



## **Treaty Primer: The Statute of Westminster (1931) and Section 35 of the Constitution Act (1982)**

What is a Constitution?

A constitution provides the fundamental rules and principles that govern a country. It creates many of the institutions and branches of government, and defines their powers.<sup>1</sup>

The Canadian Constitution exists as a series of written documents, as well as a number of unwritten conventions and principles.

REMEMBER! Canada's unwritten constitution includes the principle of **Responsible Government**, which means that The King must follow the advice of his elected ministers (i.e. the prime minister).

\*There are a few instances where The King can act without advice (i.e. appointing a prime minister), but these are very rare.



### **The Statute of Westminster (1931)**

- Ratified by the British Parliament in 1931, the Statute of Westminster redefined the relationship of the Crown with the Dominions within the self-governing British Empire. The Statute formalized what was already happening in practice: The King could now only be advised by their respective prime minister regarding matters related to a particular dominion.

<sup>1</sup> Government of Canada, D. of J. (2017, October 16). The Canadian Constitution. About Canada's System of Justice. <https://www.justice.gc.ca/eng/csj-sjc/just/05.html>.

The Statute of Westminster is regarded as the moment Canada achieved legislative autonomy from the United Kingdom. From this moment, the British Parliament could no longer pass laws affecting Canada:

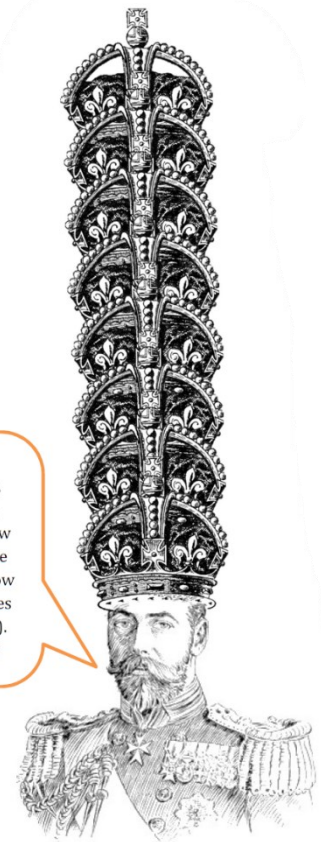
Parliament of United Kingdom not to legislate for Dominion except by consent.

4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

- The Statute of Westminster separated the Imperial Crown into legally distinct Crowns would be advised only by their settler governments – The British King became simultaneously, and separately, the King of Canada, Australia, Newfoundland, New Zealand and South Africa.<sup>2</sup>



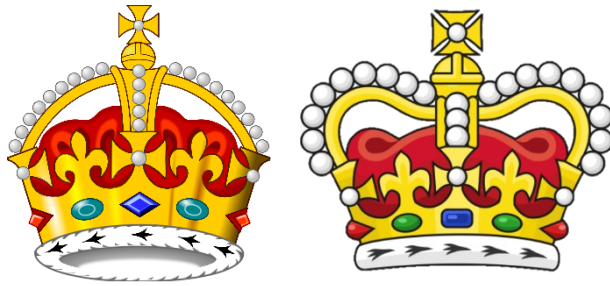
I am King George V. Before the Statute of Westminster (1931) I was King of the United Kingdom only. One person, one Crown.



After the Statute of Westminster, I also became, separately, King of Canada, Newfoundland, Australia, New Zealand, South Africa, and the Irish Free State (who were now able to legislate for themselves without British interference). One person, seven Crowns!!

- **The Statute of Westminster was enacted by non-Indigenous Governments without consulting, or the consent of, the King's Treaty Partners.** Since Treaty Relationships were established with the British Monarch, many Indigenous Nations reject the idea of a distinct Canadian Crown as holding primary responsibility for treaty relationships.

<sup>2</sup> The Statute of Westminster was implemented in different ways, and during different times, depending on the Dominion. This resource is based on my knowledge as of March 2024. It is continually being updated. N. Tidridge. nathantidridge@gmail.com



Traditional symbols of the Crown in Canada: The Tudor Crown (left) and the Crown of St. Edward (right).



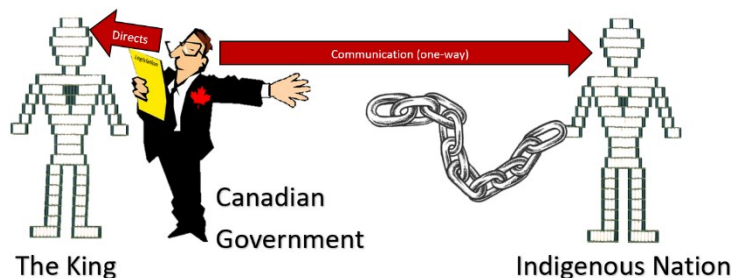
The 2023 design of the Crown imposed by the Government of Canada.

A visual expression of the Statute of Westminster (1931), as well as the fact that the Sovereign must follow the advice of their Canadian Government, came during the coronation of King Charles III in 2023.

Over the centuries, up to and including the reign of Queen Elizabeth II (1952-2022), the primary symbols of the Crown in Canada have been the Tudor Crown or St. Edward's Crown - a visual link to the institution's ancient history, including Treaty relationships with the British monarch that go back centuries.

Breaking with tradition, the Canadian Government unilaterally changed the depiction of the Crown in Canada as part of its commemoration of the coronation of King Charles III. The new design was announced by the Governor General saying "Its design was approved in April 2023 by His Majesty The King **on the advice of the Prime Minister of Canada**"<sup>3</sup> (Under the principle of responsible government, The King had to accept this new symbol).<sup>4</sup>

Created without consulting Treaty Partners, the new Crown can be seen as another example of the Government of Canada's disruption and takeover of Treaty Relationships such as the Covenant Chain.



<sup>3</sup> Office of the Secretary to the Governor General. "Royal Emblems." The Governor General of Canada, May 13, 2023. <https://web.archive.org/web/20230514210321/https://gg.ca/en/heraldry/royal-and-vice-regal-emblems/royal-emblems>.

<sup>4</sup> Interestingly, the phrase "... on the advice of the Prime Minister of Canada" has since been dropped from updated materials related to the new design.

## The Constitution Act (1982)

- Confederation was achieved through an act of the British Parliament, **The British North America Act**,<sup>5</sup> which meant that Canadian Parliament was unable to make changes to its written constitution - this power was still held by the British Parliament.
- Transferring the ability to amend the Canadian Constitution from the British Parliament to Ottawa, would end the last formal links between the Canada and Great Britain. This action could be seen as completely eclipsing the Crown-Indigenous nation-to-nation Treaty Relationships (including the Silver Covenant Chain), finalizing a process that began following the War of 1812 (see *Treaty Primer: Disrupting the Covenant Chain*).

Following the formation of governments under the leadership of **Prime Minister Pierre Trudeau** (1968-1979, 1980-1984) a concerted effort was made to end the constitutional links with the British Parliament. A series of constitutional conferences were organized with provincial leaders (excluding Indigenous leadership).

- These efforts alarmed Indigenous People who saw such moves as another attack on their Treaty Relationships (recent examples include Prime Minister Pierre Trudeau's failed attempt to unilaterally extinguish Treaty rights through the *1969 White Paper*).
- In 1979, organizations such as the **National Indian Brotherhood**<sup>6</sup> (formed as a single cohesive lobby group in 1970) sent a large delegation to lobby British Parliamentarians against any changes to their constitutional relationship with the consent of Indigenous partners.

Constitutional conference with all the provincial premiers would create a consensus that would end the British Parliament's last constitutional link with Canada (called the "patriation of the Constitution"), as well as creating a ***Charter of Rights and Freedoms***.<sup>7</sup>

---

<sup>5</sup> *The British North America Act, 1867* (now known as the Constitution Act, 1867) united the British colonies of the United Province of Canada, Nova Scotia, and New Brunswick.

<sup>6</sup> Forerunner of the Assembly of First Nations.

<sup>7</sup> Important to know that Canada already had a Bill of Rights (enacted by the government of John Diefenbaker in 1960). However, the Bill of Rights was criticized as being too weak and only applied to the federal jurisdiction.



- In response to the proposed patriation, many Indigenous organizations and activists joined in demonstrations, fundraisers, and campaigns to reject the domestication of their treaties in Canada’s constitution. Other organized to have their title and rights explicitly recognized in the Constitution. One of the most influential demonstrations was the **Constitution Express**.



- The Constitution Express was a 3,000-mile-long protest led by **Secwépemc leader George Manuel** (President of the Union of BC Indian Chiefs) in direct response to the federal government trying to change the constitution in a way that did not recognize Treaty Rights. Two trains were chartered from British Columbia to take demonstrators and supporters to Ottawa. Tours were later organized to the United Nations in New York, as well as London, England. Arthur Manuel described the Constitution Express as the most effective direct action in Canadian history, ultimately leading to a change in the constitution.<sup>8</sup>

- The **Indian Association of Alberta**, joined by other groups, went to the British Courts to challenge the Canadian Government’s assertion that the Statute of Westminster had transferred the Treaty Relationship from the British Crown (and Government) to the Canadian Crown (and Government).
  - Ultimately heard by **Lord Denning at the Court of Appeal**, the Canadian government’s argument was upheld. However, Denning’s ruling included some important commentary, characterized by Professor Peter Russell as possibly “... the most valuable result of the [Indigenous] London lobby”<sup>9</sup>:

*I have no doubt that all concerned regarded the Royal Proclamation of 1763 as still of binding force. It was an unwritten provision which went without saying. It was binding on the legislatures of the Dominion and the Provinces just as if there had been included in the Statute a sentence: 'The aboriginal peoples of Canada shall continue to have all their rights and freedoms as recognised by the Royal Proclamation of 1763'*

<sup>8</sup> Hanson, Erin. “Constitution Express.” indigenousfoundations. Accessed March 11, 2024.

[https://indigenousfoundations.arts.ubc.ca/constitution\\_express/](https://indigenousfoundations.arts.ubc.ca/constitution_express/).

<sup>9</sup> Peter Russell, Canada’s Odyssey: A Country Based on Incomplete Conquests, (University of Toronto Press, 2017), 378.

This resource is based on my knowledge as of March 2024. It is continually being updated.

N. Tidridge. nathantidridge@gmail.com

and

*There is nothing, so far as I can see, to warrant any distrust by the Indians of the Government of Canada. But, in case there should be, the discussion in this case will strengthen their hand so as to enable them to withstand any onslaught.*

*They will be able to say that their rights and freedoms have been guaranteed to them by the Crown — originally by the Crown in respect of the United Kingdom — now by the Crown in respect of Canada — but, in any case, by the Crown. No Parliament should do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada 'so long as the sun rises and the river flows'. That promise must never be broken.<sup>10</sup>*

- Due to the lobbying efforts by Indigenous Peoples, the Trudeau Government were compelled to include the protection of Treaty Rights in the legislation being drafted to sever Canada's constitution with the British Parliament.
  - Interestingly, during the 30 hours of debate in the British Parliament over the Canada Act (the British legislation introduced to end their constitutional relationship with Canada), 27 concerned Indigenous rights.<sup>11</sup>
  - The House of Commons of the United Kingdom passed the ***The Canada Act*** in 1981 – 44 Members of the UK Parliament voted against the Act, citing concerns over Canada's mistreatment of Québec and Indigenous peoples.
  - Acting in her role as Queen of the United Kingdom, Queen Elizabeth II granted Royal Assent to the Canada Act on March 29th, 1982, permanently ending the British Parliament's constitutional connection to Canada.
  - The Queen then travelled to Canada to proclaim, as Queen of Canada, the new 1982 Constitution Act (including the Canadian Charter of Rights and Freedoms).
- *The Constitution Act (1982)* included the following changes to the Canadian Constitution:
  1. The power to amend (change) the Canadian constitution was permanently transferred from the British Parliament to the Canadian Parliament.

---

<sup>10</sup> THE POLITICAL AND LEGAL POLICY adopted by THE INDIAN ASSOCIATION OF ALBERTA, THE UNION OF NEW BRUNSWICK INDIAN CHIEFS and THE UNION OF NOVA SCOTIA INDIAN CHIEFS in relation to THE PATRIATION OF THE CANADIAN CONSTITUTION, 9 February, 1982.

<sup>11</sup> Peter Russell, 387.

2. Changes to the constitution could only be made using rules established by the Federal and Provincial leaders.
  3. Section 35 - recognizing Aboriginal and Treaty Rights - was added to the 1982 Constitution Act.
  4. The Canadian Charter of Rights and Freedoms was added to the written Constitution (and included an explicit statement on Treaty Rights).
- 

### **Section 35 of the Constitution Act (1982):**

Recognition of existing aboriginal and treaty rights

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of *aboriginal peoples of Canada*

(2) In this Act, aboriginal peoples of Canada includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

### **Section 25 of the Canadian Charter of Rights and Freedoms:**

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:

any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

any rights or freedoms that now exist by way of land claim agreements or may be so acquired.

## Sources:

Manuel, Arthur and Grand Chief Ronald M. Derrickson. *Unsettling Canada: A National Wake-Up Call. Between the Lines*, 2021.

Russell, Peter. *Canada's Odyssey: A Country Based on Incomplete Conquests*. University of Toronto Press, 2017.

Statute of Westminster, 1931.

THE POLITICAL AND LEGAL POLICY adopted by THE INDIAN ASSOCIATION OF ALBERTA, THE UNION OF NEW BRUNSWICK INDIAN CHIEFS and THE UNION OF NOVA SCOTIA INDIAN CHIEFS in relation to THE PATRIATION OF THE CANADIAN CONSTITUTION, 9 February, 1982.

Consultation With:

Dr. Amber Adams, *Mohawk Nation*

Dr. John Borrows, *Nawash First Nation*

Rick Hill, *Tuscarora Nation*

Dave Mowat, *Alderville First Nation*