Canada May Be Broken But It Is Not An Illusion:

Debunking the Theory that Canada Does not Exist

3 March 2026

Introduction

1. There is a theory, or interpretation, or narrative that is gaining popularity in Canada, especially in Alberta, which insists that Canada is not a sovereign nation and ultimately citizens are not under the jurisdiction of Ottawa. I will call it, using its own self-reference, the Canada the Illusion theory (CtI theory or just CtI). CtI holds that effective upon enactment of the Statute of Westminster, 1931 Canada ceased to exist and all sovereignty reverted to the peoples of the several provinces. British Columbia became sovereign. Alberta too. Every province became sovereign, albeit without a constitution or government.

2. The CtI theory goes on to say that upon each province becoming sovereign the people of each former province were free to hold a constitutional assembly, agree on a constitution and declare themselves independent. Each newly minted state would then proceed to establish its government apparatus and framework of laws to become an independent nation state recognizable internationally.

3. CtI goes on to observe that the peoples of the former provinces did not understand this consequence, and accordingly they did not seize the opportunity to establish themselves as independent states. Instead the federal and provincial governments, although no longer legally valid, continued as if they were valid. This invalid Canada has continued ever since as some kind of fraud.

4. Here is the link to a video titled "Canada the Illusion" on the YouTube channel 'The Myth is Canada': https://www.youtube.com/watch?v=8wHj2vucj4o

5. Here is the link to an updated version: https://rumble.com/v6ziduu-canada-the-illusion-updated-and-reworked.html?e9s=rel_v2_ep

6. I will be referencing these videos for the most part, along with several documents compiled by Walter Kuhl, an historical proponent of CtI.

Initial Comments

7. I observe at the outset that CtI is a severely flawed theory. It will never be recognized in the Canadian legal system because its errors are so basic. It is not a sound theory upon which to base discussions and actions relating to the secession of a province from Canada.

8. Why bother with it then? It seems that notwithstanding its errors it has been gaining a following and it is distracting people on all sides from serious discussion surrounding the secession question. Worse, it is tempting many down an unproductive road. CtI is pitched at a level of abstraction and purported expertise that makes it hard for people not trained in law to refute it. Yet it needs refuting so it will no longer be a distraction to the discussions going on respecting the question of secession. Both sides of the debate will benefit by this. Hence, this refutation.

9. CtI radically diverges from Canadian law in its main thrust that Canada disappeared in 1931 and each province became an independent territory. It in fact contradicts Canadian law on almost all principal points.

10. The dispute is not between me and the authors of CtI. It is between CtI and Canadian law. In what follows I merely set out the established law so that readers can see the difference between that law and CtI. The only thing that matters is what the courts recognize as law.

11. If CtI supporters reject my comments it is an easy thing to resolve the question. Initiate (or join) a legal proceeding in a Canadian court and take issue with the court's jurisdiction. Argue that the court lacks jurisdiction because according to CtI Canada does not exist. This will put to rest the pretence that CtI has any standing in Canadian law.

12. If proponents of CtI will not do this, the readers should ask themselves why.

13. What is the point of CtI? Even if its proponents can show that their legal analysis and interpretation is preferable (in their opinion) to that adopted by Canadian courts, it makes no difference. It is wrong by Canadian law. It is not law. It is legally null.

14. We return to the question: What is the point of CtI? The point of CtI is not legal but political. It purports, under colour of law, to justify a unilateral declaration of independence *without a referendum*. It will have no truck with any part of the process set out in *Reference re Secession of Quebec, [1998] 2 S.C.R. 217* (*Quebec Secession Reference*).

Kuhl's Original Theory

15. Note first the context in which this theory was formulated by Kuhl. It was decades before the Supreme Court of Canada decided the *Quebec Secession Reference*. At that time the only legal route to independence was a request to the UK Parliament to enact legislation excluding the province from Canada. Kuhl sought another route to independence and he found it in the work, apparently, of R. Rogers Smith. For the purpose of convenience I will refer to this early form as Kuhl's theory.

16. Attached is a compilation of documents titled "Canada: A Country Without a Constitution" (the Kuhl Compilation) setting out Kuhl's interpretation, an early version of CtI, as communicated in the House of Commons, correspondence and other documents. The CtI theory

is an expansion and elaboration of Kuhl's theory. To give the full context I will set out Kuhl's theory here and then proceed to deal with the much more complicated CtI theory.

17. Kuhl observed that the original process that resulted in the creation of Canada started with the stated intention of the several original colonies (three of which would become the original four provinces) to create a 'federal union'. Kuhl defined a federal union as the joining of sovereign and independent nations, or polities, into a single country through a pact or treaty by which the joining nations create a central government and confer on it some of their sovereign powers while keeping the remaining powers to themselves.

18. This never happened. Canada was instead established by UK legislation called the British North America Act (the BNA Act); there was no pact, no treaty, no voluntary union initiated by and carried out by the original colonies under their own sovereign authority. The BNA Act simply created a dominion called Canada that was structured as a federal state with a federal government and provincial governments. Kuhl regarded this as improper but acknowledged that it did happen, albeit with unacceptable and precarious constitutional results.

19. The correct procedure, in Kuhl's view, was for the UK to abolish its control over the original colonies, thus making them sovereign polities, and then these polities would have joined together into a federal union through a treaty.

20. According to Kuhl the opportunity to do this arose in 1931 when enactment of the Statute of Westminster, 1931 (SW 1931) had the effect, through section 7(2) of that statute, of rendering the ten provinces into independent territories capable of becoming independent states after which they could, if they wished, make a treaty among themselves to form a federal union.

21. He was wrong about this. Section 7(2) merely provided that the provisions of section 2 of that same statute, which freed Dominion law from the predominance of UK law, applied as well to the provinces so that provincial law too was no longer subject to UK law. It did not have the effect of sundering the BNA Act and making the provinces sovereign and independent polities.

22. Sometimes Kuhl says SW 1931 directly made the provinces into independent states (see letter to Rene Levesque dated November 23, 1976). The difference is immaterial – both are wrong.

23. Kuhl sums up the situation in this statement: "As an analogy, it might be said that the relationship into which the original provinces entered under the B.N.A. Act was a sort of shot-gun marriage; they were forced into a United Colony against their will. The Statute of Westminster gave the provinces their independence so that they could consummate a voluntary marriage, but they have not yet done so. Ever since December 11, 1931, the provinces have been living common-law with Ottawa and have the right to terminate this arrangement at any time they wish."
[From Kuhl note titled 'Explanation of the Statute of Westminster' in the Kuhl Compilation.]

24. Eldon Warman fleshed out Kuhl's theory by adding his view that repeal of s. 2 of the BNA Act severed the connection between the monarch and Canada. [See Eldon Warman's add-on at page 18 of the Kuhl Compilation.] This is considered in detail below.

Let's Get Into It

25. Below I deal with the elaboration of Kuhl's original theory as set out in the above-referenced videos. The law to which I refer is standard Canadian law, the law that is followed in the courts, explained in the law textbooks and discussed in the law journals. The goal is to note the divergence of CtI from Canadian law.

26. This is the key point of this paper: that CtI is so extreme, so mistaken, that it is beyond the pale of Canadian law.

27. Early in the CtI argument there is reference to the repeal of s. 2 of the BNA Act by the Statute Law Revision Act, 1893. Although the reasoning is not clear the theory seems to say that as a consequence of this repeal the monarchy was severed from Canada and from its role in the BNA Act when Queen Victoria died in 1901. This established an altered and precarious legal situation with the result that enactment of the Statute of Westminster, 1931 caused the dissolution of Canada.

Repeal of Section 2 of the BNA Act

28. Section 2 of the BNA Act was constitutional boilerplate that provided for continuance of the role of the monarch upon the death or abdication of the reigning monarch. The next monarch, king or queen, continues in the place of the former and the Crown (the corporate embodiment of the state) continues uninterrupted. The specific reason for the repeal of s. 2 is uncertain but it was likely recognized as redundant, hence its repeal in a housekeeping enactment. It was redundant because of section 9 of the BNA Act, which vests executive jurisdiction in the monarch, and because of the rules of royal accession.

29. Section 9 of the BNA Act reads:
The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.

30. Section 9 provides for continuation of the monarch's role upon death or abdication of the reigning monarch. Note also that the rules of accession provide that immediately upon the death or abdication of a monarch the law recognizes the next monarch without interruption.

31. CtI however contends that, because of this repeal, upon Queen Victoria's death her successor (King Edward VII) failed to step into her role within the BNA Act. While the BNA Act continued to apply to Canada the monarch no longer played his/her role. CtI holds that:

a) The new monarch not succeeding to Queen Victoria's role as Queen of Canada, he became legally irrelevant and detached from Canada. One consequence of this was that Canadian Crown title to the land was no longer vested in the monarch.

b) Canadian Crown title, no longer being vested in the monarch, became vested in a UK government body called the Crown in Chancery instead.

c) Canadian Crown title being vested in that government body, and no longer vested in the monarch, caused the king to lose jurisdiction over Canada because holding Crown title was a necessary condition to having that jurisdiction. CtI seems to treat this as a second, follow on reason for the loss of monarchical jurisdiction over Canada, but its own reasoning is faulty. A more accurate (yet still mistaken) way of describing the above process according to CtI is that: The repeal of s. 2 and Queen Victoria's death severed the monarch's constitutional connection to Canada, and *that severance entailed* both the loss of jurisdiction and the loss of Crown title to the land.

d) As a result, the Canadian Governor General, formerly the monarch's representative in Canada, ceased to represent the monarch and yet continued to perform the role of Governor General as provided by the BNA Act.

32. All of this is mistaken. Section 9 of the BNA Act vests executive jurisdiction in the Queen (not specifically in Queen Victoria but in the reigning monarch). Canada then and now follows the UK rules of succession and accession respecting the monarch. When Queen Victoria died in 1901 her successor, King Edward VII, immediately and without interruption acceded to the Crown and carried on in performance of the role described as 'the Queen' in the BNA Act. 'The Queen' in the BNA Act means the reigning monarch of the UK in his or her capacity as King or Queen of Canada.

33. The reference to the Crown in Chancery is mystifying. The Crown in Chancery refers to a mode of Crown activity by which it carries out its equitable and supervisory functions. The Crown in Chancery does not and never did hold title to Canadian Crown land.

34. The repeal of s. 2 did not affect the operation of the BNA Act. It did not sever the connection of the monarch to Canada. Legal sovereignty remained in the monarch. Canadian Crown land (all the territory of Canada) remained vested in the monarch. The Governor General remained the monarch's representative in Canada. Nothing changed.

Canada and the Enactment of the Statute of Westminster, 1931

35. CtI goes on to make its primary argument, that enactment of the Statute of Westminster, 1931 dissolved Canada. This is the main argument of CtI so it must be dealt with in its principal points.

36. First, a brief remark regarding sovereignty. Canada achieved its full sovereignty in a step by step process, not all at once with a single act. The BNA Act created Canada as a self-

governing dominion, which is a type of colony, exercising sovereign jurisdiction but Canada did not exercise all sovereign jurisdiction. The UK parliament retained jurisdiction to enact laws affecting Canada and many UK laws continued to apply in Canada, in particular the Colonial Laws Validity Act, 1865. The BNA Act, a UK statute, was the constitution of Canada. By sovereign jurisdiction was meant that the Canadian federal parliament and provincial legislatures exercised *original jurisdiction*. They were neither agents nor delegates of the UK parliament. Their laws were laws of Canada and the provinces, not of the UK.

37. The sovereignty exercised by the provincial legislatures is the same sovereignty as that exercised by parliament. The provinces are constitutionally equal to the federal level not inferior.

38. Sovereign powers are distributed and limited by the BNA Act. Legal sovereignty is in the (now) King; executive jurisdiction is in the King; legislative jurisdiction is in parliament and the legislatures; judicial jurisdiction is in the superior courts.

39. However, there were several limitations on Canada's sovereignty and the UK parliament retained ultimate authority over Canada.

40. Acceding to demands from Canada for complete sovereign jurisdiction the UK parliament enacted the Statute of Westminster, 1931 giving *almost all* sovereign jurisdiction to Canada:

a) Canadian laws were no longer subject to the Colonial Laws Validity Act, 1865. [s. 2(1)]

b) Canadian laws would not be void or inoperative in the case of conflict with UK laws. [s. 2(2)]

c) Canadian laws could have extra-territorial effect. [s. 3]

d) No *subsequently enacted* UK law would apply in Canada unless the UK law expressly stated that it had been requested and consented to by Canada. [s. 4]

e) The expression 'colony' will not, in any UK Act passed after SW 1931, include Canada or a province of Canada in its meaning. [s. 11)]

41. What was not given to Canada was the power to amend the BNA Act. Ottawa and the provinces were unable to agree on amending procedures so this power was withheld by the UK parliament pending an agreement among Ottawa and the provinces.

42. Although enactment of SW 1931 is generally recognized as the moment when Canada acquired virtually full sovereignty, CtI differs - in its view this was the moment when Canada was dissolved.

The Statute of Westminster, 1931 & Canada the Illusion Theory

43. According to CtI, when SW 1931 was enacted Canada had no monarch and allodial (formerly Crown) title to the land of Canada was held by the Crown in Chancery. (See the discussion above respecting repeal of s. 2 of the BNA Act).

44. No. In 1931 Crown title to all land in Canada was vested in the monarch. All land in Canada, including land granted as fee simple or any other land interest, is Crown land. There is a common practice of distinguishing between Crown land and private land like fee simple. This practice is fine so long as one keeps in mind that Crown title continues under private land in the sense it remains vested in the monarch (this is a feature of sovereignty).

45. CtI then enters into one of its most bizarre claims: that a king or queen (distinct from a monarch) has government authority only when he or she has title to the land. When that title is lost the king or queen loses government authority. When this happens the king or queen becomes a monarch, and a monarch has no government authority.

46. No. The distinction between queen and king, on the one hand, and a monarch on the other is specious. There is no distinction. Territory and government jurisdiction are aspects of sovereignty. Legal sovereignty is in the monarch (meaning the king or queen). A constitution, like the BNA Act, limits and distributes sovereign jurisdiction (e.g., legislative jurisdiction is exercised by parliament and the legislatures). Territory never ceases being vested in the monarch.

47. Per CtI: Queen Victoria's successor lost Crown title to Canadian territory, was accordingly reduced to the status of monarch, and accordingly lost all authority vis-à-vis Canada. The Canadian Governor General therefore obtained *sole* authority to govern Canada. (Reference again to the discussion above respecting the repeal of s. 2)

48. No. The Governor General did not (and does not) govern Canada. CtI ignores the working of the BNA Act. The monarch of Canada is currently King Charles III. No monarch of Canada (from King Edward VII through to King Charles III) ever lost title to Canadian territory and never lost his/her role as monarch. The Governor General is the monarch's representative in Canada and as such exercises the monarch's powers, in accordance with the BNA Act *and convention*. Government in Canada is in accordance with the BNA Act: parliament and the legislatures legislate; the monarch exercises executive jurisdiction as directed by elected officials; the judiciary adjudicates.

49. Per CtI: The provincial legislatures and the federal House of Commons are not responsible to the Canadian people. They are responsible only to the Governor General.

50. No. Apart from the original error relating to the repeal of s. 2 of the BNA Act, CtI misunderstands the relationship between law and convention. Looking only at the federal level, the Governor General represents the King (who is Head of State) and exercises the legal authority of the King. It looks like the Governor General runs the show but he is, for the most part, only a figurehead. For instance, the Governor General gives royal assent to bills (thus

making them law), and the Governor General signs orders in council into effect and does many other things. Yet these powers are exercised only upon the advice (the direction) generally of the Prime Minister or cabinet. *The real power is in the Prime Minister and the cabinet*.

51. This is so because of *convention*. A convention is a non-legal rule that constrains the exercise of legal powers. The legal power is the Governor General's but the actual power is in the hands of elected representatives.

52. The formal provisions make it look like the Prime Minister (and government) is inferior to the Governor General, and responsible to (as in subject to) the Governor General. But the opposite is true. An example is the principle of responsible government. Responsible government is a convention that the Governor General appoints a person as Prime Minister only if that person has the support (confidence) of the House of Commons; and must appoint that person as Prime Minister if he or she has that support. *The real effect of responsible government is to make the Prime Minister (the government) politically accountable to the elected representatives in the House of Commons, not to the Governor General.*

53. Yes, this is convoluted and archaic but this is how our constitution works.

54. Per CtI: Section 11 of SW 1931 is interpreted to mean that Canada was no longer a colony and *accordingly the BNA Act no longer applied to Canada*. Canada consequently dissolved into its provinces (as unorganized territories of sovereign peoples).

55. No. Section 11 provides that the term 'colony' used in *any UK act passed after SW 1931* will not include Canada in its meaning. The BNA Act itself continues in force. Everything continued as before except that Canada possessed more sovereign powers (see para. 40 ??? above) and Canada would not be affected by any reference to 'colony' made in acts enacted after SW 1931. This was one more piece of the statutory scheme in SW 1931 that (mostly) ended Canada's status as a colony while maintaining its constitutional framework (principally the BNA Act).

56. CtI continues by asking who owns the land now? Remember that CtI claims that Canadian Crown title was held by the Crown in Chancery. CtI says that with enactment of SW 1931 and the purported severing of Canada's colonial ties to the UK, the Crown in Chancery lost its allodial title (formerly crown title) to Canadian territory. *Consequent* on this loss of allodial title the Governor General lost his power. In the result, the former provinces naturally took ownership (allodial title) of the land.

57. No. Title to the land remained (and remains) in the monarch (i.e., the King or Queen of Canada). The Crown in Chancery never had the allodial (crown) title to the land. The Governor General never ceased to be the monarch's representative; the Governor General was unaffected by SW 1931. Neither section 2 nor 11 of SW 1931, nor any other section of SW 1931, touched on the validity of the BNA Act or its continuity, nor did either interrupt the continuance of Crown sovereignty. Instead, SW 1931 removed most remaining limitations on the jurisdiction of Canada's parliament and legislatures.

58. CtI goes on to discuss various consequences of this supposed dissolution of Canada. One is that the people of each former province became a sovereign people; and that as a sovereign people each could organize a constitutional assembly to agree on a constitution. The people of each former province could then declare themselves an independent state. CtI laments that people did not realize the effects of SW 1931 and accordingly did not seize the opportunity to form themselves into independent states.

59. CtI says that the opportunity is still here. Canada remains dissolved and the peoples of the several provinces need only act as sovereign peoples to achieve independence.

60. No. None of this happened.

61. The CtI discussion of post-SW 1931 events are irrelevant since the theory's discussion of pre-SW 1931 events and SW 1931 is wrong.

62. However, I will look at one post-SW 1931 development. Many people have expressed questions concerning ss. 23, 58 and 59 of the Constitution Act, 1982, specifically asking whether these provisions together prevented the Constitution Act, 1982 from coming into force.

63. These questions stem from CtI's claim that the Constitution Act, 1982 did not come into force because Quebec has not issued the authorization mentioned in s. 59.

66. No.

67. Section 23 provides for minority language rights in the provinces.

68. Section 58 provides that the Constitution Act, 1982 will come into force on a day to be fixed by proclamation by the Queen or Governor General under the Great Seal of Canada, *subject to section 59*.

69. Section 59(1) provides for an exception in respect of s. 23 in the province of Quebec. It provides that paragraph 23(1)(a) will come into force in Quebec on a day to be fixed by proclamation of the Queen or Governor General. Section 59(2) provides that such a proclamation will be made *only* where it has been authorized by the legislative assembly or government of Quebec.

70. Sections 23, 58 and 59 operate together for *the limited purpose only of deferring the day when certain language rights will come into force in Quebec*. They do not operate to impede in any way the procedure in s. 58 giving force to the Constitution Act, 1982. In other words, the phrase 'Subject to section 59' in section 58 indicates an exception, and that exception is that certain language rights in s. 23 will not come into force in Quebec unless and until Quebec authorizes a proclamation fixing the day for their coming into force. Quebec has not yet authorized the issuance of this proclamation.

71. CtI's attempt to argue that the phrase 'Subject to section 59' holds hostage the coming into force of the whole of the Constitution Act, 1982 until authorized by Quebec is an elementary misreading of the legal provisions, wholly erroneous.

Conclusion

72. Canada the Illusion theory is not a sound legal theory and is no basis upon which a province could validly declare itself independent. No Canadian court would recognize it as valid.

73. The real purpose of CtI is uncertain. It seems to seek to justify a unilateral declaration of independence without a referendum on the key question of secession.

74. In other words: CtI would take away from democratic purview the vital question of whether to secede or not.

75. There are serious political and legal defects to this approach. Here I will mention only one: that this process will deny legal and democratic legitimacy to the purported secession. This is because CtI says secession is already done. There's nothing to talk about. There's nothing to vote on. A referendum would be wholly redundant.

76. Using Alberta as an example, if Alberta (through whatever procedure CtI proponents advance) declares independence without a referendum it will lack the most vital element of its attempt at independence – legitimacy. Similarly, those opposed to secession need a valid democratic process to legitimize their rejection of secession.

77. Legitimacy is indispensable. To get it there must be a referendum on the central question: To secede or not.

78. *CtI denies precisely this*.

79. The Supreme Court of Canada in the *Quebec Secession Reference* created a legal pathway for any province wishing to secede. The procedures (if not the doing) are simple and the legal framework is in place. For those seeking secession of a province from Canada the *Quebec Secession Reference* is the most direct and effective route; it is a legal route; it is a legitimate route.

80. Many people suspect that the federal Clarity Act blocks the *Quebec Secession Reference* path, that Ottawa will use the act as a pretext to either reject the results of a referendum or sabotage negotiations. Ottawa may well do that. Yet with a referendum clearly demonstrating democratic support for independence, with good faith negotiations to reach an agreement, Alberta will be in a strong legal and political position to make a legitimate unilateral declaration of independence.

The Statute of Westminster, 1931

22 George V, c. 4 (U.K.)

An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930.

[11th December, 1931]

WHEREAS the delegates to His Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences holden at Westminster in the years of our Lord nineteen hundred and twenty-six and nineteen hundred and thirty did concur in making the declarations and resolutions set forth in the Reports of the said Conferences:

And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom:

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

And whereas it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom:

And whereas the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland have severally requested and consented to the submission of a measure to the Parliament of the United Kingdom for making such provision with regard to the matters aforesaid as is
hereafter in this Act contained:

NOW, THEREFORE, BE IT ENACTED by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:--

1. In this Act the expression "Dominion" means any of the following Dominions, that is to say, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland.

2. (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a

Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule, or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

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.*

[Note: As far as Canada is concerned, section 4 was repealed by the Constitution Act, 1982.]

5. Without prejudice to the generality of the foregoing provisions of this Act, section seven hundred and thirty-five and seven hundred and thirty-six of the Merchant Shipping Act, 1894, shall be construed as though reference therein to the Legislature of a British possession did not include reference to the Parliament of a Dominion.

6. Without prejudice to the generality of the foregoing provisions of this Act, section four of the Colonial Courts of Admiralty Act, 1890 (which requires certain laws to be reserved for the signification of His Majesty's pleasure or to contain a suspending clause), and so much of section seven of that Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in any Dominion as from the commencement of this Act.

7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

8. Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.

9. (1) Nothing in this Act shall be deemed to authorize the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia.

(2) Nothing in this Act shall be deemed to require the concurrence of the Parliament or Government of the Commonwealth of Australia, in any law made by the Parliament of the United Kingdom with respect to any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament

or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of this Act that the Parliament of the United Kingdom should make that law without such concurrence.

(3) In the application of this Act to the Commonwealth of Australia the request and consent referred to in section four shall mean the request and consent of the Parliament and government of the Commonwealth.

10. (1) None of the following sections of this Act, that is to say, sections two, three, four, five, and six, shall extend to a Dominion to which this section applies as part of the law of that Dominion unless that section is adopted by the Parliament of the Dominion, and any Act of that Parliament adopting any section of this Act may provide that the adoption shall have effect either from the commencement of this Act or from such later date as is specified in the adopting Act.

(2) The Parliament of any such Dominion as aforesaid may at any time revoke the adoption of any section referred to in sub-section (1) of this section.

(3) The Dominions to which this section applies are the Commonwealth of Australia, the Dominion of New Zealand, and Newfoundland.

11. Notwithstanding anything in the Interpretation Act, 1889, the expression "Colony" shall not, in any Act of the Parliament of the United Kingdom passed after the commencement of this Act, include a Dominion or any Province or State forming part of a Dominion.

12. This Act may be cited as the Statute of Westminster, 1931.

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William F. Maton

CANADA
A COUNTRY WITHOUT A CONSTITUTION

A Factual Examination Of
The Constitutional Problem

By
Walter F. Kuhl
Member Of Parliament
Jasper-Edson 1935-1949

January 1977

"It is therefore easy to see why Canada is
not a confederation....."
[Dr. Maurice Ollivier, K.C., Joint Law Clerk,
House of Commons, before the Special Committee
on the British North America Act, 1935 --

"I have always contended, for reasons too long to enumerate here,
that it [Canada] has not become either a confederation
or a federal union."
[Dr. Ollivier, in a personal letter to Mr. Kuhl, May 30th, 1936]

FORWARD

There is probably no political issue in Canada on which there is more lack of information and more misinformation than on the constitutional question. The stalemate and the impasse which the governing authorities in Canada have reached on this question seem to indicate that there is and has been something very fundamentally awry in Canada's constitutional history.

For almost half a century this controversy has been raging without a satisfactory solution having been arrived at. Many Canadians, myself included, have had enough of this bickering between politicians and are determined to do something to bring this internecine strife to an end.

The purpose of this booklet is to indicate in some measure what I as a member of the House of Commons and as a private citizen have attempted to do to bring order out of the constitutional chaos in which Canada finds herself. Democracy is successful only in proportion to the knowledge which people have with respect to their rights and privileges. It is my hope that the information contained in this brochure will assist Canadians to that end.

Immediately following the recent Quebec election, I sent to Mr. Rene Levesque a personal letter in which I indicated my conception of the constitutional rights which the provinces of Canada enjoy at the moment. At the conclusion of this booklet will he found a reproduction of this letter. Included with this letter was the additional material found in this booklet. A copy of my letter to Mr. Levesque,along with copies of the additional material, was subsequently mailed to each of the premiers of the provinces of Canada.

I desire to express my gratitude to Mr. R. Rogers Smith, who as my private tutor for almost the entire fourteen years during which I served as a member of the house of Commons, brought to my attention facts from the statutes at large, from the Archives and from original historical sources, the material upon which this brochure is based.

Walter F. Kuhl

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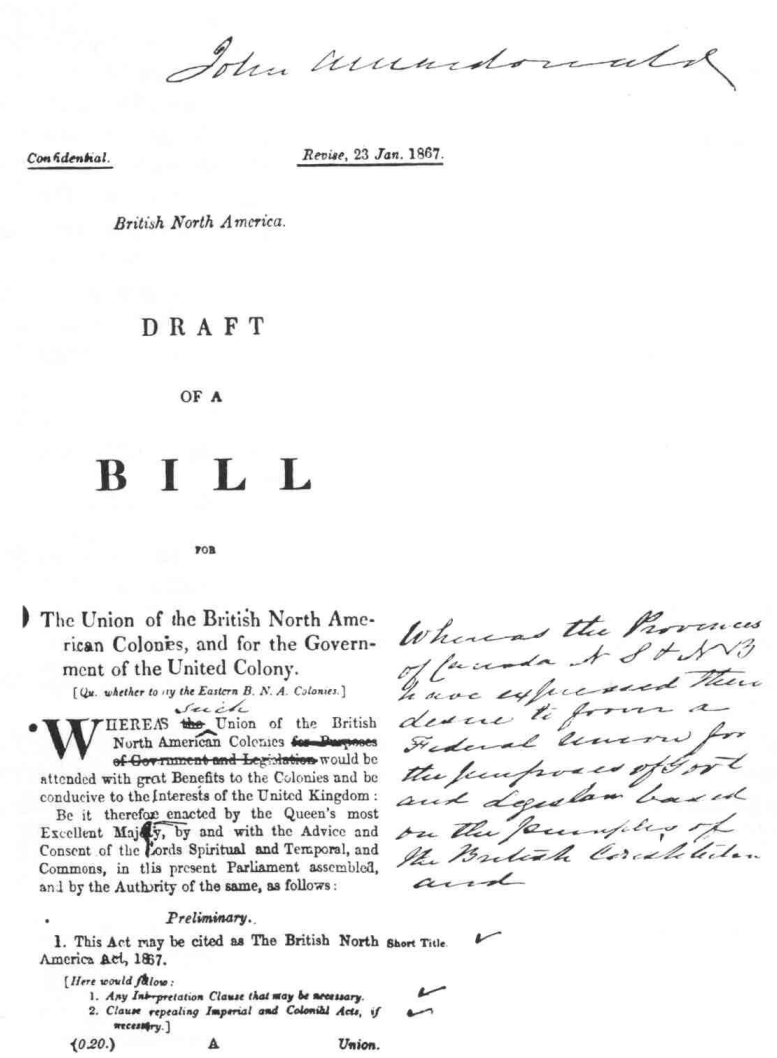
Copy of the first page of the BNA Act (1867). This page was not part of that private members bill that was passed by the British Parliament



John A. Macdonald

Confidential. Revise, 23 Jan. 1867.

British North America.

DRAFT

OF A

BILL

FOR

The Union of the British North American Colonies, and for the Government of the United Colony.

[*Qu. whether to say the Eastern B. N. A. Colonies.*]

WHEREAS ~~the~~ such Union of the British North American Colonies ~~for Purposes of Government and Legislation~~ would be attended with great Benefits to the Colonies and be conducive to the Interests of the United Kingdom:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Preliminary.

1. This Act may be cited as The British North America Act, 1867. Short Title.

[*Here would follow:*
1. *Any Interpretation Clause that may be necessary.*
2. *Clause repealing Imperial and Colonial Acts, if necessary.*]

(0.20.) A Union.

Whereas the Provinces of Canada N S & N B have expressed their desire to form a Federal Union for the purposes of Govt and Legislation based on the principles of the British Constitution and

On the left is the preliminary draft by the Colonial Office. This means the Domination of the Colony, or the uniting of the Colonies into one Dominion. This is the basis of the British North American Act.

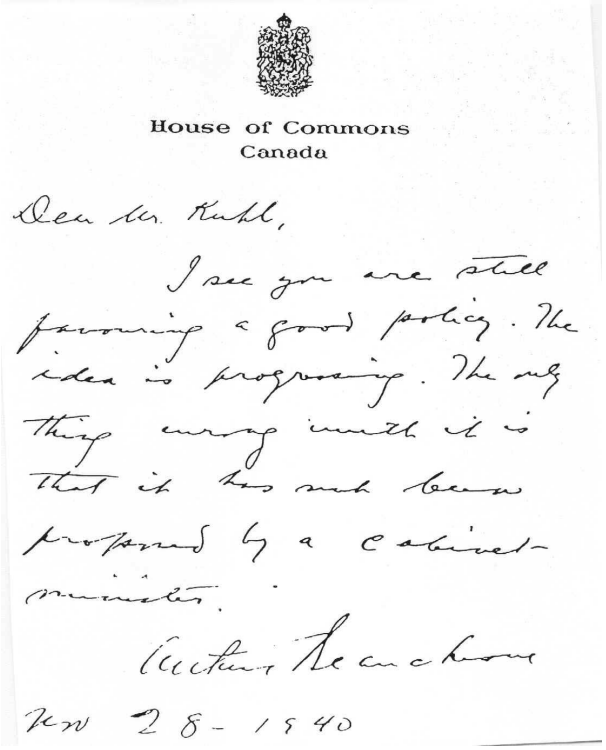
Notice how they stroked out "for the purposes of Government and Legislation", and left the emphasis on "colonies"

On the right is the desire of the Provinces to unite into a Federal Union; which means freedom. Drafted by John A. MacDonald before he received his title. One draft is diametrically opposed to the other. The hand written text:

"Whereas the Provinces of Canada (Upper and Lower - Ontario and Quebec), Nova Scotia amd New Brunswick have expressed their desire to form a Federal Union for the purposes of government and legislation based on the principles of the British Constitution, and..."

This is a copy of a page from "Inside Canada", a publication by R. Roger Smith.

Memo of support from Dr. Beauchesne, Parliamentary Secretary



House of Commons
Canada

Dear Mr. Kuhl,

I see you are still favouring a good policy. The idea is progressing. The only thing wrong with it is that it has not been proposed by a cabinet minister.

Arthur Beauchesne

June 28 - 1940

Text: ***"Dear Mr. Kuhl, I see you are still forming a good policy. The idea is progressing. The only thing wrong with it is that it has not been proposed by a Cabinet minister."*** **Dr. A. Beauchesne Dated: June 28, 1940. and sent in response to a speech made by Mr. Kuhl on Canadian constitutional problems on June 25th, 1940.**

CONFEDERATION A MYTH by Elmer Knutson
Author of: Confederation or Western Independemce

In my search for truth, I found several handwritten articles, written in very large script by Lord Monck on sheets of paper 11 x 14. As that is much larger than the pages of this book I have reduced them in size, which makes them unreadable without a magnifying glass. So I have typed the contents of each page for your convenience.

Lord Monck was the Governor of Quebec, and he also became the first Governor General of Canada. He sat in on all the discussions during the Quebec Conference of 1864, he knew what the drafters of the Quebec resolutions intended and wanted, and as such was intimately acquainted with the thoughts and wishes of the delegation which went to London in December 1 866. He reported in the first six pages of his dispatch his personal observations of the "scheme" to his superior the Right Honorable Edward Cardwell M.P. in charge of the Colonial department, the eventual author of the B.N.A. Act.

Confidential
25NOV64
Government House
Quebec
Nov. 7,1864

The Right Honourable Edward Cardwell M.P.

Sir,

In another dispatch of this date I have had the honour of transmitting to you the resolutions adopted by the representatives of the different colonies of British North America at their late meeting at Quebec in reference to the proposed Union of the Provinces.

I propose in this dispatch to lay before you some observations of my own on the proposed scheme which I think it would be judicious for the present at least, to treat as confidential.

I must in the first place express my regret that the term "Confederation" was ever used in connection with the proposed Union of the British North American Provinces both because I think it an entire misapplication of the term and still more because I think the word is calculated to give a false notion of the sort of union which is desired. I might almost say which is possible, between the provinces.

A Confederation or Federal Union as I understand it, means a union of Independent Communities bound together for certain defined purposes by a treaty or agreement entered into in their quality of sovereign states, by which they give up to the central or federal authority for those purposes a certain portion of their sovereign rights retaining all other powers not expressly delegated in as ample a manner as if the Federation had never been formed.

If this be a fair definition of the term Federation and I think it is applicable to all those Federal Unions of which history gives us examples, it is plain that a Union of this sort could not take p/ace between the provinces of British North America, because they do not possess the qualities which are essential to the basis of such a union.

They are in no sense sovereign or independent communities.

They possess no constitutional rights except those which are expressly conferred upon them by an Imperial Act of Parliament and the power of making treaties of any sort between themselves is not one of those rights.

The only manner in which a Union between them could be effected would be by means of an act of the Imperial Parliament which would accurately define the nature of the connection, and the extent of the respective powers of the central and local authorities, should any sort of union short of an absolute Legislative Consolidation be decided on. (Elmer's note: the BNA Act was just that)

The Sovereignty would still reside in the British Crown and Imperial Legislature, and in the event of any collision of authority between central and local bodies there would be the power of appeal to the supreme tribunal from which all the colonial franchises were originally derived and which would possess the right to receive the appeal, the authority to decide, and the power to enforce the decision. (End of Lord Monck's letter)

The Late Elmer Knutson's webpage contained some of his last expressions of hopes, wishes and dreams for a REAL Canada

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CANADA

House of Commons Debates

OFFICIAL REPORT

SPEECH

OF

Mr. W. F. KUHL

MEMBER FOR JASPER-EDSON

ON THE SUBJECT OF

A DISTINCTIVE NATIONAL FLAG

— AND —

CONSTITUTIONAL PROBLEMS IN CANADA

Delivered in the House of Commons
on Thursday, November 8, 1945

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A Distinctive National Flag

And

Constitutional Problems In Canada

Mr. W. F. KUHL (Jasper-Edson): *This resolution urges the expediency of Canada's possessing a distinctive national flag. I agree that an anomaly exists with respect to the matter of a Canadian flag, and I, and my associates in Parliament are in favour of removing this condition. But personally I consider that under the constitutional conditions prevailing in this country at the moment such action is premature. There are other and more important actions to be taken before it is appropriate to adopt a new flag.*

The flag question is just one of the many anomalies which exist in Canada's constitutional position. Some of these have' been referred to this afternoon. One of them, the matter of Canadian citizenship, is intended to be dealt with at this session. There are others, such as amendments to the constitution, appeals to the Privy Council, the power of disallowance, the matter of a Federal District proper - and doubtless there are others. All these anomalies ought to be dealt with, and I am personally in favour of dealing with them at the earliest possible opportunity. But I consider that the present piecemeal method is improper as well as undemocratic. I contend that the people of Canada are not being consulted in the manner in which I believe they ought to be concerning their rights in these questions.

To Account For Anomalies

I wish to indicate, Mr. Speaker, my reasons for contending that the method that is proposed to attempt to remove these anomalies is improper and undemocratic. Then I wish to indicate what I consider to be the proper method to use. To do this I first wish to endeavour to, account for the constitutional circumstances in which we find ourselves at the moment.

The question which must occur to every hon. member of this house and to every other citizen in this country is, why do such anomalies exist in our constitutional position? How did they come about? There must be something in Canada's constitutional history that accounts for the circumstances in which we find ourselves. No other part of the British Empire finds itself in the same circumstances. Why are these conditions peculiar to the people of Canada? In endeavouring to answer these questions, and in suggesting what I consider to be the proper remedy for them, I am not posing as a constitutional expert, although I may say it is now ten years since I began my studies on this subject, and I trust, I shall not be considered presumptuous in claiming to have added a little to my knowledge in that time.

The matters which I wish to discuss are those with which every public school child in the seventh and eighth grades, every high school student, and certainly every voter, should be thoroughly familiar. Every citizen in the land should know by what authority we do things in this country. On several occasions during the past two Parliaments I have argued the case I am about to introduce, but very little attention was paid to my statements either in the house or out of it. On this occasion I intend to be heard, and if not, I demand to know the reason why. I consider that the situation which I shall discuss is of such importance that a reply or a comment should certainly be forthcoming from the Acting Prime Minister (Mr. Ilsley) the Minister of Justice (Mr. St. Laurent), and for that matter, from all hon. members of the house. I and the people who have sent me here have a right to know whether there is, or is not, a basis in fact for my contentions, and if there is, they have the right to know what is going to be done about it.

Submit Reasoned Argument

I propose to make a reasoned argument supported by the best evidence I have been able to secure. If my argument is to be controverted, I demand that it be met with a reasoned argument and not with personal abuse and statements which are wholly irrelevant. I expect a more intelligent criticism of my argument than was exhibited by a certain hon. member when I discussed this subject in a previous parliament. In Hansard of April 8, 1938, at page 2183, this little exchange took place between myself and the hon. member for Selkirk, Mr. Thorson:

Mr. Thorson: Would the hon member indicate where he gets these queer ideas?

Mr. MacNicol: He has queer ideas of his own.

Mr. Kuhl: I continue:

Mr. Kuhl: I placed on Hansard on February 10 a clear outline of the reasons for my statement. If the hon. member wishes to refute any of the facts or arguments which I placed before the house, I shall be pleased to hear the refutation.

Mr. Thorson: Why battle against windmills".

I submit that the subject matter and the arguments which I presented on that occasion were worthy of more intelligent criticism than was exhibited by that hon. gentleman. I have long ago learned that when an individual has a weak argument, or no argument at a1l, he usually resorts to personal abuse of his opponent. If hon. members have not a better argument to make than Mr. Thorson made on that occasion, I suggest that they hold their peace.

In submitting my argument, Mr. Speaker, I wish to assure you that I am actuated by the highest possible motives. We proudly proclaim our faith in democracy; we proclaim it from the housetops. I wish to urge that we practice what we preach. Let us demonstrate democracy instead of merely paying lip service to it.

It is my desire to see the people of Canada consulted where their fundamental rights are concerned. I wish to see government of the people by the people. These are the motives which actuate me in what I have to say on this resolution.

In presenting the special case I am about to discuss I am not necessarily speaking as a member of the Social Credit group; I am speaking as a native of Canada. The matters on which I am to speak are of fundamental concern to every citizen of Canada regardless of his or her political persuasion. They are among the most serious matters upon which a citizen can be called to think; they are the bed-rock considerations of human government.

Basic Premises

In order to endeavour to account for the contradictions in Canada's constitutional position and to suggest a remedy therefor, I wish to lay down some fundamental premises on which I shall base my entire argument. Locke is credited with saying:

"Men being by nature all free, equal, and independent, no one can be put out of this estate and subjected to the power of another without his consent. The only way whereby anyone divests himself of his natural liberty and puts on the bonds of civil society is by agreeing with other men to join and unite into a community."

Jefferson, in the declaration of independence states:

"We hold these truths to be self-evident: that all men arc created equal; that they are endowed by their Creator with certain inalienable rights: that among these are life, liberty and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed."

Federal Union Defined

In addition to that promise, I wish to indicate the definition of a federal union. What is a federal union? Bouvier in his law dictionary defines "federal government" as:

"a union or confederation of sovereign states, created either by treaty, or by the mutual adoption of a federal constitution."

Doctor Ollivier, Joint Law Clerk of the House of Commons, on page 85 of the report of the special committee on the British North America Act, said:

"A confederation is a union of independent and sovereign states bound together by a pact or a treaty for the observance of certain conditions dependent upon the unanimous consent of the contracting parties, who are free to withdraw from the union."

A. P. Newton, in his book entitled "Federal and Unified Constitutions," at page 5 says:

"*A federal state is a perpetual union of several sovereign states based first upon a treaty between those states or upon some historical status common to them all, and secondly upon a federal constitution accepted by their citizens."*

Two points stand out prominently in these definitions. The first is that the states which form the union must be sovereign, free and independent before they federate; the second, that the federal constitution which forms the basis of the union must be accepted by the citizens of the federating states. I think it worth while in this connection to point out that when the states of Australia federated, the people of Australia were provided with two opportunities of voting on their constitution. I should like to quote a paragraph from a history of the Australian constitution by Quick and Garran.

This paragraph is on the meaning of the words "have agreed" in the constitution, and it states:

"These words make distinct and emphatic reference to the consensus of the people arrived at through the procedure, in its various successive stages, prescribed by the substantially similar enabling acts adopted by the legislatures of the concurring colonies. In four of the colonies acts were passed enabling the people to take part in the framing and the acceptance or rejection of a federal constitution for Australia. Through those acts the people agreed, first. to send representatives to a federal convention charged with duty of framing for Australia a federal constitution under the Crown in the form of a bill for enactment by the Imperial Parliament, and, secondly, they agreed to pronounce their judgment upon the constitution at a referendum, which in each colony was arranged to follow the convention. In all the colonies, the constitution was eventually referred to the people. At this referendum, each voter was eligible to vote by ballot "yes" or "no" on the question asked on the ballot paper, "Are you in favour of the proposed federal constitution?"

In this manner, there was, in four colonies, a popular initiative and finally in all the colonies a popular ratification of the constitution, which is thus legally the work, as it will be for all time, the heritage of the Australian people. This democratic method of establishing a new form of government may be contrasted with the circumstances and conditions under which other federal constitutions became law.

Federal Union Desired In 1867

Now I should like to ask a few questions concerning our position in Canada. Did the provinces of Canada desire federal union? The Quebec resolutions, the London resolutions, and the draft of the bill by the London delegates all indicate that the provinces of Canada desired federal union. The preamble to the Quebec resolutions reads:

"The best interests and present and future prosperity of British North America will be promoted by a federal union under the Crown."

Clause 70 of the Quebec resolutions indicates that whatever agreement was arrived at by the delegates would be submitted to the provinces for their approval. It reads:

"The sanction of the Imperial and local parliaments shall be sought for the union of the Provinces, on the principles adopted by the conference."

Furthermore, a bill drafted in London by the Canadian delegates contains the same preamble that appears in the Quebec resolutions, and this draft bill also contains a repealing clause which hon. members can find on page 179 of Pope's "Confederation Documents". It reads:

"From and after the union, all acts and parts of acts passed by the Parliament of Great Britain, the Parliament of the United Kingdom of Great Britain and Ireland, the Legislature of Upper Canada, the Legislature of Lower Canada, the Legislature of Canada, the Legislature of Nova Scotia, or the Legislature of New Brunswick, which are repugnant to or inconsistent with the provisions of this act shall be and the same are hereby repealed."

Canada Not Federated Under B.N.A. Act

The next question is: Did Canada become a federal union under the British North America Act. I submit that the manner in which the bill was drafted and the manner in which it was enacted throw much light on the answer to this question. The act was drafted by the Law Officers of the Crown attached to the Colonial Office. Lord Carnarvon, Secretary of State for the Colonies, was the chairman of the conference. Sir Frederick Rogers, Under-secretary for the Colonies, in Lord Blachford's Letters, is quoted as saying at page 301:

"They held many meetings at which I was always present. Lord Carnarvon was in the chair, and I was rather disappointed in his power of presidency."

In reading accounts of the times, it is quite obvious that the bill which was drafted by the Colonial Office seems to have prevailed over that which was drafted by the delegate from Canada. The title and preamble of the bill drafted by the Colonial Office read:

"The union of the British North American Colonies, and for the government of the united colony. Whereas the union of the British North American Colonies for the purposes of government and legislation would he attended with great benefits to the Colonies and be conducive to the interests of the United Kingdom;-"

That is the preamble of the draft bill submitted by the Colonial Office, whereas the preamble of the bill drafted by the Canadian delegates read:

"Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to form a federal union under the British Crown for the purpose of government and legislation, based upon the principles of the British Constitution;"

I submit, Mr. Speaker, no evidence is to be found to show that the preamble which we find in the printed copies of the British North America Act in Canada was either discussed or proven in the British Parliament. This preamble reads:

"Whereas the provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one dominion-"

Lord Carnarvon, who introduced the bill on February 19, 1867, used these words as reported at page 559 of the British Hansard:

"The bill opens by reciting the desire of the several Provinces to be federally united."

Furthermore Lord Campbell, speaking to the bill on February 26 of the same year, is reported at page 1012 of the British Hansard as having said:

"The bill is founded, I believe, on what is termed the Quebec scheme of 1864. When the resolution, which alone engages the Nova Scotian Parliament, was in debate, its whole tenor, as our papers show, were against that project. The leader of the government was understood distinctly to renounce it. Our lights. indeed. may be imperfect upon this part of the subject, and I will not dwell upon it. But one thing is clear, the preamble of the resolution comes before us in full and perfect authenticity. The preamble lays down the expediency of confederating British North America."

I submit it should be evident from these quotations that the preamble which was discussed was that to be found in the Quebec resolutions, not the one we find in the printed copies of the British North America Act in Canada.

A pertinent question to ask at this point would be: When was the present preamble placed in the British North America Act? Why was it not discussed in the British Parliament, and, furthermore, what is the significance of an act bearing a preamble which was not even discussed, let alone proven? Another point of significance in connection with this, I believe, is the undue haste with which the bill was passed through the Imperial Parliament. When second reading was called for, the bill was not even printed. At page 1090 of British Hansard for February 27, 1867, we find these words:

Mr. Hatfield said he rose to ask the government why it was the second reading of this bill had been fixed for to-morrow. It was one which affected 4,000,000 of people, and upon which great doubts and differences of opinion were entertained. It was not yet printed and was of so important a character that he thought some little time ought to elapse after it was in the hands of the members before it was introduced in order that some little consultation should take place upon it. He was not at all sure that he should be opposed to it, but he certainly required more time to consider it.

Later, on page 1195, on February 28, we find this:

He (Mr. Hatfield) thought that a bill of such great importance ought not to be passed through parliament with such haste. It was read a third time in the House of Lords only on Tuesday night and two days after they were called to give it a second reading in that house (Commons) that was a bad precedent to establish and might produce ill effect at another time. If the bill had been delayed only for a few weeks, the people of Nova Scotia would have been able to express an opinion upon it. He had not had time to consider either the bill itself or the papers on the subject which had been put into his hands.

Another significant statement is that by John Bright, which we find at page 1181 of British Hansard for February 28, 1867, as follows:

"I have heard there is, at present in London, a petition complaining of the hasty proceedings of Parliament and asking for delay signed by 31,000 adult male, of the province of Nova Scotia; and, that petition is, in reality, signed by at least half of all the male inhabitants of that province. So far as I know, the petition does not protest absolutely against union but against the manner in which it is being carried out by this scheme and bill, and by the hasty measures of the colonial office.

Nobody pretends that the people of Canada prefer a nominated council to an elective council. I regret very much that they have not adopted another system with regard to their council or senate, because I am satisfied - I have not a particle of doubt with regard to it - that we run a great danger of making this act work ill almost from the beginning - - -

For my share, I want the population of these Provinces to do that which they believe to be the best for their own interests - remain with this country if they like, or become independent states if they like."

Conclusions

From the evidence which I have thus far submitted, I draw the following conclusions:

1. The Provinces of Canada desired a federal union.
2. The Quebec resolutions provided for a federal union.
3. The bill drafted by the Canadian delegates at the London conference, also provided for a federal union,
4. The colonial office was not disposed to grant the Provinces of Canada their request for a federal union.
5. The British North America Act, enacted by the Imperial Parliament, carried out neither the spirit nor the terms

of the Quebec resolutions.
6. Canada did not become a federal union under the British North America Act, but rather a united colony. The privilege of federating, therefore, was still a future privilege.
7. The Parliament of Canada did not become the government of Canada, much less a federal government. It became merely the central legislature of a united colony, a legislative body whose only power was that of aiding and advising the Governor General as agent of the Imperial Parliament.
8. The British North America Act, as enacted by the Imperial Parliament, was not a constitution, but merely an Act of the Imperial Parliament which united four colonies in Canada into one colony with the supreme authority still remaining in the hands of the British government.

Further Evidence

As further evidence that the British North America Act was not a constitution, and that Canada did not become a federal union, I refer to the definition of the term "dominion" which is to be found in section 18, paragraph 3 of the Interpretation Act of 1889. It reads as follows:

"The expression 'colony' shall mean any of Her Majesty's dominions, exclusive of the British islands and of British India; and where parts of such dominions are under both a central legislature and local legislatures, all parts under the central legislature shall, for the purpose of this definition be deemed to be one colony."

Excepting Canada, no country in the empire had a central legislature and local legislatures. Therefore, according to this definition made twenty-two years after the enactment of the British North America Act, Canada is deemed to be one colony.

To show that I am not alone in my conclusions I quote some of the statements of recognized Canadian constitutional authorities before the special committee on the British North America Act in 1935.

Doctor W. P. M. Kennedy, Professor of Law in the University of Toronto, at page 69 of the report~states:

"I think we have got to get away from the idea that the British North America Act is a contract "or treaty". I do not want to go into that, but it is true neither in history nor in law. The British North America Act is a statute, and has always been interpreted as a statute."

Professor N. McL. Rogers, of Queen's University, at page 115 of the report states in reply to a question by Mr. Cowan:

Mr. Cowan: You do not subscribe to the belief that this was a pact or contract?

Mr. Rogers: I am thoroughly convinced it is not, either in the historical or the legal sense.

Then I would quote Doctor Beauchesne, Clerk of the House of Commons, who at page 125 states.

"It is quite true that if we apply to the British North America Act the principles followed in the interpretation of statutes, it is not a compact between provinces; it is an act of parliament which does not even embody all the resolutions passed in Canada and in London prior to its passage in the British Parliament where certain clauses that had not been recommended by the Canadian Provinces were added."

The evidence which I have submitted establishes to my satisfaction that there has been at no time in Canada any agreement, pact or treaty between the Provinces creating a federal union and a federal government. The privilege to federate, therefore, was still a future privilege for the Provinces of Canada.

Provinces Completely Sovereign

Since the condition of sovereignty and independence must be enjoyed by the Provinces before they can federate, it was necessary that the British government relinquish its authority over them. This was done through the enactment of the Statute of Westminster on December 11, 1931. By section 7, paragraph 2, of this statute, the Provinces of Canada were made sovereign, free and independent in order that they might consummate the federal union which they wished to create in 1867, but were not permitted to do so.

Since December 11, 1931, the Provinces of Canada have not acted on their newly acquired status; they have not signed any agreement, they have not adopted a constitution, and the people of Canada have not ratified a constitution. Such

action should have been taken immediately upon the enactment of the Statute of Westminster. It is by reason of the failure of the Provinces and of the people of Canada to take this action that all the anomalies in our present position exist. We have been trying since 1931 to govern ourselves federally, under an instrument which was nothing more than an act of the Imperial Parliament for the purpose of governing a colonial possession.

Not only has this anomalous condition obtained since 1931, but it has done so without any reference whatsoever having been made to the Canadian people. They have not been consulted on anything pertaining to constitutional matters. Before there can be a federal union in Canada and a federal government, the Provinces of Canada must be free and independent to consummate such a union. They have been free to do so since December 11, 1931, but they have not done so.

Canada Without A Constitution

I therefore pose this question: Whence does the Dominion Parliament derive its authority to govern this country? The Imperial Parliament cannot create a federal union in Canada or constitute a federal government for the people of Canada by virtue of the British North America Act or any other act. This can be done only by the people of Canada, and they have not yet done so.

Since December 11, 1931, as an individual citizen of this country I have had the right to be consulted on the matter of a constitution. I have had the right along with my fellow citizens to ratify or to refuse to ratify a constitution, but I have not been consulted in any way whatsoever. I assert therefore that until I, along with a majority of Canadians, ratify a constitution in Canada, there can be no constitution, and I challenge successful contradiction of that proposition.

Mr. POULIOT: Were you born in 1867?

Mr. KUHL: Not that I recall.

Mr. JOHNSTON: Were you?

Mr. POULIOT: No.

Mr. KUHL: Those who were in charge of Canadian affairs in 1931 were under obligation to acquaint the people of Canada with the constitutional position obtaining at the time and to prepare them so that they would be able to act upon their altered status.

Mr. JAENICKE: What about section 7 of the Statute of Westminster?

Mr. KUHL: I have already answered that. I have indicated the position of the British North America Act, and have pointed out that it has not been accepted as a constitution by the people of Canada.

Mr. JAENICKE: The Statute of Westminster made the provinces autonomous?

Mr. KUHL: Yes.

Mr. JAENICKE: What about section 7 of the Statute of Westminster?

Mr. KUHL: Which one?

Mr. JAENICKE: Amending the British North America Act.

Mr. KUHL: Just exactly as I have said, there can be no constitution in Canada, whether it is on the basis of the British North America Act or any other act, until the people of Canada accept it. They have not accepted it.

Mr. COLDWELL: We have been acting under the British North America Act since 1867.

Mr. KUHL. That does not alter the situation.

Mr. JAENICKE: What are you going to do about it?

Remedy For Condition

Mr. KUHL: Before I resume my seat I shall indicate definitely what to do about it. The people of Canada have not acted on the altered constitutional status; hence the deplorable constitutional position in which we find ourselves in this country. I know of no country which is in such shocking constitutional circumstances as Canada. As a native of this country it is most humiliating to me to be obliged to continue to accept this position, and I am determined to do my part to rectify that position.

Legally, Canada is in a state of anarchy, and has been so since December 11, 1931. All power to govern in Canada since the enactment of the Statute of Westminster has resided with the provinces of Canada, and all power legally remains there until such time as the provinces sign an agreement and ratify a constitution; whereby, they delegate such powers as they desire upon a central government of their own creation. Since December 11, 1931, the Parliament of Canada has governed Canada on assumed power only. It is imperative that this situation be dealt with in a fundamental way. Patchwork methods will not suffice.

Obviously the first act is that the Provinces of Canada shall sign an agreement authorizing the present Parliament to function as a provisional government. That is number one in answer to my hon. friend.
Secondly, steps must then be taken to organize and elect a constituent assembly whose purpose will be to draft a constitution which must later be agreed to by the Provinces and then ratified by the people of Canada. The Dominion-Provincial Conference is to reconvene in the near future. This would be a most appropriate time and a most appropriate occasion on which to initiate action of this kind. I trust that the delegates to this conference will not disappoint us in this matter. I shall observe with much interest what will be said in this conference on constitutional relationships in Canada.

Proposals Endorsed

To show that I am not alone in my proposal I quote Doctor Beauchesne from the evidence of the special committee on the British North America Act in 1935. On page 126 of the evidence he is credited with saying:

"-the Statute of Westminster has altered our status. The time has come, in my humble opinion, when the British North America Act, except as to minority rights, should he transformed and a new constitution more in conformity with present conditions should be adopted. Amendments here and there would be mere patchwork which could not last. The people of 1935 are different from those of 1867. What we want is a new constitution. The new constitution must leave nobody with a grievance. A spirit of conciliation should predominate. For these reasons, the task must be entrusted to an independent body in which all the elements of the country will be represented. I, therefore, beg to suggest an imposing constituent assembly formed of eminent men coming from all parts of Canada. Provincial conferences, attended by a few ministers meeting behind closed doors, would hardly satisfy public opinion. The debate should be public. I want the assembly to sit in a city in the west. It would not be necessary for a delegate to be a member of Parliament or of a provincial Legislature."

And on page 128 Doctor Beauchesne is reported as follows:

"I would suggest that the assembly do not sit in Ottawa, in order that it may not have the appearance of being dominated or even influenced by the dominion power; and as the western provinces are of such paramount importance in the country, I suggest the best city for the representatives to gather in would be Winnipeg."

And again on page 131:

"There have been many disputes about provincial rights since 1867 and it seems certain that when a new constitution is drawn up, the distribution of federal and provincial powers will have to be modified."

And page 135:

"I think the time is ripe for a change in the constitution. I do not think you would need much publicity in order to draw to the attention of the people of this country that the British North America Act is inadequate."

And finally on page 129:

"Whether our country should be changed from a dominion to a kingdom is also a subject which might be discussed. I would suggest that the country should be called "the federated states of Canada."

I should also like to quote in this connection a resolution which was adopted at a convention of Social Credit supporters and monetary-reform-minded people held in the city of Edmonton in 1942. This resolution is to be found at page 59 in the publication "Prepare Now," issued by the Bureau of Information, Legislative Building, Edmonton. It reads as follows:

"Whereas the statute of Westminster, in granting complete sovereignty and equality with Great Britain to Canada and other nations of the British Commonwealth, has changed the relative positions of the provincial and federal governments as provided in the B.N.A. Act;
and, Whereas it is desirable and expedient in the interests of national unity that an inter-provincial conference of appropriate representatives of the Canadian Provinces be held for the purpose of reviewing and adjusting the constitutional relationship as between the Provinces and their central government with a view to providing effective democratic government in Canada;
Therefore be it resolved that without in any way prejudicing or jeopardizing the rights and privileges of any minority group in Canada, a comprehensive conference of representatives of the Provinces be held for the purpose of considering:
1. The existing legislative and administrative organization in the provincial and federal spheres.
2. A more expedient allocation of powers as between the provincial and federal authorities.
3. Ways and means of facilitating the drafting, the adoption and the implementation of a Canadian constitution in keeping with the rights granted in the Statute of Westminster.

I contend, Mr. Speaker, that such are the actions which should be taken before it is appropriate to adopt a distinctive national flag. I submit that the adoption of a new flag of our own designing should be the crowning act to putting our constitutional house in order.

I believe that the statements which I have placed upon the record are historical facts. I believe that the conclusions which I have drawn from these facts are the only ones which can be drawn from them, and I believe, consequently, that the solution which I have suggested is the only one adequate for the circumstances. If hon. members of this assembly can successfully dispute either the facts which I have submitted or the conclusions which I have drawn there-from, I shall be prepared to withdraw those conclusions, but if they do not do so, I believe the people of the country have a right to know what they propose to do in the circumstances.

It was my intention to move an amendment, but as one has been moved already I shall refrain from doing so until the amendment already moved has been dealt with. So far as the substance of that amendment is concerned, I repeat what I have previously indicated. I think it is premature to consider any flag, either the one suggested in the amendment or any other. There are other and more important actions to be taken before we can consider the adoption of a new flag.

Ottawa: Printed by Edmond Cloutier, Printer to the King's Most Excellent Majesty, 1945

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Explanation of the

Statute of Westminster

By Walter Kuhl

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The Parliament of a Dominion in Section 2 does not refer to the legislative body sitting in Ottawa on December 10, 1931. The legislative body sitting in Ottawa the day before the Statute of Westminster was passed, according to the Interpretations Act of 1889, Sec. 18, Par. 3, was the Central Legislature of a United Colony, whose only function and authority was to aid and advise the Governor General as the agent of the British Government.

Section 2 does not validate the Central Legislature of a United Colony as the Federal parliament of a Federal Union. A Federal Union in Canada can be created only by completely independent and autonomous provinces, which section 7 (2) provides for.

As a consequence of Section 11, the term, Dominion, can now be applied to a Federal Union, and the term, the Parliament of a Dominion can now be applied to a Federal Parliament and not be inconsistent insofar as a definition is concerned. However, the British Government can no more convert the Central Legislature of a United Colony into the Federal Parliament of a Federal Union, by changing definitions, than it can turn water into wine.

The only validity which the B.N.A. Act has since December 11, 1931, is as a guide to the creation of a Federal Union which only the provinces can bring about. The provinces of Canada are free to use it as a guide in the creation of a Federal constitution, or they may reject it completely in favour of a constitution of their own making.

As an analogy, it might be said that the relationship into which the original provinces entered under the B.N.A. Act was a sort of shot-gun marriage; they were forced into a United Colony against their will. The Statute of Westminster gave the provinces their independence so that they could consummate a voluntary marriage, but they have not yet done so. Ever since December 11, 1931, the provinces have been living common-law with Ottawa and have the right to terminate this arrangement at any time they wish. End

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PERTINENT CLAUSES FROM

THE STATUTE OF WESTMINSTER

AND OTHER STATUTES

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2.(1) The Colonial Laws Validity Act. 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall he void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

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.

7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act still extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall he restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

11. Notwithstanding anything in the Interpretation Act, 1889, the expression "Colony" shall not, in any Act of the Parliament of the United Kingdom passed after the commencement of this Act, include a Dominion or any Province or State forming part of a Dominion.

THE INTERPRETATIONS ACT, 1889

Sec. 18, Par. 3, - The expression "Colony" shall mean any of Her Majesty's Dominions exclusive of the British Islands and British India, and where parts of such dominions are under both a Central Legislature and Local Legislature for the purposes of this definition shall be deemed to be one Colony.

THE COLONIAL LAWS VALIDITY ACT,
JUNE 29th, 1865

Sec. 6, - Any proclamation purported to be published by the authority of the Governor, circulating in any newspaper in the Colonies, signifying Her Majesty's assent to any Colonial law or Her Majesty's disallowance of any such reserved bill as aforesaid, shall be prima facie evidence of such disallowance or assent.

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Spruce Grove, Alta., R.R. I,
November 23rd, 1976.

The Hon. Rene Levesque,
Premier-elect,
Province of Quebec,
Quebec, P.Q.

Dear Mr. Levesque:

Congratulations on your magnificent personal victory and that of your Parti Quebecois in the recent Quebec election.

As a student of Canadian constitutional history and of Canadian constitutional problems for some 40 years, I am tremendously interested in the constitutional implications of your recent political victory.

For 14 years, from 1935 to 1949, it was my privilege to serve as a member of the House of Commons, from the province of Alberta. The withholding of assent to some Alberta legislation in those years by the Lieutenant-Governor and the disallowance of other Alberta legislation by the people at Ottawa, set me to investigating how these things could be. I was assisted in my studies by R. Rogers Smith, who was personally acquainted with a onetime private secretary to John A. MacDonaId at the time when the B.N.A. Act was being enacted. Through this source I have become acquainted with much information concerning the history of the B.N.A. Act which is not to be found in text books.

All this information has led me to the conclusion that the existing constitutional circumstances are shocking to the point of unbelief. However, in my considered opinion, after 40 years of intensive study, these existing constitutional circumstances are of such a nature that they can be of extreme advantage to you in governing your province.

I am enclosing copies of some of the addresses which I delivered in the House of Commons on the subject, as well as copies of a pamphlet by Mr. Smith, dealing with the same subject. If you have not already been made acquainted with this material, I trust it will prove enlightening and helpful to you in the constitutional considerations in which you obviously are going to become involved.

Although the enclosed material should give you a clear outline of what I conceive to be your present standing constitutionally as a province, 1 would like to give you a brief summary of what I believe to be your present position.

So far as separation. is concerned, rather than it being necessary to seek separation rights through a referendum, THE PROVINCE OF QUEBEC IS ALREADY COMPLETELY CONSTITUTIONALLY SEPARATED FROM THE REST OF CANADA ! ! ! ! This is equally true of every other province in Canada and has been so since December 11, 1931, through the Statute of Westminster.

HOW CAN YOU BE DIVORCED IF YOU HAVE NEVER BEEN MARRIED?

In other words, ever since the enactment of the Statute of Westminster in 1931, by the British Government, each of the provinces of Canada has been a completely sovereign and independent state, and because the provinces have signed nothing since then constituting a Federal Union and a Federal Government, and because no such treaty has been ratified by the people of Canada, the provinces still enjoy the status of sovereignty and are privileged to use it in any way they see fit.

As you will observe from the enclosed addresses, I quote eminent Canadian constitutional authorities as suggesting that the only and logical solution to the existing constitutional circumstances is the drafting and the adoption of a proper federal constitution in which the provinces can reserve for themselves any and all powers necessary to enable them to govern their provinces successfully.

I am sure you can appreciate that if this were done, you could solve your economic and other problems in Quebec without resorting to separation. I feel sure that having the ability to solve your problems and still remain constitutionally part of the country of Canada, would be much more satisfactory to your supporters as well as to others within your province.

The following is a summary of the reasons for the things I have just stated:

1. At the time of Confederation movement in Canada, the Provinces of Canada, Nova Scotia and New Brunswick desired to form a Federal Union.

2. The Quebec Resolutions of 1864 provided for a Federal Union.

3. The Bill drafted by the Canadian delegates at the London Conference in 1866 also provided for a Federal Union.

4. The Colonial Office of the Imperial Parliament was not disposed to grant the Provinces of Canada their request for a Federal Union.

5. The British North America Act enacted by the Imperial Parliament carried out neither the spirit nor the terms of the Quebec Resolutions.

6. Canada did not become a Federal Union or a Confederation under the British North America Act, but rather a United Colony. The privilege of federation, therefore, was still a future privilege for the provinces of Canada.

7. The Parliament of Canada did not become the government of Canada, much less a federal government; it became merely the central legislature of a United Colony, a legislative body whose only power was that of aiding and advising the Governor-General as agent of the Imperial Parliament.

8. The British North America Act, as enacted by the Imperial Parliament, was not a constitution but merely an act of the Imperial Parliament which united four colonies in Canada into one colony, with the supreme authority still remaining in the hands of the British government.

9. The privilege of federating became realizable for the provinces of Canada, only through the enactment of the Statute of Westminster on December 11, 1931. Through this statute, the Imperial Parliament relinquished to the people of Canada their sovereign rights, and through them to their Provincial governments as their most direct agents.

10. Since December 11, 1931, the Provinces of Canada have not acted on their newly acquired status in the forming of a Federal Union, nor have the people of Canada ratified a constitution. Therefore, the original proposition, namely: that all power to govern in Canada resides at the moment, with the Provinces of Canada; and, that all power legally remains there until such time as the Provinces sign an agreement and ratify a constitution whereby they may delegate such powers as they wish to a central government of their own creation. In the meantime, Canada exists as ten political units without a political superior.

Should you consider that there is merit in the information which I have given you, I would be very happy to meet with you personally to discuss in greater depth the implications of the unprecedented constitutional circumstances prevailing in Canada.

Yours for a better Canada,

Walter F. Kuhl
[Member of Parliament for Jasper-Edson, 1935-1949]

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By: Eldon Warman

An added note on the question: What right or authority does the Queen of Great Britain have in calling herself the Queen of Canada? What right does she have in being the plaintiff in charges made in the name of the Crown against a Canadian citizen?

The BNA Act (1867) section 2: The provisions of this Act referring to Her majesty the Queen extends also to the heirs and successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.

The Imperial Parliament repealed section 2 of the BNA Act (1867) by the Statutes Revision Act of 1893. Under what authority did the successor to Queen Victoria, or successors to the British throne since, continue to rule Canada as the Crown of Canada?

Where is the "CROWN OF CANADA"???? Where is the "THRONE OF CANADA"????

More appropriately, the title of Mr. Kuhl's booklet
should have been:

CANADA

NOT A BONAFIDE
COUNTRY
AND,

WITHOUT A
CONSTITUTION