CITATION: Teskey v. Canada (Attorney General), 2013 ONSC 5046
COURT FILE NO.: 13-56569
DATE: 20130809

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Bryan Teskey, Applicant

AND:

Attorney General of Canada, Respondent

BEFORE: Hackland R.S.J., March 7, 2013 (Ottawa)

COUNSEL: Bryan Teskey in person

J. Sanderson Graham and David Aaron for the Respondent

ENDORSEMENT

Background

[1] The Applicant, Bryan Teskey brings the present application for a declaration that the *Canada Act 1982*, prevents Canada from consenting to legislation passed by the Parliament of the United Kingdom to change the rules of succession for the Crown and for a declaration that all legislative provisions or rules which prohibit Catholics and those married to a Catholic from ascending to the Crown of Canada are of no force and effect.

[2] At the Commonwealth Heads of Government Meeting held in Perth, Australia in October 2011, the Prime Ministers of the 16 Commonwealth nations that recognize the Queen as their head of State, including Canada, agreed in principle (the Perth Agreement of October 2011), that they would each work within their respective administrations to bring forward the necessary measures to enable all the realms to give effect to two changes to the rules governing succession to the Throne:

(1) to end the system of male preference primogeniture under which a younger son can displace an elder daughter in the line of succession.

(2) to remove the legal provision that anyone who marries a Roman Catholic shall be ineligible to succeed to the Crown.

[3] The Government of the United Kingdom subsequently introduced a Bill into the Parliament of the United Kingdom to effect these changes. All Commonwealth Governments present at the Perth conference, including the Government of Canada, confirmed in writing that they were in agreement with the U.K. Bill.

[4] In Canada, Bill C-53, the *Succession to the Throne Act, 2013*, S.C. 2013, c. 6, was introduced in the House of Commons on January 31, 2013 and, as of the date of argument of this application, had been passed by that House on February 4, 2013. The Bill was subsequently passed by the Senate of Canada on March 26, 2013 and received Royal Assent on March 27, 2013. The Act has not yet come into force, but will be proclaimed on a date set by order of the Governor in Council.

[5] The preamble to the Act refers to the Perth Agreement, recites the preamble to the *Statute of Westminster, 1931*(U.K.), 22 and 23 Geo.5, c.4, and refers to the U.K. Bill. Its sole substantive provision is section 2 which provides as follows:

> 2. The alteration in the law touching the Succession to the Throne set out in the bill laid before the Parliament of the United Kingdom and entitled *A Bill to Make succession to the Crown not depend on gender; to make provision about Royal Marriages; and for connected purposes* is assented to.

Issues

[6] I accept the position of the respondent that the issues to be decided in this application are whether the application raises a justiciable issue and whether the Applicant has standing to bring this application. Apart from these issues, the application was not argued on the merits. This resulted from the Applicant setting the matter down on the short motions list with the resultant time restrictions.

Disposition

[7] This application is very similar to the case of *O'Donohue v.Canada*, [2003] O.J. No. 2764 (Ont. S.C.), aff'd [2005] O.J. No. 965 (Ont.C.A.). I intend to follow that decision and

indeed am bound by it. I therefore dismiss this application as I find the issues raised to be non-justiciable and I find the Applicant lacks public interest or any other form of standing.

Analysis

Justiciability

[8] In substance, the Applicant relies on the *Charter of Rights and Freedoms* to challenge the long standing rule that prohibits Catholics and those married to Catholics from becoming monarchs. He objects to the proposed changes to the royal succession rules because they leave in place this rule. In *O'Donohue* the same succession rule was alleged to be discriminatory and subject to *Charter* review under section 15(1). The prohibition against Catholics succeeding to the throne has been part of our law since the *Act of Settlement, 1701*. This Act itself is an imperial statute which ultimately became part of the law of Canada.

[9] In *O'Donohue,* the application judge Rouleau J., as he then was, observed that the applicant had no personal interest in the succession to the monarchy and therefore the court was required to deal with the question of public interest standing and justiciability. The same circumstances pertain to the present application.

[10] The principal argument advanced against the application in *O'Donohue* was that there was no serious issue to be tried in that the Applicant's argument was not justiciable. The parties were in agreement that if the succession rules had constitutional status, the challenge to these rules would not be justiciable on the basis of the well settled constitutional rule that the *Charter* cannot be used to amend or trump another part of the constitution, see *(Reference Re Bill 30, an Act to Amend the Education Act (Ontario),* [1987] 1 S.C.R. 1148, at 1196 and *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly),* [1993] 1 S.C.R. 319, at 390.

[11] Rouleau J. considered the juridical status of the monarchy in Canada and made the following observations, which I respectfully adopt:

> 17. The impugned portions of the *Act of Settlement* are a key element of the rules governing succession to the British Crown. They were enacted following a

long period of civil and religious strife. They confirmed that only the Protestant heirs of Princess Sophia, the Electoress of Hanover, are entitled to assume the throne. The *Act of Settlement* together with other statutes establish the legitimate heir to the British Crown (See also *Bill of Rights of 1689*, (Eng.) 1 Will. & Mar. sess.2, c.2; *Crown and Parliament Recognition Act, 1689*, (Eng.) 2 Will. & Mar. chap.2; *Act of Union (Scotland)*, chap.11, Article ii; *Union with England, 1706*, chap.7, Article ii; *Treaty of Union (Ireland), 1800*, chap.67, Article II; *Accession Declaration Act, 1910*, (U.K.) chap.29; *Coronation Oath Act, 1688*,, (Eng.) 1 Will. & Mar. chap.6, s. 3.)

18. Canada was established as a constitutional monarchy. This fundamental aspect of our constitutional structure is both recognized and maintained by the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c.11. It is found, among other places, in the preamble to the Constitution.

19. It is well recognized that the preamble to the Constitution identifies the organizing principles of our Constitution and can be used to fill in gaps in the express terms of the constitutional text (see *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.) at p.75).

20. The preamble to the *Constitution Act, 1867*, (U.K.) 30 & 31 Victoria, c.3, as amended, provides as follows:

> Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom…

21. This portion of the preamble confirms not only that Canada is a constitutional monarchy, but also that Canada is united under the Crown of the United Kingdom of Great Britain. A constitutional monarchy, where the monarch is shared with the United Kingdom and other Commonwealth countries, is, in my view, at the root of our constitutional structure.

22. The role of the Queen is provided for in s. 9 of the *Constitution Act, 1867*, which reads as follows:

> 9. The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.

[12] Rouleau J. went on to conclude that the rules of succession are essential to the proper functioning of the monarchy and are therefore, by necessity, incorporated into the Constitution of Canada. The structure of the Canadian Constitution as a constitutional monarchy, he reasoned,

and the principle of sharing the British monarch, are fundamental to our constitutional framework with the result being that the rules of succession must be shared and in symmetry with those of the United Kingdom and other Commonwealth countries.

[13] In the present case, the Applicant submitted in argument that Canada could and should adopt different succession rules from those which pertain in Great Britain with the possibility of recognizing a different monarch. I reject that argument on the same basis as Rouleau J. which is that this would change our present constitution in a fundamental manner and would involve the court changing, rather than protecting, our fundamental constitutional structure.

[14] The Perth agreement has resulted in Bill C-53 being passed by the Parliament of Canada and, when proclaimed in force, will by its terms simply record Canada's assent to the changes to the rules of royal succession embodied in a Bill passed by the Parliament of the United Kingdom which received Royal Assent on April 25, 2013: *Succession to the Crown Act 2013* (U.K.), 2013, c. 20. This course of events followed the constitutional convention embodied in the preamble to the *Statute of Westminster, 1931*, which requires that any alteration in the law touching the succession to the throne requires the assent of the Parliament of Canada. This was explained by Rouleau J. in *O'Donohue* as follows:

> 33. As a result of the Statute of Westminster it was recognized that any alterations in the rules of succession would no longer be imposed by Great Britain and, if symmetry among commonwealth countries were to be maintained, any changes to the rules of succession would have to be agreed to by all members of the Commonwealth. This arrangement can be compared to a treaty among the Commonwealth countries to share the monarchy under the existing rules and not to change the rules without the agreement of all signatories. While Canada as a sovereign nation is free to withdraw from the arrangement and no longer be united through common allegiance to the Crown, it cannot unilaterally change the rules of succession for all Commonwealth countries. Unilateral changes by Canada to the rules of succession, whether imposed by the court or otherwise, would be contrary to the commitment given in the Statute of Westminster, would break symmetry and breach the principle of union under the British Crown set out in the preamble to the *Constitution Act, 1867*. Such changes would, for all intents and purposes, bring about a fundamental change in the office of the Queen without securing the authorizations required pursuant to s. 41 of the *Constitution Act, 1982*.

[15] As noted, I am in respectful agreement with this court's decision in *O'Donohue*, affirmed by the Court of Appeal which held that the rules of succession and the requirement that they be the same as those of Great Britain, are necessary to the proper functioning of our constitutional monarchy and, therefore, the rules are not subject to *Charter* scrutiny and are not justiciable in the sense that they are beyond the review jurisdiction of this court.

Standing

[16] I would also find that the Applicant lacks any recognized standing to bring this application. He deposes that he is a member of the Catholic faith but that appears to be his only interest in the issues raised in this application. He has no connection to the Royal Family. He raises a purely hypothetical issue which may never occur, namely a Roman Catholic Canadian in line for succession to the throne being passed over because of his or her religion. Should this ever occur a proper factual matrix would be available to the court to deal with a matter of this importance.

[17] As recently re-stated in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para. 37, the test for public interest standing requires the court to determine: (1) whether there is a serious and justiciable issue raised as to the invalidity of the legislation in question; (2) whether it is established that the applicant is directly affected by the legislation or if not, whether s/he has a genuine interest in its validity; and (3) whether there is another reasonable and effective way to bring the issue before the Court.

[18] The Supreme Court of Canada has noted various factors that underlie the need to limit public interest standing, including "properly allocating scarce judicial resources and screening out the mere busybody; ensuring that courts have the benefit of contending points of view of those most directly affected by the determination of the issues; and preserving the proper role of the courts and their constitutional relationship to the other branches of government: *Downtown Eastside* at para. 25.

[19] I think it is clear that the Applicant lacks public interest standing on the basis of any of these criteria. Moreover I find that neither the Agreement reached at the Perth conference nor

the recent legislative changes to the succession rules in the United Kingdom Parliament are subject to *Charter* review.

[20] Accordingly, this application is dismissed.

[21] The Respondent may submit a claim for costs by written submission within 30 days of the release of this endorsement and the Applicant may respond within 30 days of receiving the respondent's submissions.

Mr. Justice Charles T. Hackland

Released: August 9, 2013

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BETWEEN:

Bryan Teskey

and

Attorney General of Canada

ENDORSEMENT

HACKLAND R.S.J.

Released: August 9, 2013