CANADIAN INDEPENDENCE
1931-1982

Canada's transition from a self-governing British colony into a fully independent state was an evolutionary process, which arose in such a gradual fashion that it is impossible to ascribe independence to a particular date. The Supreme Court of Canada reflected this uncertainty when it said in Re Offshore Mineral Rights of British Columbia that Canada's "sovereignty was acquired in the period between its separate signature of the Treaty of Versailles in 1919 and the Statute of Westminster, 1931..."[i][1] However, the development of this independence had its roots before 1919, and was not actually completed until well after 1931. As Frank Scott has argued, "Never at any time in [1919-39] was the full international personality of the Dominions, as distinct from Great Britain, established beyond equivocation".[ii][2] Indeed, symbolically-important legal traces of Canada's colonial status were only shed with the passing of the Canada Act[iii][3] by the British Parliament in 1982. That Act not only provided for the first time a process by which Canada's basic constitutional laws could be legally amended without action by the British Parliament, but it also declared that no British law passed thereafter would apply to Canada. There are still two final vestiges of colonialism to be eliminated, those found in ss.55 and 56 of the 1867 Constitution Act which provide for the reservation and disallowance of federal legislation. Of course Canada has been an independent nation for a number of decades, and these shadows of her former status are nothing more than anomalies which illustrate how the legal provisions of the Canadian constitution failed to keep pace with the political developments which propelled Canada to full statehood.

At its inception in 1867, Canada's colonial status was marked by political and legal subjugation to British Imperial supremacy in all aspects of government - legislative, judicial, and executive. The Imperial Parliament at Westminster could legislate on any matter to do with Canada and could override any local legislation, the final court of appeal for Canadian litigation lay with the Judicial Committee of the Privy Council in London, the Governor General had a substantive role as a representative of the British government, and ultimate executive power was vested in the British Monarch - who was advised only by British Ministers in its exercise. Canada's independence came about as each of these subordinations was eventually removed.

What is remarkable about this whole process is that it was achieved with a minimum of legislative amendments. Much of Canada's independence arose from the development of new political arrangements, many of which have been absorbed into judicial decisions interpreting the constitution - with or without explicit recognition. Canada's passage from being an integral part of the British Empire to being an independent member of the Commonwealth richly illustrates the way in which fundamental constitutional rules have evolved through the interaction of constitutional convention, international law, and municipal statute and case law.

Legislative Independence

When the Dominion of Canada was created in 1867 it was granted powers of self-government to deal with all internal matters, but Britain still retained overall legislative supremacy. This

imperial supremacy could be exercised through several statutory measures. In the first place, the Constitution Act of 1867 provides in s.55 that the Governor General may reserve any legislation passed by the two Houses of Parliament for "the signification of Her Majesty's pleasure", which is determined according to s.57 by the (British) Queen in Council. Secondly, s.56 provides that the Governor General must forward to "one of Her Majesty's Principal Secretary's of State" in London a copy of any federal legislation that has been assented to; within two years after the receipt of this copy, the (British) Queen in Council can disallow an Act. Thirdly, four pieces of Imperial legislation constrained the Canadian legislatures. The Colonial Laws Validity Act of 1865 provided that no colonial law could validly conflict with, amend or repeal Imperial legislation which explicitly or by necessary implication applied directly to that colony; the Merchant Shipping Act, 1894 as well as the Colonial Courts of Admiralty Act, 1890 required reservation of Dominion legislation on those topics for approval by the British Government; and, the Colonial Stock Act of 1900 provided for the disallowance of Dominion legislation which the British government felt would harm British stockholders of Dominion trustee securities. Most importantly, however, the British Parliament could exercise the legal right of supremacy it possessed at common law to pass any legislation on any matter affecting the colonies.

The Disallowance and Reservation of Federal Legislation

It is a curious anomaly of the Canadian Constitution that the Imperial powers of reservation and disallowance still exist in legal form; neither have ever been repealed or amended. Had these powers been used as widely as were those in relation to provincial legislation, the Imperial imprint would have been felt very firmly in Canada.[iv][4] However, both powers were first greatly restricted and then neutered by convention. Only one Canadian Act, the Oaths Act of 1873, was disallowed by the British government, and the last time the Governor General exercised the power of reservation was in 1886. These powers subsequently fell into desuetude and firm conventions have developed against their use. Even before these powers were nullified, however, their practical exercise was greatly restricted; as Cassault J. of the Quebec Superior Court said in 1879, "Ce désaveu ne peut être prononcé par la Reigne que lorsequ'une loi sanctionée par le Gouverneur Général empiète sur les prérogatives du Souverain ou du Parlement Impérial..."[v][5] The reservation of Dominion legislation on the initiative of the Governor General was nullified by a convention agreed to at the first Colonial Conference convened by Britain in 1887.[vi][6] By the time of the 1926 Imperial Conference, opinion had clearly solidified against an exercise of reservation or disallowance, and a qualified statement was made to that effect. The report of the 1929 Conference stated quite plainly, "The Conference agree that the present constitutional position is that the power of disallowance can no longer be exercised in relation to Dominion legislation". With regard to reservation, the report stated that the British government's advice to the King would never be "against the views of the Government of the Dominion concerned"; thus a Governor General's reservation would be totally ineffective. With the adoption of these resolutions by the full Imperial Conference in 1930, the powers of disallowance and reservation of Dominion legislation can be said to have been totally nullified by convention. The Imperial Conferences of 1929 and 1930 also led to the repeal by the 1931 Statute of Westminster of the provisions of the Colonial Courts of Admiralty Act, 1890 and the Merchant Shipping Act, 1894 which had required the reservation, for British government approval, of Dominion legislation on related topics.[vii][7]

If the powers of reservation and disallowance of federal legislation were ever to be considered by a court it is not entirely clear what its verdict would be. Certainly in 1938, these powers relating to federal legislation were said to be subsisting and unfettered in law by a majority of the Supreme Court, in answer to reference questions about the reservation and disallowance of provincial statutes.[viii][8] As Cannon J. declared, "The Imperial Conferences ...could not and did not change the law".[ix][9] However, several developments since then have occurred which might lead to a different conclusion. The Canadian Governor General continued at the time to forward copies of all federal legislation to the British Government, in fulfillment of his obligations under s.56 of the 1867 Constitution Act and the Letters Patent of 1931; however, this practice stopped in 1942.[x][10] In 1947, the new Letters Patent which were issued constituting the office of Governor General omitted a provision, found in all previous Letters Patent, which mentioned the requirement to forward legislation; that same year, the federal Parliament repealed a Canadian statute of 1925[xi][11] which also provided for the forwarding of legislation to Britain. Since the power of disallowance may only be exercised after the receipt by the British minister of the Canadian legislation, the practice of not forwarding legislation has effectively neutered the power of disallowance.

However, the actual powers of disallowance or refusing assent to a reserved bill might also be declared by the courts to be spent even in law, because of the inability of the British government to advise the Queen on Canadian matters. This inability grew, as we shall see later, purely out of political practice, but it would be a most regrettable display of formalist legal theory if Canadian judges were to hold that even in the full flower of Canadian independence British Ministers still retain these rights in law.

The Legislative Supremacy of the British Parliament

The unfettered legal power of the British Parliament to enact laws for Canada was gradually reduced by a combination of convention and statute law; to the point that it could only be legitimately exercised in 1982, the date of its final extinction, in order to give effect to a Canadian request to amend the various British North America Acts. A convention against the unilateral exercise of the power dates at least from the Colonial Conference of 1887, where it was agreed that Britain should only legislate for a Dominion with its consent.[xii][12] This convention solidified with time, and by 1928 Corbett and Smith described a `well established convention' that "the legal supremacy of Parliament should only be employed with the consent of the Dominions in order to enact legislation which the Dominions are unable to enact themselves".[xiii][13] In the remarkable Copyright Owners case decided in 1958, the High Court of Australia relied in part upon the conventions restraining the legislative power of the British Parliament to rule that the Copyright Act of 1928 was not in force in Australia. The absence of a request by Australia indicated that the Act had not been intended to extend there:

Constitutional practice governing the political relations between the United Kingdom and the Commonwealth, as at that time, could not but enter into the question whether the Act of 1928 was intended to operate in Australia. The rule of construction which found its source in the political and constitutional relations between the United Kingdom and the Commonwealth before the Statute of Westminster would raise a presumption that the Act of 1928 was not intended to operate of its own force in this country.[xiv][14]

The 1929 Imperial Conference recommended that the British Parliament pass legislation which would further restrict the applicability of British law in the Dominions; these recommendations were approved by the Imperial Conference a year later and were embodied in the Statute of Westminster in 1931. Britain's legislative superiority was restricted by both a formulation of the existing convention in the preamble and in a further re-statement of this rule in s.4 of this Act: "No Act of the 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 stated in that Act that that Dominion has requested, and consented to, the enactment thereof".

The Legislative Powers of Canadian Legislatures

Until the passage of the Statute of Westminster, no Dominion legislature had the power to pass either laws with normal extra-territorial effect or laws purporting to amend or repeal Imperial laws which expressly or necessarily applied to it; the need for this change was demonstrated in 1925 when the Australian High Court had ruled inoperative sections of an Australian Commonwealth Act which contradicted provisions of the Imperial Merchant Shipping Act.[xv][15] Section 2 of the Statute of Westminster is perhaps the most significant legal provision relating to Canada's acquisition of legislative sovereignty, because it accorded both Parliament and the provincial legislatures the power to pass any laws amending or repealing legislation of the Imperial Parliament; also, no Canadian law passed thereafter could be held void because it conflicted with Imperial legislation.[xvi][16] Even if the Imperial Parliament passed a bill against the wish of a Canadian government, it could be repealed by the local legislature. However, none of these provisions related to the British North America Acts. This exclusion had been made at the request of a Dominion-Provincial Conference in 1931, because the Canadian first ministers could not agree on a method to amend the constitution themselves. Section 3 of the Statute also gave the Dominion Parliament "full power to make laws of extra-territorial operation"; but this provision did not apply to provincial legislatures, and they still lack this general power.[xvii][17] In 1933, the Canadian Parliament passed an Act which provided that all federal Acts already in force would have the extra-territorial force they would have had if passed after the Statute of Westminster.

These provisions giving all Canadian legislatures the ability to amend or repeal Imperial legislation and the Canadian Parliament the power to pass extraterritorial laws form the foundation of Canada's acquisition of legislative independence. The transition between the former legislative regime and that prevailing after 1931 is reflected in a 1933 court case dealing with the Canada Shipping Act. This Act was declared inoperative because it had been passed prior to the Statute of Westminster and had not received the formal approval of the British Government required under the UK Merchant Shipping Act;[xviii][19] the following year the Canadian Parliament replaced the inoperative Canada Shipping Act and repealed all the British Acts dealing with Canadian Shipping.

Conventions Supporting the Statute of Westminster

In recent decades much has been made of the passage of the Statute of Westminster and how it

gave legislative sovereignty to the Dominions. However, the specific provisions of the Act are not nearly so grandiose. Most especially, the exclusion of the British North America Acts from any provisions of the Statute continued the British government's complete legal supremacy over the Canadian constitution. And, as K.C. Wheare wrote in 1933, the Statute of Westminster did not end Britain's legislative sovereignty, "indeed the passage of the act is proof of its existence".[xix][21] He went on to add:

It certainly does not make equal the powers of Dominion Parliaments, or the powers of the Parliaments of all the members of the Commonwealth. The Imperial Parliament possesses a right which is not shared and cannot be shared with any other Parliament in the Commonwealth, the right to pass legislation extending throughout the Commonwealth.[xx][22]

The Statute of Westminster did not place any legal impediment in the way of the Imperial Parliament passing laws for the whole Empire. As Wheare later argued, the provisions of s.4 actually only form a rule of construction, and not a restriction on the Imperial Parliament's power:

It is not directed to the United Kingdom Parliament; it is directed to the courts. ...it does not render it legally impossible for the United Kingdom Parliament to legislate for a Dominion without the request and consent of the Dominion. ...It is not necessary for the United Kingdom Parliament to repeal section 4 of the Statute explicitly. It merely has to legislate for a Dominion, and that legislation frees it from the restriction voluntarily accepted and expressed in section 4.[xxi][23]

F.R. Scott, also echoed these views in 1945 when he wrote that the main provisions of the Statute of Westminster were:

a mere extension of existing authority rather than an irrevocable transfer of sovereignty, and ...a self denying ordinance establishing a rule of construction rather than a binding restriction on the future powers of the Imperial legislature. Hence the Statute of Westminster could be, and was interpreted by many authorities as not affecting the previous indivisibility of the Crown or diminishing the legal sovereignty of the Parliament which enacted it.[xxii][24]

In 1982, the Civil Division of the English Court of Appeal demonstrated the fragility of the impediment found in s.4 of the Statute of Westminster, when it ruled that a British Act only had to contain a phrase saying that Canada had consented to the legislation for it to be valid; it need not be true at all that the consent had in fact been sought and given.[xxiii][25]

The only general restraint upon the Imperial Parliament not to legislate as it wished for Canada remained until 1982 the conventional rule, reaffirmed in the preamble of the Statute of Westminster, that Britain legislation would only extend to a Dominion at its request and consent. The preamble of the Statute of Westminster also stated a more specific conventional rule which had been first agreed to by the 1929 Imperial Conference: "any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom".

Although the British Parliament was conventionally bound to legislate for Canada only on her request and consent, there is strong evidence that the British did not feel an obligation to enact any request so made. K.C. Wheare wrote in 1953 that the British Parliament "was not bound by convention to alter the [B.N.A.] Act if and when the Dominion Government or Parliament requested it to do so".[xxiv[26]] Much more recently, the report of the British parliamentary committee which investigated issues arising out of Pierre Trudeau's threatened unilateral efforts to patriate the Constitution concluded that although the British Parliament was bound to act only upon a request from Canada, it was not bound to act upon every request from the federal government and Parliament alone; however, the motivation behind this lack of automatic action was to ensure that Canadian conventions concerning the request for British legislation had been complied with.[xxv[27]] The Supreme Court of Canada decided that a request for an amendment of the British North America Acts that changed provincial powers could only be properly made, according to convention, with a "substantial measure of provincial consent".[xxvi[28]] However, there is much to suggest that the Court was mistaken in not finding that the unanimous consent of the provinces was needed.[xxvii[29]]

A subject which has been much debated since the passage of the Statute of Westminster is whether any of the powers conferred upon the Dominion legislatures or the restrictions against the application of future Imperial legislation could be subsequently repealed by the British Parliament.[xxviii[30]] Some difficulties concerning the finality of the grant of powers under this Statute arise from the common law rules which buttress the principle of parliamentary sovereignty in the British constitution. The most basic rule supporting this principle is that no parliament may tie the hands of a future parliament; what one parliament has done another can undo. It is not at all clear whether the British courts might be forced to alter established views of parliamentary sovereignty if the Statute of Westminster were unilaterally amended or repealed.[xxix[31]] However, it does appear that this Statute has acquired a special place among British constitutional documents, and it is safe to say that a convention has existed to protect it from destructive amendment.[xxx[32]] In 1935, Viscount Sankey commented in British Coal Corp. v. The King, that while the Imperial Parliament could "as a matter of abstract law", alter or repeal provisions of the Statute, "that is theory and has no relation to realities".[xxxi[33]] Two years later R.T.E Latham concluded that "the repeal of the Statute is not a practical possibility to be reckoned with..."

This conventional rule protecting the Statute of Westminster appears to be the ultimate conveyor of legislative supremacy to the Dominions. Even the provision of the Canada Act 1982 which supposedly extinguished the British Parliament's jurisdiction over Canada, might in strict theory be revoked by the Westminster Parliament; but again, this event is not in the realm of practical possibilities.

Peter Hogg has argued that regardless of the views of British courts on the ability of the Imperial Parliament to repeal legislation such as the Statute of Westminster or the 1982 Canada Act, "it is inconceivable that the Supreme Court of Canada would accept the resuscitated power and uphold the new law".[xxxii[36]] In 1937, the Appeal Division of the South African Supreme Court heard a case in which the view was forwarded that the British Parliament could repeal the Statute of Westminster; but the court declared unanimously: "We cannot take this argument seriously. Freedom once conferred cannot be revoked".[xxxiii[37]] Slattery has argued strenuously that it is the

judicial acceptance of such a new grundnorm pervading Canadian case law which has been the basis of Canada's legal independence.

In summary then, Canadian legislative independence was achieved in several steps. The powers of the Imperial Parliament to make, amend, or repeal any law at will for the whole Empire became restricted by conventional rules which required that legislation applying to the self-governing Dominions be consented to by them; in addition the powers of Imperial reservation and disallowance have been nullified by convention. The passage of the Statute of Westminster gave Canadian legislatures the power to amend and repeal any Imperial legislation except the British North America Acts; at the same time, the previous conventional rule restricting the Imperial legislative power was given some legal effect in the form of a rule of construction that required British legislation to contain a clause stating that a Dominion had requested and consented to an act before it was valid law in that Dominion. The final legal step was achieved in 1982 with the passage of the Canada Act, which contained another rule of construction declaring that no future British Act would have effect in Canada; furthermore, the power of the British Parliament to amend the formal constitution of Canada was passed to a new legislative authority vested in the Governor General, who can now proclaim amendments when authorized by a varying number of provincial legislatures and Parliament.[xxxiv[39]] However, conventional rules have continued to play a crucial role in enlarging and protecting these legal provisions. First, a convention required that Dominion consent actually be sought and given to British legislation applying to the Dominions. Secondly, the unilateral British repeal of the provisions of the Statute of Westminster, or the Canada Act has been barred by a fundamental convention protecting the independence of Canada and the other Dominions. There is no doubt that this convention would be upheld in substance, if not in name, by Canadian courts.

Judicial Sovereignty

The Constitution Act of 1867 failed to provide a specific court of appeal for Canada. Instead, appeals went from the superior courts of the provinces to the Judicial Committee of the Privy Council in London, as they had before Confederation.[xxxv[40]] The judicial powers of this committee had their origins in the power of the Norman kings of England to dispense justice; however, this prerogative power gained some statutory basis in the Judicial Committee Acts of 1833, and 1844. In essence, the Law Lords sat as a committee of the British Privy Council to hear appeals from all over the Empire;[xxxvi[41]] the idea was not only just to provide a final court of appeal, but also to provide some sense of unity to the law being applied in the many colonies.[xxxvii[42]] For decades after Confederation, the ultimate interpreter of Canadian law was this Imperial institution.

Although the Judicial Committee of the Privy Council is formally only a body which `advises' the Queen in Council of their `opinions' on the legal matters referred to them, it is not doubted that it is in fact a court of law. As Viscount Sankey clearly stated, the Judicial Committee has been able to operate as a final court of appeal because of constitutional conventions:

It is clear that the committee is regarded in the Act as a judicial body or court, though all it can do is to report or recommend to His Majesty in Council, by who the Order in Council which is made to give effect to the report of the Committee is made. But according to constitutional

convention it is unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee, who are thus in truth an appellate Court of law, to which by the statute of 1833 all appeals within their purview are referred.

In 1875, the Canadian Parliament exercised the power granted by s.101 of the 1867 Constitution Act to establish "a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada"; and created the Supreme Court of Canada.[xxxviii[44]] However, the Supreme Court was not the final court of appeal for Canada, as a case could be appealed from there to the Judicial Committee; furthermore, appeals from the provincial superior courts could still be taken directly to the Judicial Committee, bypassing the Supreme Court of Canada. Regardless of what statutory provisions might be made in Canada concerning judicial appeals, litigants could petition the Judicial Committee to exercise the ancient royal prerogative power to hear an appeal and dispense justice. In 1888, the Canadian Parliament tried to abolish appeals to the Judicial Committee in criminal cases; nevertheless, appeals continued to be heard under the prerogative of the British Crown. In the 1926 case Nadan v. The King, the Judicial Committee ruled ultra vires the provision in the Criminal Code of Canada which ostensibly abolished Privy Council Appeals.[xxxix[45]] It held that this measure was not within the power of the Canadian Parliament, because it attempted in effect to regulate the exercise of the prerogative power in Britain and to repeal the applicability of the Judicial Committee Acts with respect to Canada;[xl[46]] since the Canadian Parliament could neither make laws to operate outside of Canada, nor could it amend or repeal Imperial legislation, the appeals to the Judicial Committee could not be abolished by Canadian statutes.

The passage of the Statute of Westminster, however, provided the Canadian Parliament with the needed legislative powers. Thus Parliament once again enacted a provision to abolish appeals in criminal cases, and this was upheld by the Judicial Committee[xli[47]] on the grounds that the Statute of Westminster now provided the authority which it was said to lack in Nadan. In 1947, the Judicial Committee decided that the Canadian Parliament could abolish appeals to the Privy Council of civil cases from provincial courts, which continued to be given under the prerogative power to allow appeals; this prerogative was said to be a `fetter' on the power of the Canadian Parliament which could be removed due to the Statute of Westminster.[xlii[48]] In this decision, Lord Jowitt also looked beyond the provisions of the Statute of Westminster to the statements of equality declared by the various Imperial Conferences and stated, "It is not consistent with the political conception which is embodied in the British Commonwealth of Nations that one member should be precluded from setting up, if it so desires, a Supreme Court of Appeal having a jurisdiction both ultimate and exclusive of any other member".[xliii[49]] Because of this decision, an Act was passed in 1949 which ended appeals of all Canadian cases to the Privy Council.[xliv[50]] Thus, Canada finally gained complete sovereignty over the interpretation and enforcement of Canadian law. Only in this aspect of the acquisition of Canadian independence from Britain was each step essentially built upon specific developments in positive law, rather than conventional rules based on political practice or agreement.

Executive Independence

In contrast, Canada's independence from the British executive was marked by significant political developments and few changes in positive law. The original Constitution Act of 1867

declared in its preamble that the four federating provinces desired to be "united into One Dominion under the Crown of Great Britain and Northern Ireland"; furthermore, s.9 of the Act stipulated that "The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen". The new Dominion of Canada was a colony; albeit self-governing in domestic matters, but still a colony. British ministers alone had the right to advise the monarch. The Governor General was appointed on the advice of the British government and initially had a substantive role as its representative in Canada. Canadian legislatures were incompetent as a matter of common law to legislate on any issue relating to the Monarch's office or any of the royal prerogatives which did not concern the internal governance of Canada.[xlv][52] Thus the King or Queen over Canada was the person who was the monarch of Britain, according to the laws of Britain, and held whatever title was granted under British law. Most importantly, Canada's subordination to the Imperial Crown meant that the British government initially determined all matters of foreign policy. Canada was just one part of the whole British Empire, and the foreign policy of the Empire was conducted on behalf of the British Crown by British ministers.

The main stumbling block in the way of Canada acquiring an executive power which was truly independent of Britain's was the pervasive acceptance of the doctrine that the Crown was indivisible throughout the Empire. The monarch could only act as one, and thus could only be directly advised by the British government. Canada was only able to escape these colonial bonds and assert an executive power, independent of Britain's, when this doctrine of indivisibility was eroded by political practices reflecting the growing demands of the Dominions to be able to direct their own affairs.

The Governor General and the Monarch

The Governor General was originally appointed by the monarch on the advice of the British cabinet, and only British individuals were appointed to the position. The Governor General was perceived as a representative of the British government and, although advised by Canadian ministers on most matters, was ultimately responsible to the Colonial Secretary - later, the Secretary for the Dominions. Canadian government ministers could only deal with Britain through the Governor General. However, with the strengthening of the traditions of self-government in Canada, Governors General came gradually to lose any substantive role in actively representing the British and Canadian governments to each other; they became merely conduits for communications. By the time of the 1926 Imperial Conference, matters had solidified sufficiently for the report adopted at that meeting to state:

In our opinion it is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government.

The report went on to recommend that in future the governments of the Dominions be able to communicate directly with the British government, rather than through the Governor General;

and starting July 1, 1927 Dominion ministers dealt directly with their British counterparts.[xlvi[53]] Writing in 1929, Noel Baker mentioned that a convention had already arisen by that time whereby the British government would only nominate an individual to be Governor General after consulting with the Dominion government.[xlvii[54]] However, the 1929 Imperial Conference made a recommendation, subsequently adopted by the full Conference in 1930, that from henceforth the appointment of Governors General should only be the concern of the Dominion governments alone. The sections of this report bear quoting at length for they illustrate how concisely conventions may be phrased:

1. The parties interested in the appointment of a Governor General are His Majesty the King, whose representative he is, and the Dominion concerned.

2. The constitutional practice that His Majesty acts on the advice of responsible Ministers applies also in this instance.

3. The Ministers who tender and are responsible for such advice are His Majesty's Ministers in the Dominion concerned.

4. The Ministers concerned tender their formal advice after informal consultation with His Majesty.

With these passages, the Imperial Conference created brand new conventional rules. The report went on to recommend that each Dominion could choose the manner of communicating with the King and how the instrument appointing the Governor General might be phrased. In the event, it was not until 1931 that Dominion governments actually communicated directly with the King;[xlviii[55]] in the intervening period, correspondence was conducted through British ministers who acted as passive channels of communication. The Letters Patent and Instructions for the Canadian Governor General were re-issued in 1931 on the appointment of Lord Bessborough, the first made entirely on Canadian advice, in order to remove any references to British ministers; and in 1939 the Canadian Parliament passed the Seals Act providing a complete set of official seals which would be kept in the custody of Canadian ministers.[xlix[56]] These minimal changes were the only ones effected in legal documents to accompany the transfer of the control of the executive offices from the British government to responsible Canadian ministers. The Canadianisation of the office of Governor General was completed in 1952 with the appointment of the first Canadian to the position, Vincent Massey.

The role of the monarch with respect to Canada has also evolved slowly over the years. At first the Monarch's only dealings with respect to Canada were conducted solely on the advice of British ministers. In the 1920s, Canadian ministers first acquired the informal right to advise the king on international affairs, albeit initially through the intermediacy of British ministers. The agreement of the 1930 Imperial Conference that Governors General should be appointed solely on the advice of Dominion ministers led to the assertion in 1931, first by the Irish and then by all Dominion Governments, of a right of direct access to the King.

The major alteration came in 1947 with the issuance of new Letters Patent which authorized the Canadian Governor General "to exercise all powers and authorities" belonging to the monarch

with respect to Canada, except the amendment of the Letters Patent.[l][57] Despite this complete delegation of powers in legal form, the monarch has continued to perform several functions denied in practice to the Governor General. Until 1977, the issuance of all commissions for Canadian Ambassadors and the receipt of foreign Ambassadors' Letters of Recall were functions reserved to the Queen; these functions have since been performed by the Governor General.[li][58] The single area in which the Queen presently plays any substantive on-going role is in the appointment of a new Governor General; however, it appears that even this function could be performed by the retiring Governor General if so advised by the Prime Minister.[lii][59] Nevertheless, the Queen continues to be kept abreast of Canadian affairs through weekly communications with the Governor General. The Queen may still exercise any of her powers personally when so advised. Thus the Queen has opened sessions of Parliament in 1957 and 1977, and she proclaimed the 1982 Constitution Act into force during a royal visit that year.[liii][60] It should be emphasised that although the Governor General is empowered to exercise the Queen's powers, there is no legal bar to the Queen exercising them;[liv][61] the only impediments are conventional rules which presently limit her to only a few activities. Furthermore, the Letters Patent are not sufficient to alter the express provisions of the formal Constitution relating to the Queen. The delegation of powers contained there, such as her position as Commander in Chief of the Armed Forces, cannot amount to a final abdication of those powers by the monarch in favour of the Governor General.

The Divisibility of the Crown

The question of whether or not the British Crown was divisible among the various territories of the Empire was one which dogged the Dominions' development of an executive authority independent of Britain. Right up to the early 1920s, constitutional opinion solidly supported the notion that the Crown was an indivisible unity. As A.H. Lefroy wrote in 1918, "The Crown is to be considered as one and indivisible throughout the Empire; and cannot be severed into as many kingships as there are Dominions, and self-governing colonies".[lv][63] The practical consequences of this indivisibility are underlined in a variety of court cases from around the Empire.[lvi][64] Not only could colonial governments claim the prerogative powers of the Crown needed for the purposes of governing the colony - such as pardoning[lvii][65] and precedence over other creditors[lviii][66] - but also the forfeiture of a felon's property owed to a colonial government was satisfied with property in England;[lix][67] soldiers who enlisted in New South Wales to fight in the Boer War were paid by the British Government at a rate less than half of that promised by their colonial government.

Nevertheless, the courts were also forced to pay attention to the fact that the Crown could be a party to legal action between various colonial governments; this was especially underlined in cases brought in Canada and Australia, where the federal systems ensured a continuous stream of suits between governments.[lx][69] One issue of these distinct legal personalities was the effect of legislation purporting to bind "the Crown". In 1918, the Supreme Court of Canada ruled that provincial legislation could not bind the Crown in right of the Dominion except "by express terms or necessary intendment";[lxi][70] thus a distinction was underlined between the legal personalities of the Crown, and legislation of one Canadian jurisdiction had to specifically mention that the Crown in right of the other level of government was to be bound by the legislation.[lxii][71] References to the indivisibility of the Crown became tempered with statements

such as one by the Viscount Haldane in 1919 that the Crown in Australia "acts in self-governing States on the initiative and advice of its own ministers in these States".[lxiii][72] The recognition of the fact that the Crown acts on the advice of different sets of ministers and legislators led to clear distinctions being drawn between the control of, and access to, revenues in the various jurisdictions of the Empire. In 1932, the Privy Council firmly drew a line between the provincial and federal treasuries in Canada: "It is true there is only one Crown, but as regards Crown revenues and Crown property by legislation assented to by the Crown there is a distinction to be made between the property in the Province and the revenues and property in the Dominion. There are two purses."

The divisibility of the Crown was forcefully underlined in 1982 when several Canadian native Indian groups failed in legal actions in British courts to block the passage of the 1982 Constitution Act. Lord Denning clearly stated in one decision that the political developments of the twentieth century had fundamentally altered the legal position of the Crown:

Hitherto I have said that in constitutional law the Crown was single and indivisible. But that law was changed in the first half of this century, not by statute, but by constitutional usage and practice. The Crown became separate and divisible, according to the particular territory in which it was sovereign. This was recognised by the Imperial Conference of 1926. ...Thenceforth the Crown was no longer single and indivisible. It was separate and divisible for each self-governing Dominion or province or territory.

Thus the courts have come to recognise that the Crown can and does act in distinct and separable manners in each of the jurisdictions of the former Empire; and the recognition in case law of these different legal personalities was largely based upon the actual practices of government which had evolved across the Empire.

The divisibility of the Crown was further advanced by legislation relating to the royal style and titles, regency, and succession. The power to legislate on the title of the monarch originally reposed solely with Britain. In 1901, the British Parliament authorised a change in the title to included specific reference to the "British Dominions". In 1926, the Imperial conference agreed that a further change was necessitated by the separation of the Irish Free State from the United Kingdom. The report of this conference gave unanimous approval to the change required, but first noted that "it would be in accord with His Majesty's wishes that any recommendation should be submitted to him as a result of the discussion at the Conference". This precedent saw the emergence of a new convention requiring the approval of all the Dominions before the British Parliament authorized alterations to the royal style and titles. This convention was recognized and amplified by the 1929 Imperial Conference report; as noted previously, the British Parliament was said to require the assent of the Dominion Parliaments before legislating upon either the royal style and titles or succession to the throne. After approval by the Conference in 1930, this convention was included in the preamble of the Statute of Westminster.

The legislative confusion which followed the abdication of King Edward VIII in December of 1936 was an important step in the evolution of Dominion status, because it demonstrated that the Imperial Crown could be an entirely divisible entity in law. All the Dominion governments had been warned that the King was about to abdicate the throne; indeed, the Canadian government

sent a cable urging him to put his duty as King ahead of his desire to abdicate and marry Wallace Simpson. The news that the Instrument of Abdication had been signed was cabled to all the Dominion governments. Australia's Parliament was in session at the time and gave its formal assent to British legislation, as required by the convention recited in the preamble of the Statute of Westminster. The governments of New Zealand, Canada, and South Africa gave their consents as their Parliaments were not in session; the British Parliament passed an Abdication Act on the following day, December 11th, that gave legal effect to the Instrument of Abdication and brought George VI to the throne.

The divisibility of the Crown became a matter of law in some jurisdictions, however, through the actions of two Dominion Parliaments. The Irish Free State passed an Act declaring that the abdication took effect on December 12th, while the South African Parliament later passed an Act that declared that the abdication had taken effect in South Africa on December 10th. When the Canadian Parliament met in the new year, it passed an Act[lxiv[76]] giving its assent to the British legislation. The assumption of this legislative authority was legally redundant because the British Act was undoubtedly already in force in Canada; it complied with the requirements of s.4 of the Statute of Westminster by containing a reference to the fact that it was being enacted with the request and consent of Canada, and a proclamation announcing that the accession to the Throne had also been duly made by the Governor General.[lxv[77]] But as Clokie observed about the Canadian Act, "Whether necessary or not, it was clearly designed to demonstrate Canada's equality with Britain in the British Commonwealth and to display the Canadian aspect of the monarchy".[lxvi[78]] Even though the courts in South Africa and the Irish Free State would recognise the divisibility of the Crown and the authority of their own laws on the succession, these measures had no practical effect outside those two Dominions. As far as Canada, New Zealand, and Australia were concerned, the Crown remained a legal unity since their new monarch came to the throne through British legislation.

In 1937, the British Government informed the Dominions that it would be introducing legislation to provide for a regency in the event of the new King's incapacity. Although it is not clear whether regency is properly a matter of `succession' upon which Britain must conventionally seek Dominion consent before passing any legislation, the British government still made this effort. However, the Dominion Prime Ministers at a conference in 1935 declined to have such legislation extend to them, because they felt that the Governors General could perform any royal task required during a monarch's incapacity.[lxvii[79]] In the event neither the 1937 Regency Act nor subsequent Regency Acts passed in 1943 and 1953 were passed with any reference to Dominion assent. Therefore they have not had the force of law in Canada, because they fail the rule of construction found in s.4 of the Statute of Westminster.[lxviii[80]] Since the new Letters Patent were issued in 1947 authorizing the Canadian Governor General to exercise all the monarch's powers there would be no function required of a Regent which relates to Canada; even the appointment of a new Governor General could be accomplished by the incumbent.

When India gained independence, two changes were required to be made to the Royal Style and Titles in effect around the Commonwealth, which had last been amended by the British Government in 1927. In 1948, the British Government and all the remaining Dominions agreed to remove `Emperor of India' from the title; in so acting they were following the convention recited in the preamble to the Statute of Westminster. However, when India decided to become a

republic but still remain in the Commonwealth, the Indian government acknowledged the Queen as the Head of the Commonwealth, a title which had not previously existed. Within a few years several other colonies were on the verge of following India to independence and a meeting of the heads of Commonwealth governments in 1952 decided that the Royal Style and Titles needed to be changed more substantially. This meeting declared, "...it would be in accord with established constitutional practice that each member country should use for its own purposes a form of title which suits its own particular circumstances but retains a substantial element which is common to all". In 1953 the Canadian Parliament passed a Royal Style and Titles Act which gives the Queen her official title in Canada: "Elizabeth the Second, 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". K.C. Wheare has underlined how much the Canadian government at the time stressed the British element of the Crown.[lxix[81]] In the debate on this Bill, Prime Minister St. Laurent told the House:

Her Majesty is now Queen of Canada but she is the Queen of Canada because she is Queen of the United Kingdom... It is not a separate office ...it is the sovereign who is recognised as the sovereign of the United Kingdom who is our Sovereign...

The agreement of the Commonwealth Heads of Government in 1952 has effectively ended the previous convention that any changes in the Royal Style and Titles should only be made with the assent of all Commonwealth countries who retain the Queen as Head of State.[lxx[83]] Indeed the Australian Parliament changed the formulation in 1973 from one similar to Canada's to simply "Elizabeth the Second, Queen of Australia and Her Other Realms and Territories, Head of the Commonwealth".[lxxi[84]] It does not seem that a Canadian Parliament could now amend the Canadian title to something like the Australian one. The Canadian title clearly emphasises that the Canadian sovereign is one and the same as the British monarch, whereas the Australians deliberately eliminated this connection. Now that the office of the Queen is protected by the amending provisions of the 1982 Constitution Act, such an alteration in the royal title would appear to require the unanimous approval of all the provincial legislatures as well; the elimination of the clear connection with Britain seems to be a significant change in the office of the Canadian monarch and not just a simple change in title.

Foreign Relations

One important aspect of the historic indivisibility of the Crown lay in the conduct of foreign affairs. Originally, if the monarch signed a treaty or declared war, all the Empire was effected by that action. The final assumption of independent control over these powers of the Crown overcame Canada's last impediments to effective national sovereignty. In many respects, the legal ability to conduct foreign relations is the ultimate test of a nation's sovereign statehood. The process by which Canada acquired a complete and independent international personality was characterised by the evolution of new political arrangements, rather than changes in positive law. Although the acquisition of international sovereignty resulted from changes in political practice, important consequences may be seen for Canadian constitutional law.

Canada's entry onto the international stage was marked by several clear innovations in political practice.[lxxii[86]] The participation of Sir John A. MacDonald as part of the British delegation

which negotiated the Treaty of Washington in 1871 marked the first step towards Canada's international capacity. Especially in bilateral trade issues, Canadian representatives played an increasingly dominant role in negotiating international agreements for Canada.[lxxiii[87]] However, British participation was also necessary to give any formal ratification to the agreements reached. Thus British government signatures were required on a commercial treaty Canadian representatives negotiated with France in 1907. Canada continued to negotiate directly with foreign states, and in 1911 the Canadian government reached a Reciprocity Agreement with the US. That same year Canada began to send separate delegations to multi-lateral negotiations, on a US invitation to a conference on industrial property in Washington. Then the King signed separate powers for Dominion plenipotentiaries to international conferences on radio broadcasting in 1912 and on safety at sea in 1913. However, the significance of these developments should not be overstated. Although Canada had acquired a separate international profile, it was still very much regarded as a constituent part of the British Empire.

The First World War brought political developments which gave the Dominions an important step up onto the international stage. Because of their contributions to the war effort, they demanded to be separately represented in the negotiations leading up to the peace treaties. In 1919, plenipotentiaries for each of the Dominions signed the Treaty of Versailles, although the King signed once as High Contracting Party for the whole Empire. This treaty also established the League of Nations, in which each of the Dominions had a separate membership. These developments are easy to exaggerate, as Lloyd George did when opening the 1921 Imperial Conference by declaring that, "British Dominions have now been accepted fully into the community of nations".[lxxiv[88]] But, as James Crawford has pointed out: "The League Covenant allowed the admission of any `fully self-governing state, Dominion, or Colony'(Art.1), with the inference that Dominion status was something between that of `Colony' and `State'".[lxxv[89]] In 1923, Canada concluded its first major treaty without a countersignature by a British minister, the Halibut Treaty with the US. An Imperial Conference was held later that same year to deal with the negotiation of international agreements by the Dominions, and it was agreed Dominion representatives could negotiate and sign treaties entirely on their own; however, it was agreed that efforts should be made to ensure cooperation among the Dominions and Britain when negotiating matters which effected more than one party. This ability of Dominions to negotiate and sign treaties on their own was an important development in their road to independence, which developed as other foreign countries expressed their willingness to deal directly with them and as Britain acceded to Dominion demands that they be able to handle their own negotiations.

Nonetheless, the development of an independent capacity to enter into international agreements did not mean that the Dominions were freed of their Imperial constraints. This new capacity of the Dominions co-existed with the power of the British Government to take action in foreign relations which also effected the Dominions. In 1922, Britain declared war for the Empire against Turkey over the Chanak crisis and brought this to a close with the Treaty of Lausanne in 1924, which it negotiated on its own. However, the over-riding power of the British government was limited by convention when the Imperial Conference met in 1926. There it was agreed that a government must, "before taking any steps which might involve the other governments in active obligations, obtain their definite assent".

The right of the various Dominion governments to advise the King was also stressed at this

conference: "The plenipotentiaries for the various British units should have full powers, issued in each case by the King on the advice of the Government concerned, indicating and corresponding to the part of the Empire for which they are to sign". The first permanent diplomatic missions were established 1927 when the King acted on the advice of the Canadian government to appoint Vincent Massey as Canadian representative in Washington; the Irish Free State also had a representative appointed to Washington that year, and the American government responded by sending ambassadors to Ottawa and Dublin. This right of the Dominions to offer individual advice to the King was taken to an important conclusion in 1928 when he signed the Kellog-Briand Pact on the renunciation of war separately for each of the Dominions; previous multi-lateral treaties had just been signed once by the King for the whole British Empire. The separate capability to conduct independent relations with other foreign countries continued to solidify to the point that Alan Gotlieb asserted: "By 1931, Canada was in full control of its own treaty-making, which it carried out as an independent member of the international community".[lxxvi[90]] However, Canada still continued to conduct these relations within her membership in the British Empire. Thus the 1936 treaty on naval disarmament accorded the Empire a single quota; but both South Africa and the Irish Free State refused to ratify this treaty on the grounds that their separate identities were not bring recognised. The Imperial Conference of 1937 then resolved that "each member takes part in a multi-lateral treaty as an individual identity, and, in the absence of express provision in the treaty to the contrary, is in no way responsible for the obligations undertaken by any other member".

The Declaration of War

Even though each of the Dominions was asserting and practising the right to conduct independent (though co-operative) foreign policies by the late 1930s, one crucial Imperial tie remained to be severed. Right up until the outbreak of the Second World War, it was not certain that the Dominions could take any independent stance on the declaration of war or neutrality. In this one vital aspect the unity of the British Empire lingered on, and it was based for the most part on the doctrine of the indivisible Imperial Crown; it was felt that anything less than the unity of the Empire would mean that the King could be advised to declare war on himself with respect to another of his territories. It was not at all certain that Britain had lost its unique right to advise the King on matters of war and peace for the whole Empire.[lxxvii[92]] The consequences of this power were underlined by Mackenzie King in a speech to the Commons in 1924 about the Treaty of Lausanne which ended the war with Turkey: "When His Majesty declared war, Canada was brought into the war as a consequence of the declaration, and when the King ratifies the treaty, Canada will be brought out just as she went into the war by the action of the sovereign without any consultation with our ministers in that regard".[lxxviii[93]] These views continued to hold sway in both Britain and Canada until well into the next decade. Kennedy wrote in 1937 that, "in the final test of sovereignty - that of war - Canada is not a sovereign state ...and it remains as true in 1937 as it was in 1914 that when the Crown is at war, Canada is legally at war".[lxxix[94]] In 1938 Berriedale Keith continued to argue that "issues of war or neutrality still are decided on the final authority of the British Cabinet".[lxxx[95]] However, Ollivier has claimed that in 1938 the British Secretary of State for the Dominions gave a speech in Toronto in which he suggested that Canada could in fact make independent decisions about war and peace.[lxxxi[96]] He may well be mistaken about what was actually said on that occasion, because both Mackenzie King and his Justice Minister, Ernest Lapointe, made long speeches to the House of Commons in March 1939

in which they strongly stated that Canada had no accepted capacity to declare war independently of Britain. They did, however, re-affirm the position taken by Canadian governments since the Boer War: although Canada's belligerency would be determined by British action, the extent of Canada's contribution to the war effort, if any at all, was a matter to be decided by Canada.

In any event, this question was settled later in 1939, following Britain's declaration of war against Germany on September 3. Both New Zealand and Australia assumed that Britain's declaration had put the whole Empire at war. Australia's Prime Minister Menzies stated on the occasion, "It is my melancholy duty to announce officially that in consequence of Germany's persistence in her invasion of Poland, Britain has declared war and as a result Australia is at war also".[lxxxii[98]] Frank Scott claims that, "In Canada, belligerency of September 3 was automatically accepted by most people, and apparently at first by the government..."[lxxxiii[99]] However, the Canadian cabinet came under pressure when the United States President left Canada out of the list of belligerent countries in his declaration of neutrality on September 5.[lxxxiv[100]] The Canadian Parliament met on September 7 and debated the speech from the throne, in which Parliament was asked to provide authority for Canada to make every effort to defend itself; but it was not framed as an explicit declaration of war. After Parliament approved this motion in the evening of September 9, the Cabinet met and cabled a petition to the King that a declaration be made on behalf of Canada, which was done the next morning. Meanwhile South Africa had made a separate declaration of war on September 6, while the Irish Free State declared its neutrality - a position it maintained throughout the war. The practice around the Empire became more uniform when declarations were made later against Italy, Rumania, Hungary, Finland, and Japan; in these instances Australia joined the other Dominions in securing separate declarations from the King.

These separate declarations of war and neutrality were final proof of the complete functional divisibility of the Crown. As Scott concluded in a paper written towards the end of the war, "Today it is firmly established as a basic constitutional principle that, so far as relates to Canada, the King is regulated by Canadian law and must act only on the advice and responsibility of Canadian ministers".[lxxxv[101]] However, the Canadian ministers' ability to advise the King on this matter was acquired entirely through informal political arrangements and not through any legal change.

The International Competence of the Provinces

The divisibility of the Crown, achieved through the assumption by Canadian ministers of the right to advise the monarch on Canadian foreign relations, raises important constitutional issues for the division of powers within Canada. As the British government allowed an increasing role for Canadian representatives, the federal government assumed that it was the only Canadian government competent to direct international relations. Canadian plenipotentiaries were selected by the federal government, the King advised on their appointment by Canadian ministers, and when formal ratification of Canadian-negotiated treaties was required, this was performed by the King on the advice of the federal ministers. However, ever since these roles were assumed by the federal government, there has been a sporadic but recurring debate as to whether the provincial governments also have a right to conduct their own relations with foreign states. The argument in favour of a provincial competence stems from the notion that the provinces are

essentially sovereign within their legislative spheres and that they have the right to advise the Crown with respect to any affairs relating to the conduct of their governmental powers.

The federal government had initially tried to assume complete control of treaty-making and implementation, based on s.132 of the 1867 Constitution Act; this section provides Parliament with the power to enact legislation to give effect to Empire treaties, regardless of whether the subject matter would normally be dealt with exclusively by the provinces. The Judicial Committee heard three cases in the 1930s which have formed the legal basis for the constitutional division of treaty-implementing powers; the first two cases settled that Parliament could implement treaties on radio broadcasting[lxxxvi[102]] and aviation.[lxxxvii[103]] However, the Judicial Committee later distinguished these cases as not finally settling the general topic of implementing treaties which were not truly Empire Treaties.

In the 1937 Labour Conventions case, Lord Atkin declared that the legislature which could implement a treaty was the one which would normally deal with the subject matter domestically: "the Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth".[lxxxviii[104]] Thus, if the treaty matter was normally a subject dealt with provincially, then only provincial legislatures could enact laws to implement the treaty.

However, what is of interest here is which level of government has the power to enter into treaties with foreign governments. In the Labour Conventions case, Atkin clearly stated that he was not going to deal with treaty-making powers.[lxxxix[105]] However, he referred approvingly in an obiter dictum[xc[106]] to the opinion of Duff C.J.C in Supreme Court's earlier decision on this case, in which Duff laid down that only the federal government had any international competence. Duff had declared that the national government alone had acquired the power to enter into international agreements; in reaching this conclusion he relied heavily upon the political practices which had already become evident:

As a rule, the crystallization of constitutional usage into a rule of constitutional law to which the courts will give effect is a slow process extending over a long period of time; but the Great War accelerated the pace of development in the region with which we are concerned, the practice, that is to say, under which Great Britain and the Dominions enter into agreements with foreign countries in the form of agreements between governments and of a still more informal character, must be recognised by the Courts as having the force of law.

Duff then went on to add:

As regards all such international agreements, it is a necessary consequence of the respective positions of the Dominion executive and the provincial executives that this authority resides in the Parliament of Canada. The Lieutenant Governors represent the Crown for certain purposes. But, in no respect does the Lieutenant Governor of a province represent the Crown in respect of relations with foreign governments.

The opinions of two other judges also stated that the federal executive alone had acquired the right to conduct foreign relations;[xci[109]] thus a clear majority of the Canadian Supreme court held

that the federal government had acquired the exclusive power of treaty-making through the political practices which had arisen. For all of these judges, the established pattern whereby foreign states had negotiated only with the federal government was a crucial factor; but Duff also relied upon the idea that executive powers should match an exclusive federal competence to enact treaty legislation - a power which the Privy Council denied on appeal.

However, the Ontario government argued before the Judicial Committee that provincial governments have the power to advise the Crown, as represented by their Lieutenant Governors to conclude agreements with foreign governments:

The Province has the right to advise the Crown in matters where legislative powers apply. Ontario has the right to enter into an agreement with another part of the British Empire or with a foreign state. So far as the legislative and executive authority are concerned the Governor General and the Lieutenant Governors of the Provinces are equal in status.

Several Quebec governments have also argued since then that they possess the competence to conduct foreign relations.[xcii][111] These claims for provincial competence to conduct foreign relations relating to matters within their legislative jurisdictions appear to be founded upon solid legal grounds. The provincial arguments rely on the fact that original treaty-making powers for Canada were vested by common law in the Imperial Crown and directed in practice by the British government. And, according to the Judicial Committee's judgment in The Liquidators of the Maritime Bank v. the Receiver General of New Brunswick, a Lieutenant Governor, "when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor General is for all purposes of Dominion Government".[xciii][112] Thus Lieutenant Governors should be capable of receiving any prerogative power relevant to provincial government which originally belonged to the Imperial Crown. Furthermore, the Judicial Committee has decided that the distribution of executive powers in Canada must follow the distribution of legislative powers;[xciv][113] and, as already noted, treaty-implementing powers were held to be distributed according to the subject matter of the treaty. And in 1971 the English Court of Appeal dramatically underlined the position of the provinces, although not without exaggeration:

The British North America Act 1867 gave Canada a federal constitution. Under it the powers of government were divided between the Dominion government and the provincial governments. Some of those powers were vested in the Dominion government. The rest remained with the provincial governments. Each provincial government, within its own sphere, retained its independence and autonomy, directly under the Crown. The Crown is the sovereign in New Brunswick for provincial powers, just as it is sovereign in Canada for Dominion powers: see Maritime Bank of Canada (Liquidators) v. Receiver-General of New Brunswick. It follows that the Province of New Brunswick is a sovereign state in its own right, and entitled, if it so wishes, to claim sovereign immunity.
Even without this eccentric conclusion of Lord Denning, the other cases clearly support the contention that a provincial executive does possess the legal powers, formerly possessed by the British Crown alone, to make treaties dealing with subjects normally within its exclusive legislative jurisdiction.

However, the preponderance of published opinion overwhelmingly supports the federal government's claim to exclusive jurisdiction to make treaties. Essentially, the political arguments are made that a state needs a single international personality, and that the practice has always been for the federal government to assert overall direction of all dealings between foreign and Canadian governments; in addition, there is the fear that an international competence for the provinces would unleash centrifugal forces of separatism. Several legal arguments have also been forwarded to justify exclusive treaty-making powers for the federal government. It is said that legislative power to deal with treaty-making should properly belong to the federal level of government through the peace, order, and good government powers, because treaty-making does not fall within the enumerated powers of the provinces of s.92 of the Constitution Act, 1867. However, it is not clear that treaty-making can always be separated as a power distinct from treaty-implementation; where legislative jurisdiction exists to enact laws on a subject, full executive powers (which treaty-making has always been in anglo-canadian constitutional law) are assumed to reside in that level of government with respect to that subject matter. It is difficult to establish conclusively that treaty-making is in fact an independent subject matter that can be separated from general powers given to the provinces.

Another legal argument proposed by proponents of an exclusive federal power is that the 1947 Letters Patent empowered the Governor General to exercise all powers belonging to the Monarch "in respect of Canada". Hogg argues, "This language undoubtedly delegates to the federal government of Canada the power to enter into treaties binding Canada".[xcv][115] This argument seems most unsatisfactory, however, because its logical conclusion is that the federal government could legally exercise any prerogative power vested in the Queen with respect to the provinces; the broad language of the Letters Patent would appear to include the delegation of every single prerogative power already existing with respect to provincial as well as federal government.

It is unlikely that the Supreme Court would ever support such a broad interpretation of the powers exercisable by the federal cabinet, as it declared in a 1987 case that executive powers "must be adapted to conform to constitutional imperatives".[xcvi][116] Any conclusion that the federal government could exercise prerogative powers belonging to the provincial Crown would be most destructive to the fundamental principle of federalism embedded in the Canadian constitution. The federal government cannot simply acquire a prerogative power which belongs to the Crown in right of a province simply by advising the Queen to issue Letters Patent.

Moreover, this argument for exclusive federal jurisdiction also relies upon the purely conventional barriers against provincial governments directly advising either the Queen or the Governor General. The Letters Patent actually state in Article II that the powers delegated to the Governor General are to be exercised "with the advice of Our Privy Council for Canada or of any members thereof individually, as the case requires...". Since John Buchanan is a member of the Canadian Privy Council he could legally advise the Governor General and lead Nova Scotia in an independent foreign policy, if Hogg's argument based on the Letters Patent were valid.

Perhaps the strongest legal ground cited for an exclusive federal right to conclude treaties is found in s.3 of the Statute of Westminster which gives Parliament, but not provincial legislatures, the power to legislate extra-territorially. However, this power was conferred to

extend Parliament's power to deal with Canadian subjects abroad, such as the provisions of the National Defence Act which stipulate that the whole of Canadian military law applies to members of the Forces outside the country. This is somewhat different from the power of making agreements which have legal effects outside the territorial limits. Such a power to make legal agreements with extra-territorial partners is not exclusive to the federal government, since provincial governments are constantly making binding agreements (with legal effects) with each other, the federal government and its agencies, as well as out-of-province and overseas corporations.[xcvii][118] It is this ability to reach legal agreements with extra-territorial parties that appears the most applicable for the conduct of foreign relations.

However, a fundamental flaw in any argument based upon the possession of extra-territorial legislative power is that it completely ignores the fact that the federal government's treaty-making powers had been recognised and exercised for several years prior to the passage of the Statute of Westminster. Furthermore, s.7(3) of the Statute also stipulated that the new powers conferred upon Parliament by the Statute "shall be restricted to matters within the competence of the Parliament of Canada..."; thus extraterritoriality was not a new head of power, but a territorial extension of the applicability of the laws Parliament was already competent to pass.

While there are solid legal grounds for the exercise of treaty-making powers by the federal government, the evidence is far too unsettled to support an exclusive legal power. Indeed there are strong legal arguments that the provincial executives are competent to conduct foreign relations. The exclusive exercise of this power by the national government has not been founded upon law but upon domestic conventions and the external practice of other foreign countries. There is simply no bar in international law against treaty-making powers for the constituent states of a federal country.[xcviii][119] The federal government has so far been successful in dissuading other states from dealing with provincial governments as if they had separate international identities, but successive French governments have evidenced an unrealized willingness to treat Quebec otherwise. The constitutional convention barring complete international competence to the provinces is an important rule, whose absence might seriously alter the nature of the Canadian federal system. But it is essential to recognise that the provinces have been constrained on this matter by constitutional convention and the practice of foreign states, rather than by law.

The Commonwealth

The acquisition of independence by Canada and the other Dominions corresponded with the evolution of the British Empire into the Commonwealth. Although the British Empire contained several self-governing colonies, it was a single juristic unit over whom the British institutions of government were supreme, and which functioned in international law as a single entity. Even as the Dominions gained their initial independence of action in the 1920s and 1930s, the governments of Britain and most of the Dominions adhered to the inter se doctrine; this principle held that the relations between these governments were constitutional relations within the Empire and not international relations.[xcix][120] As the Dominions acquired first greater autonomy and then independence from Britain, the Empire evolved into the Commonwealth, with a voluntary and equal membership of independent states. The disintegration of the Empire and the formation of the Commonwealth was achieved largely through the informal developments which have been

reviewed in the discussions above about Canadian independence. There was no legal extinction of the Empire, and it is difficult to point with certainty to the creation of the Commonwealth.

In an effort to trace the evolution from Empire to Commonwealth several constitutional authorities have looked to the evolution of the terms used to describe meetings of British ministers and representatives from the overseas territories.[c][121] The first meeting held between the British government and the first ministers from colonies which exercised responsible government was held in 1887 and called a Colonial Conference. These meetings were held with some regularity, and in 1907 it was agreed that in the future they would be called Imperial Conferences, consisting of Britain and the self-governing `Dominions'. Prior to the disappearance of Imperial Conferences, however, increasing currency was given to the term `British Commonwealth', which consisted of Britain and the Dominions as a group within the Empire. The 1926 Imperial Conference approved a report containing the classic formulation of the relations between Britain and the self-governing Dominions: "They are autonomous Communities within the British Empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations". At least until the outbreak of World War Two, the British Commonwealth was still assumed to be an informal association within the Empire; the last formal meeting of British and Dominion Prime Ministers to be still called an Imperial Conference was held in 1937. The final assertions of independence brought by the declarations of war in the next few years precluded any re-assertion of bonds of Empire between Britain and the Dominions in the post-war period; thus the informal meetings held in 1944 and 1946 between British and Dominion Prime Ministers were not termed Imperial Conferences. The final independence of India in 1947, and its subsequent assumption of a republican form of government, precipitated a meeting of British and Dominion Prime Ministers in 1949, which Sir William Dale has called the foundation of the modern Commonwealth.[ci][122] After noting India's desire to become a republic, the meeting concluded:

The Government of India have, however, declared and affirmed India's desire to continue her full membership of the Commonwealth of Nations and her acceptance of the King as the symbol of the free association of its independent member nations and as such the Head of the Commonwealth. Accordingly the Untied Kingdom, Canada, Australia, New Zealand, South Africa, India, Pakistan and Ceylon, hereby declare that they remain united as free and equal members of the Commonwealth of Nations, freely co-operating in the pursuit of peace, liberty and progress.

With this declaration, the British Commonwealth became the Commonwealth of Nations, a term which was soon superseded by simply `the Commonwealth'.

This 1949 declaration also created a new position for the British monarch as Head of the Commonwealth. But a Minute of this conference also recorded that "the meeting agreed that it should be placed on record that the designation of the King as Head of the Commonwealth does not denote any change in the constitutional relations existing between the members of the Commonwealth, and, in particular, does not imply that the King discharges any constitutional functions by virtue of the Headship".[cii][123] Nevertheless, the Queen has come to acquire some symbolically-important roles as Head of the Commonwealth. Her formal functions include

opening the Commonwealth Heads of Government meetings, and giving her Christmas Day broadcast to the Commonwealth. She is kept informed of political developments in Commonwealth countries through audiences with the heads of government at those meetings, or when they are in London. Furthermore, she is supplied with much information by the Commonwealth Secretariat in London. This body was created in 1965 by the mutual agreement of all Commonwealth members, essentially to aid inter-governmental co-operation. The Agreement creating the Secretariat warned that it should not "arrogate to itself executive functions".[ciii][124] The Secretary General, who heads it, holds infrequent audiences with the Queen, but he and his Deputies do have many on-going discussions with the Queen's Private Secretary. Nevertheless, the purpose of these meetings is only to keep the Queen informed, and any attempt, let alone right, to offer formal advice to the Queen is strenuously denied.[civ][125] The possibility of the Queen receiving advice from this quarter was raised by the events following the first coup in Fiji in 1986; the deposed Prime Minister met with the Secretary General after being refused a direct audience with the Queen and turning down an offer of a meeting with her Private Secretary instead. When it comes to the Queen's role as Head of State of any Commonwealth country, it would be most improper indeed for anyone other than the Prime Minister or Governor General of that state to try to offer binding advice to the Queen.

The Queen may occasionally play an informal, independent role in matters which concern the Commonwealth as a whole. In 1979 she was said to have made a substantial impression upon several heads of government at the Commonwealth meeting convened to deal with the Zimbabwe-Rhodesia issue; the tone of her meetings with the heads of state before the formal start of the conference, and at the opening dinner, reportedly helped foster the necessary will and conciliation. Her traditional Christmas Day broadcasts to the Commonwealth created a minor controversy when Enoch Powell strongly criticized the one made in 1983 and demanded that the British government shoulder responsibility for the matter. However, this episode underlined the fact that the British government has no right to advise the Queen on her activities performed as Head of the Commonwealth. Lord Blake wrote to the Times and formulated the conventional rules surrounding the offering of advice to the Queen on these matters in the following terms:

1. The Queen's Christmas broadcast and Commonwealth Day message in March are the only occasions when she speaks without ministerial advice and responsibility. This has always been the convention.
2. All other speeches which she makes in the UK are made on the responsibility of UK ministers.
3. All speeches which she makes in a Commonwealth monarchy, for example Canada or Australia, are made on the advice and responsibility of the prime minister of the country concerned.
4. All speeches which she makes when visiting a Commonwealth republic, e.g. recently Kenya, Bangladesh and India, are made on the advice and responsibility of UK ministers. This convention is fully understood by the presidents and governments of those republics.

There are, however, a number of potential conflicts between the Queen's roles she plays as the Head of State of several Commonwealth countries and as Head of the Commonwealth. For instance, one Commonwealth government over whom she is Queen may wish her make a certain speech in another country she is visiting which would conflict with the policies of either Britain,

the host country, or another Commonwealth country. There is no particular reason why the Queen should travel in Commonwealth republics or non-Commonwealth countries only as the Queen of Britain under British ministerial advice, and not as the Queen of one of the other Commonwealth countries she heads. The controversy which erupted in Britain in 1986, over an alleged disagreement between the Queen and Prime Minister Thatcher over policies towards South Africa, also illustrated that the Queen might be put in a difficult position if the policies she is advised to sanction could severely damage the Commonwealth association. However, the public discussion of this particular issue clearly demonstrated that the consensus of opinion lies with the requirement that the Queen's constitutional obligation to act on ministerial advice is supreme over her customary role as Head of the Commonwealth; naturally she has the right to express her reservations and misgivings before acting.[cv][128] Unfortunately, there is little guidance for the Queen should she be given conflicting advice by her governments in two or more different states.

Conclusions

Even though Canada only gained control of its own constitutional amendment in 1982 and the very last legal traces of its colonial past have yet to be formally extinguished, it is quite evident that Canada has been a fully independent state for a number of decades. The persistence of these vestiges of Canada's former status illustrate how much Canada owes its independence from Britain to political developments, rather than legal changes in the formal constitution. The legal amendments made to the Canadian constitution were important and necessary to the acquisition of sovereign independence, but these changes were not sufficient to convey independence on their own. Britain's legislative supremacy over Canada was greatly restrained by convention long before the passage of either the Statute of Westminster or the Canada Act. And Canada's complete control over the Monarch's prerogative powers was gained incrementally through the evolution of political practices which replaced the Monarch's British advisers with Canadian ministers. This fundamental transfer of executive power, which brought with it complete independence in foreign relations, was achieved almost entirely by constitutional convention. An understanding of Canada's acquisition of full independence continues to have critical bearing on modern constitutional debates, especially with respect to the international competence of provincial governments. What international personality the provinces have the legal power to assert is not simply a matter of international political practice; it is a matter of domestic constitutional law. In any attempt to establish what the law of the Canadian constitution is on this issue, one must appreciate that the transfer of the executive powers currently exercised by the federal government was brought about almost entirely by political practice.

AUSTRALIAN INDEPENDENCE 1942-1986

Prior to 1901, Australia was made up of six self-governing colonies; New South Wales, Victoria, South Australia, Queensland, Western Australia and Tasmania. These colonies were ultimately under British rule from the time the First Fleet landed, in 1788, until 1901. Numerous politicians and influential Australians through the years had pushed for federation of the colonies, and self-government. On 22 January 1899, leaders of the six Australian colonies met in Melbourne to discuss a federation bill.

After not being accepted by the states the first time, the amended Commonwealth Constitution was given Royal Assent on 9 July 1900. On 1 January 1901, federation of the colonies was achieved and the Commonwealth of Australia was proclaimed by Australia's first Governor-General, John Hope, at Centennial Park in Sydney. Australia's first Prime Minister was Edmund Barton, who was Prime Minister from January 1901 to September 1903. This gave Australia the right to govern itself.

Although the Constitution of the Commonwealth of Australia came into effect at Federation, this did not mean that Australia was now independent of Britain. When the UK approved colonial federation, it simply meant that the six self-governing states of Australia allocated some functions to a federal authority. Australia gained the status of a Dominion, which meant it remained a self-governing colony within the British Empire, with the Head of State being the British monarch. The British government appointed Australia's Governor-General and State Governors, who answered to the British government.

All Dominions within the British Empire were declared "equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations" at the Imperial Conference of 1926. The Statute of Westminster 1931 ratified the discussions of the Imperial Conference. This meant that Australia and other Dominions such as South Africa, New Zealand and Canada could now conduct treaties and agreements with foreign powers, and manage their own military strategies. No longer were the Australian Governor-General, Parliament and individual governors answerable to the UK. The British monarch could only act on the advice of the Australian Government, and the Governor-General was no longer appointed by and answerable to the British monarch.

The defeat of the large British garrison at Singapore in January 1942 came as a very unwelcome shock to the Australian government. It exposed the weakness of Britain and led Australia to seek much closer ties with the US and it was felt that for this the country needed full independence; hence the date for activating the 1931 Statute of Westminster. Australian Parliament formally adopted the Statute of Westminster 1931 under the Statute of Westminster Adoption Act 1942, on 9 October 1942.

Australia reached the next stage of independence on March 3rd 1986, when the Australia Acts came into effect. The Australia Acts declared that Australia had the status of a Sovereign, Independent and Federal Nation. The nation still retains Elizabeth II as head of state, but her position as Australia's head of state is a completely separate position from her position as the head of state of any other country, including the UK. What the Australia Act effectively did was remove the ability of the British Government to make laws for Australia and removed the last legal link with the UK by abolishing the right of appeal to the judicial committee of the Privy Council. Also it was not until 1988 that the last state, Queensland, removed this from their statutes as well.

Some might say Australia is still on a path to independence as we are still *technically* ruled by the British monarchy, even though that monarchy does not have any right to interfere with

Australian laws. There will always be those who disagree with the above, as it could be said that Australia received independence in varying degrees

NEW ZEALAND INDEPENDENCE 1947-1986

The independence of New Zealand is a matter of continued academic and social debate. New Zealand has no fixed date of independence, instead independence came about as a result of New Zealand's evolving constitutional status. New Zealand evolved as one of the British Dominions, colonies within the British Empire which gradually established progressively greater degrees of self-rule. They were always anomalous in international terms, and the attempt to define a "date of independence" in the sense that one can be given for most ex-colonies is not really meaningful. In many ways it is an example of the Sorites Paradox. However, a consideration of possible dates can help understanding of the processes of change.

The principles behind the independence of New Zealand began before New Zealand even became a British colony in 1841. There had been minor rebellions in Canada in the 1830s, and in order to avoid making the mistakes which had led to the American revolution, Lord Durham was commissioned to make a report on the government of colonies which contained a substantial British population. The principles of self government within the Empire were laid down in the Durham Report and first put into operation in Nova Scotia in 1848. Canada, New Zealand, and the Australian colonies very soon followed suit. The British Parliament passed the New Zealand Constitution Act 1852 to grant the colony's settlers the right to self-governance, only 12 years (in 1853) after the founding of the colony. New Zealand was therefore to all intents and purposes independent in domestic matters from its earliest days as a British colony.

The first major step towards nationhood on the international stage came in 1919 when New Zealand was given a seat in the newly founded League of Nations. In 1926 the Balfour Declaration declared Britain's Dominions as "equal in status", followed by the creation of the legal basis of independence, established by the Statute of Westminster 1931 which came about mainly at the behest of nationalist elements in South Africa and the Irish Free State. However, Australia, New Zealand, and Newfoundland were hostile towards this development, and the statute was not adopted in New Zealand until 1947. Irrespective of any legal developments, many New Zealanders still perceived themselves as a distinctive outlying branch of the British nation until at least the 1970s. This attitude began to change when the United Kingdom joined the European community in 1973 and abrogated its preferential trade agreements with New Zealand, and gradual nationality and societial changes further eroded the relationship. Thus, New Zealand has no single date of official independence. The concept of a national Independence Day does not exist in New Zealand.

Māori Declaration of Independence (1835)

On 28 October 1835, the Declaration of the Independence of New Zealand was signed by the United Tribes of New Zealand, a loose confederation of Māori tribes from the far north of New Zealand organised by British resident James Busby. This document recognised Māori independence, and most academics agree this declaration was abrogated five years later by the

Treaty of Waitangi, which ceded the independence (recognised by King William IV of the United Kingdom) of Māori to the British Crown.

The signing of the Treaty of Waitangi on 6 February 1840 marked the beginning of organised British colonisation of New Zealand. New Zealand was originally a sub-colony of New South Wales, but in 1841 it was created a colony in its own right. Waitangi Day is thus celebrated as New Zealand's national day. Some constitutional lawyers, such as Moana Jackson, have argued that the Treaty did not cede total sovereignty of New Zealand to the British Crown, and argue that the Treaty intended to protect *tino rangatiratanga* or the absolute independence of Māori. Others dispute this, pointing to the use of the term *kawanatanga* (governorship) in the Treaty deducts from *rangatiratanga*, equating the term to Māori control of Māori assets.
New Zealand became a self-governing colony in 1853 following the passage of the New Zealand Constitution Act 1852, which established responsible government in the colony. The New Zealand Parliament was bound by a number of Acts of the British Parliament, such as the Colonial Laws Validity Act and the Colonial Navy Defence Act 1865 which led to the creation of the Flag of New Zealand in 1869.

Dominion

In 1901 New Zealand did not ratify the Australian Constitution, and so rejected membership of the Australian Commonwealth. Hence, on 26 September 1907 the United Kingdom granted New Zealand (along with Newfoundland, which later became a part of Canada) "Dominion" status within the British empire. Thus New Zealand became known as the *Dominion of New Zealand*. The date was declared Dominion Day, but never reached any popularity as a day of independence. As a potential national day, Dominion Day never possessed any emotional appeal, although the term "Dominion" was popular. *The Dominion* newspaper began on Dominion Day, 1907. To regard it as a national independence day is incorrect. With Dominion status, New Zealand did not have any control over its foreign affairs or military; these issues remained the responsibility of Britain.

Despite this new status, there was some apprehension in 1919 when Prime Minister Bill Massey signed the Treaty of Versailles (giving New Zealand membership of the League of Nations), which indicated that New Zealand did have a degree of control over its foreign affairs. Massey was unequivocally an Imperialist, and fervently supported the British Empire.

In 1926, the Balfour Declaration declared that the British Dominions were equal, which had the effect of granting New Zealand control over its own foreign policy and military. The legislation required to effect this change, the Statute of Westminster 1931 was not adopted by New Zealand until some 16 years later. By 1939, the Governor-General ceased to be Britain's High Commissioner to New Zealand, instead an independent officer was appointed.

Treaty of Versailles and the League of Nations

The Institute of Taxation Research (ITR) has suggested that with the signing of the Treaty of Versailles and joining the League of Nations on 10 January 1920, New Zealand received full independence, as the League of Nations was only open to sovereign nations. Under International

Law only a sovereign state can sign an international treaty, so New Zealand must have quite a large degree of state affairs.

However, this ignores the fact that New Zealand and the other Dominions signed as part of a "British Empire Delegation", and their names were indented in a list following that of Britain. The significance of the indentation was perhaps deliberately left unclear. The Treaty of Versailles offered membership to any "fully self-governing State, Dominion, or Colony" (Art. 1). Significantly, India, which was not an independent state but a colonial territory (technically an "Empire") was included in this list and even became a member of the League. Thus while the Dominions' signature was a key moment, the case for it as a moment of independence is dubious. At the 1921 Imperial Conference British Prime Minister Lloyd George said: *In recognition of their service and achievements during the war, the British Dominions have now been accepted fully into the comity of the nations of the whole world. They are signatories to the Treaty of Versailles and all other treaties of peace.* They are members of the Assembly of the League of Nations, and their representatives have already attended meetings of the League. In other words, they have achieved full national status and they now stand beside the United Kingdom as equal partners in the dignities and responsibilities of the British Commonwealth. If there are any means by which that status can be rendered even more clear to their own communities and to the world at large, we shall be glad to have them put forward.

The Balfour Declaration (not to be confused with the Balfour Declaration of 1917 on Palestine) stated that "They [the Dominions] are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations." This was given legal effect by the Statute of Westminster 1931, which took effect when a given Dominion adopted it. The New Zealand government saw little urgency in the Act and delayed ratification, but for practical purposes 1926 had removed doubts about functional independence.

While in 1914 Britain had decided on war for the whole Empire, in 1939 the Dominions made their own decisions. On 3 September 1939 New Zealand declared war on Germany. Declaration of war is normally regarded as an indication of sovereignty.

Statute of Westminster and Realm

At the outset of the Second World War, then Prime Minister Michael Joseph Savage, who had been critical of the British policy of appeasement, famously declared "Where [Britain] stands, we stand". Savage's successor, Peter Fraser, did not withdraw New Zealand troops from the Middle East in 1942 (unlike Australia), based on an assessment of New Zealand interests.[1]

In the 1944 Speech from the Throne the Governor-General announced the Fraser government's intention to adopt the Statute of Westminster.[2] However, there was a strong outcry by the opposition that this would weaken the British Empire in a time of need.[2] In 1946, Fraser instructed Government departments not to use the term "Dominion" any longer. Ironically, the failure of a private members bill to abolish the upper house by future Prime Minister Sidney Holland led to the adoption of the Statute of Westminster on 25 November 1947 with the Statute

of Westminster Adoption Act 1947. This Act allowed passing of the New Zealand Constitution Amendment (Request and Consent) Act 1947, which granted the New Zealand Parliament full legislative powers, extra-territorial control of the New Zealand military forces and legally separated the New Zealand Crown from the British Crown. Thus, the New Zealand Monarchy is legally speaking independent of the British Monarchy.

In 1948, the New Zealand Parliament passed the British Nationality and New Zealand Citizenship Act 1948, altering the New Zealand nationality law. From 1 January 1949 all New Zealanders became New Zealand citizens. However, New Zealanders remained British subjects under New Zealand nationality law. Prior to this Act, migrants to New Zealand were classed as either "British" (mainly from the United Kingdom itself, but also other Commonwealth countries such as Australia, South Africa and India) or "Non-British".[3]

At a meeting of Commonwealth prime ministers in 1952 following the death of King George VI, it was agreed that the new Queen Elizabeth could have a royal style and title that was different in each dominion, but with an element common to all the dominions. In 1974 the New Zealand Parliament passed the Royal Titles Act, which formally recognized Queen Elizabeth II as the "Queen of New Zealand". New Zealand was thus an independent Commonwealth Realm.

In 1967, the first New Zealand-born Governor-General was appointed to the office, Lord Poritt (although Lord Bernard Freyberg had previously been appointed in 1946; Freyberg had been born in the United Kingdom, but had lived in New Zealand from a young age). Porritt had also been resident in the United Kingdom for most of his life. The result was a greater focus on new overseas markets for New Zealand goods, mainly in the Asia-Pacific regions.
Some historians argue that a more significant move towards independence in a practical rather than legal sense came in 1973, when Britain joined the European Economic Community. The move, although anticipated, caused major economic structural adjustment issues, as the vast majority of New Zealand's exports went to Britain at that time.

The election of the nationalist Third Labour Government of Norman Kirk in 1972 brought further changes. Kirk's government introduced the Constitution Amendment Act 1973, which altered the New Zealand Constitution Act 1852 so that the New Zealand Parliament could legislate extra-territorially. The third Labour government also passed the Royal Titles Act 1974, changing the Queen's style and titles to be solely Queen of New Zealand. The nationality listed in New Zealand passports for the passport holder was changed in 1973 from "British Subject and New Zealand Citizen" to simply "New Zealand citizen".[4]

The Letters Patent of 1983 declared New Zealand as the "Realm of New Zealand", and updated the previous Letters Patent of 1917. The final practical constitutional link to Britain of New Zealand's Parliament was removed in 1986 by the Constitution Act 1986. This Act removed the residual power of the United Kingdom Parliament to legislate for New Zealand at its request and consent. The Imperial Laws Application Act 1988 clarified the application of British laws in New Zealand.

In 1996, New Zealand ceased to participate in the Imperial honours system, and ceased to recommend New Zealanders for the Order of the British Empire; see New Zealand Honours System.

The fifth Labour government, led by Helen Clark, abolished appeals to the Judicial Committee of the Privy Council and created the Supreme Court of New Zealand, a move further separating New Zealand from the United Kingdom, though there was provision for cases commenced before then to remain subject to the right of appeal.

SOUTH AFRICAN INDEPENDENCE
1931-1961

South Africa as one country came into existence in the early 1900s. Prior to that it had been a series of smaller countries under various colonial and independent governments. The two colonial powers who held territory in South Africa were the Dutch and the British. The smaller countries fought fiercely for their independence agsinst both the Dutch and British. The battle of the British army against the Zulus and the Boers, known as the Anglo-Boer war was especially notable.

The British defeated the Zulus and later the took power of the Boer Republics and united them all with the Cape and Natal colonies to form a single country. South Africa, as one country, was called the Union of South Africa in 1911. It was self-governing, British colony.

In 1939, the National Party, supported mainly by the Afrikaners (Boers), won the national elections and started a process of moving away from British rule. There was no notable warfare or bloodshed, but a continued process of resisting British influence.

In 1961, South Africa was granted independence from Britain and became known as the Republic of South Africa, upon withdrawal from the Commonwealth.

IRISH INDEPENDENCE
1922-1949

The Declaration of Independence was presented January 21, 1919

Despite Independence being gained and the Irish Free State having been established "December 6, 1922", the civil war, beginning in June 1922 lasted until April 1923, in which many people died. Ireland was only a free state of the British Commonwealth after 1922.

The day Ireland actually became independent was December 6, 1937. On December 29, 1937, a new Constitution was introduced, this described Ireland as "a sovereign, independent, democratic state," named Eire. It became an actual Republic of Ireland upon withdrawal from the British Commonwealth in 1949.

i[1]. [1967] S.C.R. 792 at p.816.

Canadian Law and Politics, Toronto: University of Toronto Press, 1977, p.160.

iii[3]. 1982, c.11.[U.K.] This statute enacted the Constitution Act, 1982, which formed Schedule B of the Canada Act.

iv[4]. See the discussions in Chs.2 and 5 on the reservation and disallowance of provincial legislation.

v[5]. Guay v. Blanchet (1879), 5 Q.L.R. 43 at p.53.

vi[6]. R.I. Cheffins and P.A. Johnson, The Revised Canadian Constitution: Politics as Law, Toronto: McGraw-Hill Ryerson, 1986, p.82.

vii[7]. The provisions of the Colonial Stock Act continued in force until it was replaced in 1934.

viii[8]. Reference re Disallowance and Reservation of Provincial Legislation, [1938] S.C.R. 71 at pp. 78, 82, 84, 93-4.

ix[9]. Ibid., at p.82

x[10]. H. Brun and G. Tremblay, Droit Constitutionnel, Cowansville: Editions Yvon Blais, 1982, p.84.

xi[11]. The Publication of Statutes Act, 15-16 Geo.V. c.22.

xii[12].W. Dale, The Modern Commonwealth, London: Butterworths, 1983, p.24.

xiii[13]. P.E. Corbett & H. Smith, Canada and World Politics, Toronto: Macmillan, 1928, pp.30-1.

xiv[14]. Copyright Owners Reproduction Society Ltd. v. EMI (Australia) Pty. Ltd., [1958] 100 C.L.R. 597 at p.613, per McTiernnan J.; see also the comments of Dixon C.J. at p.612. However, this same logic was not followed in Ex Parte Bennet; Re Cunnigham, (1967) 86 W.N. (Pt.2) (N.S.W.) 323.

xv[15].Union Steamship Co. v. The Commonwealth of Australia (1925), 36 C.L.R. 130.

xvi[16]. The Canadian provincial governments insisted that these powers be extended to them as well as the federal parliament. The state legislatures in Australia were not given these powers under the Statute.

xvii[17]. See P. Hogg, Constitutional Law of Canada, (2nd.ed.), Toronto: Carswell, 1985, pp.267-275.

xviii[19]. Canada Steamship Lines Ltd. v. Emile Charland Ltd. et al., [1933] Ex.C.R. 147 at p.150. Demers L.J.A concluded that the Statute of Westminster has no retroactive effect, and thus previous Canadian legislation which contradicted Imperial legislation could not be saved.

xix[21]. K.C. Wheare, The Statute of Westminster, Oxford: OUP, 1933, p.75.

xx[22].Ibid., p.119.

xxi[23]. K.C. Wheare, The Statute of Westminster and Dominion Status, (5th.ed.), Oxford: Oxford University Press, 1953, pp.153-4.

xxii[24]. F.R. Scott, "The End of Dominion Status", in Essays on the Constitution: Aspects of Canadian Law and Politics, Toronto: University of Toronto Press, 1977, p.162.

xxiii[25]. Manuel et al. v. Attorney General, [1982] All E.R. 822 at p. 830.

xxiv[26]. Wheare, The Statute of Westminster and Dominion Status, p.180. This view was also shared by the Law Clerk of the Senate: Report to the Speaker of the Senate of Canada by the Parliamentary Counsel to the Senate on the Enactment of the British North America Act, 1867, Ottawa, 1939, p.17.

xxv[27]. HC 42 (i), First Report from the Foreign Affairs Committee (1980-1), [The Kershaw Report] at pp.xlix-l.

xxvi[28]. Reference re Amendment of the Constitution of Canada (1981), 125 D.L.R. 1 at 103.

xxvii[29]. See: P.H. Russell et al, The Courts and the Constitution, Kingston: Institute of Intergovernmental Relations, 1982; E. Forsey, "The Courts and the Conventions of the Constitution", (1984) 33 UNB Law Journal 11.

xxviii[30]. See G. Marshall, Parliamentary Sovereignty and the Commonwealth, Oxford: Oxford University Press, 1957, pp.40-1 and ch.5.

xxix[31]. See comments made in obiter on this topic by Lord Denning in Blackburn v. A.G., [1971] 2 All E.R. 1380 at pp.1382-3.

xxx[32]. This convention was firmly argued in Report to the Honourable Speaker of the Senate of Canada by the Parliamentary Counsel on the enactment of the British North America Act, 1867, Ottawa, 1939, pp. 18-9.

xxxi[33]. [1935] A.C. 500 at p.520.

xxxii[36]. P. Hogg, Constitutional Law of Canada, (2nd.ed.), Toronto: Carswell, 1985, p.47.

xxxiii[37]. Ndlwana v. Hofmeyer, [1937] A.D. 229 at p.237.

xxxiv[39]. The amending formulas are detailed in Part V of the Constitution Act, 1982,

xxxv[40]. For a general discussion of the role of the Judicial Committee of the Privy Council see: D.B. Swinfen, Imperial Appeal, Manchester: Manchester University Press, 1987.

xxxvi[41]. The Law Lords were occasionally buttressed by senior judges from colonial courts.

xxxvii[42]. P.J.N. Baker, The Present Juridical Status of the British Dominions in International Law, London: Longmans, 1929, p.231.

xxxviii[44]. The Exchequer Court, the precursor to the present Federal Court was also created at the same time. Supreme and Exchequer Courts Act, 1875, S.C. 1875, c.11.

xxxix[45]. Nadan v. The King, [1926] A.C. 482.

xl[46]. However, an earlier decision of the Judicial Committee had upheld the Canadian Parliament's power to constitute tribunals relating to bankruptcy from which no appeal could be made to the Privy Council: Cushing v. Dupuy [1880] 5 App.Cas. 409.

xli[47].British Coal Corp. v. The King, [1935] A.C. 500. The Judicial Committee heard an appeal at the same time relating to the power of the Irish Free State legislature to abolish appeals to the Privy Council; this was also said to be possible because of the Statute of Westminster: Moore v. A.G. for the Irish Free State, [1935] A.C. 484.

xlii[48]. A.G. Ont. v. A.G. Canada, [1947] A.C. 127 at p.148.

xliii[49]. Ibid., at pp.153-4.

xliv[50]. The Act applied only to cases which had commenced after its enactment; thus the final Canadian case was heard in 1959. It was only in 1956 that the last mention of Privy Council appeals were removed from the Supreme Court Act.

xlv[52]. This rule is based on the distinction between majora regalia and minora regalia; Lefroy, op.cit., p.167, n.37.

xlvi[53]. C. Martin, Empire and Commonwealth, Oxford: Oxford University Press, 1929, p.330. However, this communication is still conducted through the office of the Canadian High Commissioner to London.

xlvii[54]. Baker, op.cit., p.223.

xlviii[55]. Sir K. Roberts-Wray, Commonwealth and Colonial Law, London: Stevens & Sons, 1966, p. 253. See Dawson, Development of Dominion Status, p.421 for a description of the incident which led the Irish Free State to assert the right to deal directly with the King.

xlix[56]. A minor exception was the Sign Manual, which is the Queen's personal seal.

l[57]. However, new Letters Patent were also issued in 1988 to allow the Governor General "to grant amorial bearings in Canada". Canada Gazette, Part I, Vol,122, No.24, 11 June 1988, pp.2226-7.

li[58]. J.R. Mallory, The Structure of Canadian Government, (revd.ed.), Toronto: Gage, 1984, p.38.

lii[59]. The Letters Patent provide that the appointment of a Governor General will be made under the Great Seal of Canada (Article I), which is to be kept and used by the Governor General (Article III); the Governor General is authorized "to exercise all powers and authorities" of the monarch with respect to Canada (Article II), except the power to amend or repeal the Letters (Article XV). Thus it seems clear that an out-going Governor General could appoint a successor.

liii[60]. King George VI personally assented to nine Acts of the Canadian Parliament during a royal visit in 1939, and this function might also be performed again in the future.

liv[61].See the testimony of former Governor General Michener: Proceedings of the Special Senate Committee on the Constitution, November 21, 1978, pp.2:6-31. My view on this matter is based on s.9 of the Constitution Act, 1867 vesting executive government and authority in the Queen, as well as the 1947 Letters Patent which are worded in a fashion indicating a permissive authorization rather than aa evucuating delegation of power. Furthermore, the Monarch has continued to exercise personal powers with respect to foreign affairs and the appointment of Governors General long after the issuance of the 1947 Letters Patent.

lv[63]. A.H. Lefroy, A Short Treatise on Canadian Constitutional Law, Toronto: Carswell, 1918, pp.59-60.

lvi[64].For example: R. v. Bank of Nova Scotia, (1885) 11 S.C.R. 1 (S.C.C.); The King v. Sutton, [1908] 5 C.L.R. 789; A.G. New South Wales v. Collector of Customs, [1908] 5 C.L.R. 818; and Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd., [1920] 28 C.L.R. 129.(H.C.A.)

lvii[65]. A.G. Canada v. A.G. Ont., (1890) 20 O.R. 222.

lviii[66]. Re Oriental Bank (1885), L.R. 28 Chy.D. 643; Liquidators of the Maritime Bank v. The Receiver General of New Brunswick, [1892] A.C. 437.

lix[67].In re Bateman's Trusts (1873), L.R. 15 Eq. 355.

lx[69]. W.H.P. Clement, The Law of the Canadian Constitution, (3rd.ed.), Toronto: Carswell, 1916, pp.14-5.

lxi[70].R. v. Gauthier, [1918] 56 S.C.R. 176.

lxii[71]. It is clear that federal legislation may bind the Crown in right of the provinces, but Hogg claims that it has not been conclusively settled whether provincial governments are equally able to bind the federal Crown. Hogg, op.cit., pp.237-40.

lxiii[72]. Theodore v. Duncan, [1919] A.C. 696 at p.706.

lxiv[76]. Succession to the Throne Act, 1937, 1 Geo.VI. c.16.

lxv[77]. The Leader of the CCF, J.S. Woodsworth, complained to the Commons that they were being asked to pass this abdication Bill after they had approved a resolution congratulating the new King on his accession and assuring him of their loyalty! Hansard, January 15, 1937, p.13.

lxvi[78]. Clokie, op.cit., p.152.

lxvii[79]. J.R. Mallory, The Structure and Function of Canadian Government, (2nd.ed.), Toronto: Gage, 1984, pp.36-7.

lxviii[80]. The 1937 Act applied to both Australia and New Zealand, because the substantive clauses of the Statute of Westminster had not been extended to them yet. The New Zealand Constitution Act passed in 1986 (N.Z.S. No.114) now provides in s.4 that the Regent of the United Kingdom can perform the Sovereign's functions with respect to New Zealand.

lxix[81]. K.C. Wheare, The Constitutional Structure of the Commonwealth, Oxford: Oxford University Press, 1960, p.167.

lxx[83]. O. Hood Phillips and P. Jackson, Hood Phillips' Constitutional and Administrative Law, (7th.ed.), London: Sweet & Maxwell, 1987, p.762.

lxxi[84]. Royal Style and Titles Act, S.C.A. 1973, c.114.

lxxii[86]. A clear account of the history of Canada's acquisition of international competence is found in: E.R. Hopkins, Confederation a the Crossroads: The Canadian Constitution, Toronto: McClelland & Stewart, 1968, pp.230-47. See also Dale, op.cit., pp.12-14.

lxxiii[87]. Clokie claims that, "By 1893 it was fully acknowledged that commercial treaties were to be negotiated exclusively by Canadians". H.McD. Clokie, Canadian Government and Politics, (2nd.ed.) Toronto: Longmans, Green & Co., 1945, pp.32-3.

lxxiv[88]. Dale, op.cit., p.19.

lxxv[89]. J. Crawford, The Creation of States in International Law, Oxford: Oxford University Press, 1979, p.243.

lxxvi[90]. A.E. Gotlieb, Canadian Treaty-Making, Toronto: Butterworths, 1968, p.10.

lxxvii[92]. Some observers have implied that a Dominion government might have been competent to advise the King to declare war, but that this would have had the effect of putting the whole Empire at war; the Dominion could not declare war only for itself. Report to the Speaker of the Senate, p.15.

lxxviii[93]. Hansard, June 9, 1924, p.2928.

lxxix[94]. W.P.M. Kennedy, The Constitution of Canada (2nd.ed.), London: Oxford University Press, 1937, p.541.

lxxx[95]. A.B. Keith, The Dominions as Sovereign States, London: Macmillan, 1938, p.203.

lxxxi[96]. M. Ollivier, Problems of Canadian Sovereignty, Toronto: Carswell, 1945, p. 271.

lxxxii[98]. Quoted in Scott, op.cit., p.166.

lxxxiii[99]. Ibid., p.167.

lxxxiv[100]. Ibid., p.167; Ollivier, op.cit., pp.276-7.

lxxxv[101]. Scott, op.cit., p.152.

lxxxvi[102]. Re Regulation and Control of Radio Communication in Canada, [1932] A.C. 304.

lxxxvii[103]. Re Regulation and Control of Aeronautics in Canada, [1932] A.C. 54.

lxxxviii[104]. A.G. Canada v. A.G. Ontario, [1937] A.C. 326 at p.352.

lxxxix[105]. Ibid., at p.349.

xc[106]. Ibid., at p.352.

xci[109]. Ibid.: Cannon J. at pp.518-9, and Crockett J. at p.535. However, see the comments to the contrary made by Rinfret J. at p.512.

xcii[111]. See especially: Constitutional Conference Continuing Committee of Officials, Working Paper on Foreign Relations, Notes Prepared by the Quebec Delegation, 1969. Several academics have argued that provinces have an international competence: L. Giroux, "La capacité internationale des provinces en droit canadien", (1967-8) 9 Cahiers de Droit 241; Jacony-Millette, Treaty Law in Canada, Ottawa: University of Ottawa Press, 1975; J.Y. Morin, "International Law, Treaty-Making Power, Constitutional Law and the Position of the Government of Quebec", (1967) 45 Canadian Bar Review 160.

xciii[112]. [1892] A.C. 437 at p.443.

xciv[113]. Bonanza Creek Gold Mining Co. v. The King, [1916] 1 A.C. 566 at p.580.

xcv[115]. Hogg, op.cit., p.242. Other authors relying upon this grant of power include: R.I. Cheffins, "The Negotiation, Ratification and Implementation of Treaties in Canada and Australia", (1955-61) 1 Alberta Law Review 312; R.J. Delisle, "Treaty-Making Power in Canada", Ontario Advisory Committee on Confederation, Background Papers and Report, 1967, 115 at p. 132; J.Y. Grenon, "De la conclusion des traités et de leur mise en oeuvre au Canada", (1962) 40 Canadian Bar Review 151 at p.153; G.L. Morris, "The Treaty-Making Power: A Canadian Dilemma", (1967) 45 Canadian Bar Review 478 at pp.482-4; G.J. Szablowski, "Creation and Implementation of Treaties in Canada", (1956) 34 Canadian Bar Review 28 at p.32.

xcvi[116]. Air Canada v. A.G. British Columbia (1987), 32 D.L.R. (4th) 1 at p.5.

xcvii[118]. This does not mean that the provinces have full powers of extra-territoriality. See Hogg, op.cit., pp.267-82. However, the provinces are quite capable of entering agreements with non-Canadian governments. For instance in 1988, the Quebec Government reached an agreement with the State of New York whereby highway violations by their residents in the other territory would be treated as if they had committed the offence at home. Halifax Mail Star, July 2, 1988.

xcviii[119]. Bernier, op.cit., pp.81-2.

xcix[120]. However, J.E.S. Fawcett is doubtful that this doctrine ever amounted to much: The Inter Se Doctrine of Commonwealth Relations, London: London University Press, 1958.

c[121]. Roberts-Wray, op.cit., pp.3-12; Wheare, Constitutional Structure of the Commonwealth, pp.1-19.

ci[122]. Dale, op.cit., pp.29 & 33.

cii[123]. Ibid., p.37.

ciii[124]. Ibid., p.69,

civ[125]. Personal interview with Sir Peter Marshall, Deputy Secretary General of the Commonwealth Secretariat, June 14, 1988. It must be realised that there is a fine line between information and informal advice; however, even if advice were offered it would only be in the form of an opinion and could carry no obligation whatsoever upon the Queen to follow it.

cv[128]. See: the letter written by the Queen's Private Secretary to the London Times, July 20, 1986; Hood Phillips and Jackson, op.cit., pp.763-4.