREEMENT

At the Commonwealth Heads of Government Meeting in Perth the sixteen realm prime ministers agreed to two concrete proposals to reform

25. See HOUSE OF COMMONS LIBRARY, *supra* note 2, at 8–9.

26. See *id.* at 8.

27. His Majesty's Declaration of Abdication Act, 1936, 1 Edw. 8. c. 3 (U.K.).

28. Executive Authority (External Relations) Act, 1936, (Act No. 58/1936) (Ir.). Although there was no substantial legal consequence or harm from the Irish delay in giving legal effect to Edward VIII's abdication and the resulting twenty-four hour period where the realms did not share a common monarch, it is reasonable to speculate that this incident may be one factor in the Perth Agreement's requirement that the anticipated changes must be legally enacted in all sixteen realms before going into effect.

29. See HOUSE OF COMMONS LIBRARY, *supra* note 2, at 5–6.

30. See *id.* at 6–7.

the line of succession to their shared throne.³¹ After the meeting in Perth, it emerged that there was in fact a third proposal for reform that had been discussed by Cameron in the invitations he sent to his fellow realm prime ministers to attend the meeting; and that, though not originally a part of the earlier Perth Agreement, it had also been agreed to by all sixteen governments.³² The agreement to the third proposal effectively made it into a third component of the Perth Agreement. For the purposes of this article, unless otherwise specified, references to the agreement should be read as referring to all three proposals.

1. The First Proposal

Under the first proposal, the common law of all sixteen countries is changed so that the position of an individual in the line of succession would be based just on when they were born.³³ As a result, a daughter born into the line would no longer be bumped down the line if her parents subsequently have a son in the succession.³⁴ It was also agreed that the law implementing the change would be written in such a way that this change would be retroactive to all births in the line of succession after October 28, 2011, the day of the agreement.³⁵

2. The Second Proposal

The second proposal agreed to at the Perth meeting allows anyone in the line of succession to marry a Roman Catholic, ending the centuries old discriminatory ban on persons in the line of succession marrying Roman Catholics while allowing them to marry spouses who are members of any other (Christian or non-Christian) religion, or who profess no religious faith at all.³⁶ This would be accomplished by repealing the provisions of earlier legislation that remove persons who marry Roman Catholics from the line of succession.³⁷ Notably, persons who had earlier been removed from the line of succession for marrying Roman Catholics would be restored to the line, though no person returning to the line via this change has a realistic chance of becoming monarch.³⁸ But the existing requirements that the monarch be a member of the Church of England and that persons in the line of succession be Protestant will remain in force.³⁹

While in Perth, Cameron described the thinking behind and rationale for these two proposals by stating that, “The idea that a younger son should become monarch instead of an elder daughter simply because he

31. *See infra* notes 33–41.

32. *See* CABINET OFFICE, *supra* note 7, at 2, 5.

33. HOUSE OF COMMONS LIBRARY, *supra* note 2, at 6.

34. *See id.*

35. *See id.* at 10.

36. *See id.* at 6.

37. *E.g.*, CABINET OFFICE, *supra* note 7, at 5.

38. *Id.*

39. *See id.*

is a man, or that a future monarch can marry someone of any faith except a Catholic—this way of thinking is at odds with the modern countries that we have become.”⁴⁰ Cameron also justified continuing the religious restrictions that apply to the monarch and persons who are in the line of succession by saying, “Let me be clear, the monarch must be in communion with the Church of England because he or she is the head of that Church.”⁴¹

3. *The Third Proposal*

The third proposal agreed to by the sixteen governments would substantially reform the requirements for persons in the line of succession to seek approval for their marriages.⁴² This reform would be accomplished by repealing the Royal Marriages Act 1772 and instead only requiring persons who, at the time they intend to marry, are one of the first six persons in the line of succession to seek the monarch’s consent.⁴³ Notably though, under the proposal, if the monarch refused to consent and the person affected went ahead with the proposed marriage anyway, they and any children they might have would be removed from the line of succession; though for all other purposes, the marriage itself would be legal and any children would be legitimate.⁴⁴

The third proposal also makes every marriage *ever* voided under the Royal Marriages Act 1772 legal. As long as the person involved was not at the time of the marriage one of the first six persons in the line of succession, consent to the marriage was not sought, and no notice of intent to marry was given to the Privy Council, it was reasonable for the person concerned to not know the act applied to them, and no one involved cited the act as a basis for voiding the marriage.⁴⁵ At the same time, the proposal has one stipulation declaring that the newly validated marriages are valid for all purposes except for succession to the throne, keeping the historical line of succession intact.⁴⁶ Effectively, this part of the proposal renders most of the marriages ever voided by the Royal Marriages Act 1772 valid, but with the caveat that, even though a marriage has been validated, the removal from the line of succession of the person involved and their descendants remains in effect.

40. Nicholas Watt, *Royal Succession Gender Equality Approved by Commonwealth*, *GUARDIAN* (Oct. 28, 2011, 7:29 AM), <http://www.theguardian.com/uk/2011/oct/28/royal-succession-gender-equality-approved>.

41. *Girls Equal in British Throne Succession*, *BBC NEWS* (Oct. 28, 2011, 1:43 PM), <http://www.bbc.co.uk/news/uk-15492607>.

42. See *CABINET OFFICE*, *supra* note 7, at 5.

43. See, e.g., *id.* at 5–6.

44. E.g., *id.* at 6.

45. E.g., *id.*

46. *Id.*

B. THE LEGAL PROCESS OF IMPLEMENTING THE PERTH AGREEMENT

At Perth, after coming to the agreement to change the rules of the succession, the sixteen prime ministers also agreed on a basic plan of action to implement the changes.⁴⁷ This plan called for the Government of New Zealand to coordinate the multilateral sixteen-party discussion as to how the language implementing the agreement should be drafted and then, once agreement on the language was reached, the U.K. Government would draft its own piece of legislation to implement it.⁴⁸ That piece of legislation would then be presented to the U.K. Parliament only once the member of the U.K. Government responsible for coordinating with the other realms, Cameron's then Deputy Prime Minister, Nick Clegg, had received written letters of consent from each of the realms indicating they were ready to begin taking the necessary steps to implement the changes.⁴⁹ Clegg's office confirmed on December 4, 2012, that it had received all of those letters, and on December 13, 2012, the bill was introduced and given its first reading.⁵⁰ For purposes of this article, discussion will be limited to the passage of the relevant U.K. and Canadian legislation.

1. *Implementation of the United Kingdom Legislation*

The U.K. legislation, the Succession to the Crown Act 2013 (Succession Act), is itself a rather short piece of legislation, consisting of less than three pages, one of which consists of just a schedule of items in previous legislation that need to be changed in light of the agreement.⁵¹ The Succession Act consists of five sections in addition to the above-mentioned schedule.⁵² The first of these sections implements the changes in regard to gender. The second addresses the changes in regard to the religious requirements of royal spouses. And the third—which is larger than the first two combined—contains all of the technical minutiae required to effect the changes on consent to royal marriages.⁵³ The fourth section of the Succession Act contains the technical details required to alter earlier legislation to make it compatible with the new changes. The final section contains the short name for the Succession Act and stipulates that it will go into effect immediately, but that the other sections will only go into effect once the government so stipulates.⁵⁴ This delay was deliberately built into the Succession Act so the U.K. Government would be able to make sure that it implements the changes in unison with the other realms.⁵⁵ The Succession Act was passed by the House of Commons on

47. *See id.* at 3.

48. *See id.*

49. *See* HOUSE OF COMMONS LIBRARY, *supra* note 2, at 9.

50. *Id.* at 13.

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

52. *See id.*

53. *See id.* §§1 – 3.

54. *See id.* §§4 – 5.

55. *See* CABINET OFFICE, *supra* note 7, at 7.

January 28, 2013, and was then introduced in the House of Lords on January 29, 2013, where it passed on April 22, 2013, before being sent to the Queen, who signed it into law on April 25, 2013.⁵⁶

2. *Implementation in Canada*

On March 27, 2013, the Canadian Parliament's Succession to the Throne Act, 2013 was signed into law.⁵⁷ Through this Act the Canadian Parliament assented to "[t]he alteration in the law touching the Succession to the Throne" set out in the U.K. Succession to the Crown Act 2013.⁵⁸ This choice of language is interesting in that it reflects that the Canadian Government believes that any change to the law of succession in the United Kingdom automatically applies to Canada as soon as it is assented to by the Canadian Parliament.⁵⁹ The legal basis for this argument rests first on an inferential principle of symmetry in the Canadian Constitution, which provides that the person occupying the throne of the United Kingdom is automatically the monarch of Canada.⁶⁰ Under that legal logic, Canada should not have had to even pass its own legislation on the issue. However, it would appear that under Canadian law (unlike U.K. law⁶¹) the preamble to the Statute of Westminster is a substantive provision of that act itself. Thus, for the change to the line of succession to apply in Canada, it must first be assented to by the Canadian Parliament, as was done through the enactment of the Succession to the Throne Act, 2013.⁶²

Despite the Canadian Parliament having passed legislation that it asserts implemented the Perth Agreement under Canadian law, that legislation has, to date, been attacked on two grounds. The first of these is the continuing bar on a Catholic monarch dealt with in *Teskey* and discussed in the next section.⁶³ The second attack stems from what would appear to be a legitimate difference of legal opinion between the Government's claim that no constitutional amendment was necessary to incorporate the changes to the line of succession into Canadian law⁶⁴ and an alternate legal argument that such a constitutional amendment was necessary⁶⁵ that will ultimately probably have to be settled by the Supreme Court of Canada.

56. Parliament of the U.K., Bill Stages—Succession to the Crown Act 2013, U.K. PARLIAMENT, <http://services.parliament.uk/bills/2012-13/successiontothecrown/stages.html> (last visited Apr. 24, 2015).

57. See Succession to the Throne Act, 2013, S.C. 2013, c. 6 (Can.).

58. *Id.*

59. See Peter W. Hogg, *Succession to the Throne*, 33 NAT'L J. CONST. L. 83, 89-90 (2014).

60. See *id.* at 92 – 93.

61. See *supra* text accompanying notes 21 – 22.

62. See Hogg, *supra* note 59 at 92.

63. See *infra* Part IV.

64. See *supra* text accompanying notes 57 – 60, 62.

65. See *infra* text accompanying notes 66 – 71.

In a legal complaint filed with the Superior Court of Quebec on June 6, 2013, by two legal scholars from Laval University, Geneviève Motard and Patrick Taillon, it is asserted that under Canadian law the Succession to the Throne Act, 2013, is unconstitutional.⁶⁶ The primary argument advanced by Motard and Taillon is that changes to the line of succession fundamentally alter the “office of the Queen” and therefore to be constitutional, any changes to the line of succession must be approved by both houses of parliament and the legislatures of all the provinces under section 41(a) of the Constitution Act, 1982.⁶⁷ The complainants also make two secondary arguments. First they argue that the Succession to the Throne Act, 2013, is additionally unconstitutional under the Canadian Charter of Rights and Freedoms, which is part of the Canadian Constitution, because the Act fails to remove the discriminatory requirement that the monarch must be a member of the Church of England (a legal claim that will be discussed below in relation to *Teskey*.)⁶⁸ Their other secondary argument asserts that the Succession to the Throne Act, 2013, is unconstitutional because the United Kingdom’s Succession Act, which contains the changes that the Canadian act was passed to implement, was written in English, not in French.⁶⁹ Interestingly, the challengers themselves did not file their complaint out of opposition to the changes made by the Succession to the Throne Act, 2013.⁷⁰ Rather, they think that under the Canadian Constitution, the changes should have been approved by the provincial legislatures and Parliament and that before the Perth Agreement can be operative in Canada that the legislation implementing it must be consented to by the provinces.⁷¹

It bears pointing out that the Canadian Government has noted that when the Succession to the Throne Act, 2013 was being adopted, none of the provinces objected to not being consulted, with the obvious implica-

66. See, e.g., Janyce McGregor, *Royal Baby Law Challenge Could End Up at Supreme Court*, CBC NEWS (June 12, 2013, 8:48 AM), <http://www.cbc.ca/news/politics/royal-baby-law-challenge-could-end-up-at-supreme-court-1.1415337>.

67. See Motion to Institute Proceedings for Declaratory Judgment at 2, Motard v. Attorney General of Canada (2013) (Can. Que. Super. Ct.) (initiating motion for the current court proceedings filed before the Superior Court of Quebec by Motard and Taillon on 6 June 2013, please note that the court has yet to assign the case a public docket number) available at <http://s3.documentcloud.org/documents/712552/motard-taillon-requete-jugement-declaratoire.pdf>; see also Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.), reprinted in R.S.C. 1985, app. II, no. 44 (Can.) (contains the constitutional provision Motard and Taillon claim requires the federal parliament and the provincial legislatures to consent to the changes to the line of succession for them to be constitutional).

68. See Motion to Institute Proceedings for Declaratory Judgment, *supra* note 67 at 3; see also Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.), reprinted in R.S.C. 1985, app. II, no. 44 (Can.) (contains the constitutional provisions that Motard and Taillon claim render the Succession to the Throne Act, 2013 unconstitutional for failing to remove the requirement that the monarch be a member of the Church of England).

69. See Motion to Institute Proceedings for Declaratory Judgment, *supra* note 67, at 3.

70. See McGregor, *supra* note 66.

71. See, e.g., *id.*

tion being the provinces did not object because none of them thought that they were constitutionally required to give their consent.⁷² Further, it can easily be argued that the Canadian Government's approach is the correct one when implementing changes to ensure that the United Kingdom and Canada have the same monarch, but if Canada were to alter its law so that it had a monarch other than the monarch of the United Kingdom, then it would be necessary for both Parliament and the provinces to consent to the changes in the form of a constitutional amendment.⁷³ Both the challengers and the Canadian Government believe strongly in the merits of their legal arguments, and as a result, this case will likely be litigated until the Canadian Supreme Court issues a definitive ruling.⁷⁴ Such a ruling however might be some time coming, as the Superior Court of Quebec will not hear Motard and Taillon's case until June 2015.⁷⁵

IV. *TESKEY V. CANADA* (ATTORNEY GENERAL) AND THE BAR ON A CATHOLIC MONARCH

A. *TESKEY V. CANADA* (ATTORNEY GENERAL) OR *O'DONOHUE* REVISITED

Following the enactment of the Succession to the Throne Act, 2013, Bryan Teskey, a Canadian Roman Catholic who had recently completed legal studies at the University of Ottawa, challenged the law in the Ontario Superior Court of Justice.⁷⁶ Teskey argued that the Succession to the Throne Act, 2013 and the Perth Agreement it meant to implement violated the Canadian Constitution, specifically its Canadian Charter of Rights and Freedoms, by not removing the legal ban on a Roman Catholic becoming monarch of Canada.⁷⁷

The same issue of the discriminatory ban on Roman Catholics becoming monarch of Canada had been dealt with by the Ontario courts a decade earlier in *O'Donohue v. Canada*.⁷⁸ In that case, Tony O'Donohue unsuccessfully argued that the legislation setting out the ban on Roman Catholics becoming monarch, the Act of Settlement, was unconstitutional and should be struck down for violating the Charter.⁷⁹ In addressing O'Donohue's claim, the Ontario Superior Court of Justice ruled that the rules excluding Roman Catholics from the line of succes-

72. *See id.*

73. *See Hogg, supra* note 59, at 93.

74. *See McGregor, supra* note 66.

75. Allison Jones, *Royal Baby Law Stands as Court Dismisses Catholic Challenge*, CBC NEWS (Aug 27, 2014, 7:32 AM), <http://www.cbc.ca/m/news/politics/royal-baby-law-stands-as-court-dismisses-catholic-challenge-1.2748020>.

76. Yamri Taddese, *Law Grad Plans Appeal After Royal Succession Challenge Dismissed*, L. TIMES (Sep. 2, 2013, 8:01 AM), <http://www.lawtimesnews.com/201309023425/headline-news/law-grad-plans-appeal-after-royal-succession-challenge-dismissed>.

77. *Id.*

78. *O'Donohue v. Canada*, 2003 CarswellOnt 2573 (Can. Ont. Sup. Ct. J.) (WL), *aff'd*, 2005 CarswellOnt 951 (Can. Ont. C.A.) (WL).

79. *Id.* para. 1.

sion were part of the Canadian Constitution and thus were not subject to a challenge via the Charter because it does not apply to other parts of the Constitution.⁸⁰ The court further ruled that because there was no valid constitutional challenge to be raised, O'Donohue did not have standing to bring a case.⁸¹ The Court of Appeal for Ontario affirmed the lower court ruling in a one-paragraph opinion stating that it agreed with the ruling of the lower court.⁸²

In its ruling in *Teskey*, the Ontario Superior Court of Justice made it clear that this case was similar to *O'Donohue* and that its ruling was bound by earlier precedent.⁸³ With that in mind, the court dismissed the case for the similar reasons of there being no issue for the court to consider and Teskey's lack of standing to bring a claim.⁸⁴

In setting out its analysis for why the case should be dismissed, the court liberally quoted from and cited to *O'Donohue*.⁸⁵ In this case, Teskey objected to the implementation of the Perth Agreement in Canada because the discriminatory provision barring a Catholic from becoming Canada's monarch was to remain in place.⁸⁶ This might have very likely been an attempt to get around *O'Donohue* by arguing that the new legislation opened the rules of succession to Charter review and presumably invalidation. In any case, with respect to the rules of succession, the court, while citing to *O'Donohue*, held that the rules were a part of the Constitution, and thus not subject to Charter review.⁸⁷ Teskey, like O'Donohue, argued that Canada could and should adopt a different (and non-Catholic excluding) set of rules—and possibly a different monarch from the United Kingdom—but the court rejected that outright by stating that such a change would fundamentally alter the Canadian Constitution and “would involve the court changing, rather than protecting, our fundamental constitutional structure.”⁸⁸ The court further opined that the changes envisioned by the Perth Agreement and assented to by the Succession to the Throne Act, 2013 were properly implemented with respect to Canada as the United Kingdom had expressed a desire to modify some of the rules of succession and the Canadian Parliament had consented to those changes in accordance with the process established by the Statute of Westminster.⁸⁹ In regard to Teskey's standing, the court held the following:

[A] member of the Catholic faith but that appears to be his only interest in the issues raised in this application. He has no connection

80. *Id.* paras. 36–37.

81. *Id.* para. 39.

82. *O'Donohue v. Canada*, 2005 CarswellOnt 951, para. 1 (Can. Ont. C.A.) (WL).

83. *Teskey v. Canada* (Attorney General), 2013 ONSC 6386, para. 7 (Can. Ont. Sup. Ct. J.), *aff'd*, 2014 ONCA 612 (Can. Ont. C.A.).

84. *Id.*

85. *See, e.g., id.* paras. 8 – 15.

86. *Id.* para. 8.

87. *Id.* paras. 12, 15.

88. *Id.* para. 13.

89. *Id.* para. 14.

to the Royal Family. He raises a purely hypothetical issue that may never occur, namely a Roman Catholic Canadian in line for succession to the throne being passed over because of his or her religion. Should this ever occur a proper factual matrix would be available to the court to deal with a matter of this importance.⁹⁰

Effectively, setting aside the fact that the issue was already non-judicial because of the rules of succession not being subject to the Charter, Teskey did not have standing to bring his case because although he was Roman Catholic, he was not a member of the Royal Family, and there was no overriding public interest to protect because there may very well never end up being a Roman Catholic Canadian excluded from the throne because of their religion.⁹¹ On appeal, in August 2014 the Court of Appeal for Ontario agreed with the lower court and dismissed Teskey's appeal due to a lack of both standing and any issue for the court to decide.⁹² It would thus appear (pending any further judicial action to the contrary) that the prohibition on the Canadian Monarch being Catholic, while discriminatory, is perfectly—if not fundamentally—constitutional.

V. CONCLUSION

Elizabeth II's prime ministers set out to alter the rules governing the line of succession to make them fairer to those individuals to whom they applied. Teskey argued that because members of the Roman Catholic faith were still excluded from the throne, the changes to the rules of succession and the rules themselves were, in terms of Canadian law, unconstitutionally discriminatory under the Charter of Rights and Freedoms. The Ontario courts disagree, holding that as long as they were properly implemented, the changes to the rules of succession were themselves a part of the Canadian Constitution and thus protected from Charter review. Therefore, it would seem that if those provisions of the rules of succession that Teskey and O'Donohue deplore are to be changed or removed it will have to be accomplished politically and legislatively through another multilateral agreement similar to the Perth Agreement rather than judicially through the courts.

90. *Id.* para. 16.

91. *See id.* paras. 15–16, 19.

92. *Teskey v. Canada (Attorney General)*, 2014 ONCA 612, paras. 5 – 6 (Can. Ont. C.A.).

