

Canada's Legal-Constitutional Continuity, 1791-1867

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ABSTRACT

The Government of Canada commemorated 2017 as marking “Canada’s” 150th anniversary. However, “Canada” as a polity began long before Confederation in 1867 and ultimately stretches back to 1791. The Dominion of Canada (1867-present) is the continuator of the Province of Canada (1841-1867), which is, in turn, the continuator of Upper Canada and Lower Canada (1791-1841). This article demonstrates how precisely the *Constitutional Act, 1791* established the polity and how the *Act of Union, 1840* and the *British North America Act, 1867* modified it while maintaining the continuity of existing executive, legislative, and judicial authorities throughout. The executive and legislative authority of the Province of Canada transferred virtually intact to the Dominion of Canada on 1 July 1867, as did the parliament buildings, members of the upper house, and the Governor General and political executive. The year 2017 marked the 150th anniversary of Confederation, not of “Canada” *per se*.

1. INTRODUCTION: WHAT JOHN A. MACDONALD’S TERM AS PRIME MINISTER FROM 1864 TO 1873 SAYS ABOUT THE CANADIAN POLITY

Writing in his treatise *Parliamentary Government in the British Colonies* in 1880, Alpheus Todd, the Parliamentary Librarian for the Dominion of Canada, dated Prime Minister Sir John A. Macdonald’s penultimate ministry from 1864 to 1873.¹ His son, Arthur Todd, preserved that wording in the 2nd edition of this renowned treatise in 1894 and added that Macdonald’s last ministry, appointed in 1878, died with him in 1891.

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¹ Alpheus Todd, *Parliamentary Government in the British Colonies, 1st Edition* (London: Longmans, Green, and Co., 1880) at 48.

Upon the confederation of the British North American provinces in 1867, Sir John A. Macdonald was appointed Premier (his ministry having already been in existence in the Province of Canada for three years); and he continued as prime minister until November 5, 1873, when the Mackenzie administration was formed. [. . .] In 1878 Sir John A. Macdonald returned to power, bringing with him most of his former colleagues, and remained in office until death removed him on June 6, 1891, having but one change of ministry in twenty-seven years.²

Todd made this innocuous observation about the direct connection between the Province of Canada and the Dominion of Canada as part of a larger argument in favour of ministerial by-elections because they supported stability in the executive in Canada, in contrast to the chaos and high turnover of ministries in the Australasian colonies that had not adopted this British practice.³ Todd cited 1864, and not 1867, as the year in which Macdonald's cabinet took office in passing and so unostentatiously precisely because it seemed so obvious, uncontroversial, and unremarkable in the late 19th century that the Dominion of Canada was the direct continuator and successor polity to the Province of Canada. Sadly, what was once manifest and undeniable to Todd's generation has faded into obscurity.

The basic principle of the succession of states best explains how the Imperial Crown and Imperial Parliament re-organized the British North

² Alpheus Todd, *Parliamentary Government in the British Colonies, 2nd Edition* (London: Longmans, Green, and Co., 1894) at 62-63. In that case, Todd used 1864, and not 1867, as his point of reference, since 1891 minus 27 years is 1864.

³ When the prime minister appointed an elected MP to the Privy Council (a position of emolument under the Crown), the new Minister had to resign and run for re-election in a by-election before being sworn in to cabinet. The Province and Dominion of Canada had adopted this principle from the United Kingdom. The Westminster Parliament first mandated ministerial by-elections during the reign of Queen Anne, well before modern cabinet government had emerged in the United Kingdom and long before Responsible Government had been granted to the colonies. This procedure was seen as a means of limiting the executive's authority to turn MPs into Crown placemen, and it was motivated by the same fears that prime ministerial patronage elicits today. Ministerial by-elections also highlighted the separation of powers between the executive and legislature.

Both the Province of Canada and the Dominion of Canada mandated ministerial by-elections in statute; the Parliament of Canada abolished the practice in 1931, following the United Kingdom's repeal of ministerial by-elections in 1926. The King-Byng Affair is what ultimately spurred Parliament into abolishing ministerial by-elections. The House of Commons withdrew its confidence from Meighen's government after only a few days in the absence of Meighen and his cabinet ministers, who had all vacated their seats in order to pursue re-election in by-elections. Without ministerial by-elections, the Meighen government would have commanded a larger majority and would almost certainly have survived longer than it did. See Martin Pugh, "'Queen Anne Is Dead': The Abolition of Ministerial By-Elections, 1867-1926," *Parliamentary History* 21, no. 3 (2002): 351-366 and Statute 21-22 George V, chapter 52: An Act to remove the necessity of re-election of Members of the House of Commons of Canada on acceptance of office, 1931.

American Crown colonies in the 19th century:⁴ the Dominion of Canada is the “continuator” of the Province of Canada, which is, in turn, the continuator of Upper and Lower Canada. Each iteration of this polity expressly provided for the continuity of the same authorities (the Imperial Crown and Parliament) over the same territory.⁵ The Imperial Parliament established Upper Canada and Lower Canada through the *Constitutional Act, 1791*, re-arranged them into the Province of Canada through the *Act of Union, 1840*, and, finally, through the *British North America Act, 1867*, bifurcated the Province of Canada into Dominion of Canada and the Provinces of Ontario and Quebec. (In other respects, such as in treaties with indigenous peoples and States, the Dominion of Canada later became a continuator to the United Kingdom of Great Britain and Northern Ireland post-1931 once the Crown of Canada emerged as a separate legal person from the Crown of the United Kingdom.⁶) The *Constitutional Act, 1791*, the *Act of Union, 1840* and the *British North America Act, 1867* explicitly maintain an unbroken legal-constitutional continuity of Canada as a polity from 1791 to the present day. Canada as a polity dates back to 1791, not to 1867,⁷ and 2017 marked the sesquicentennial not of “Canada” *per se*, but rather, of Confederation and the Dominion of Canada.

⁴ James Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 2006) at 667-672.

⁵ Carsten Thomas Edenroth and Matthew James Kemner, “The Enduring Political Nature of Questions of State Succession and Secession and the Quest for Objective Standards,” *University of Pennsylvania Journal of International Economic Law* 17, no. 3 (Fall 1996): 756.

⁶ There were several key milestones in the 1930s through which Canada asserted its independence from the United Kingdom, including during the Abdication Crisis of 1936, the passage of the *Seals Act* in 1939, and the separate declaration of war in September 1939. All of these developments depended on the *Statute of Westminster*, which recognized the multiplication of the Imperial Crown into the Personal Union of Crowns of the Commonwealth Realms. The Government of Canada invoked section 4 of the *Statute of Westminster* in response to the Abdication Crisis in 1936, which meant that the *His Majesty's Declaration of Abdication Act, 1936* applied to Canada as part of its laws.

The *Seals Act, 1939* recognized the authority of the King of Canada, acting solely on the advice of Canadian ministers, to issue proclamations and any other executive instruments under the Great Seal of Canada. Previously, even on Canadian matters, the Sovereign issued executive instruments on the Great Seal of the Realm (i.e., of the United Kingdom) or under the British Signet. In September 1939, George VI signed a separate declaration of war for Canada as King of Canada on September 10, one week after the United Kingdom had declared war. See Maurice Ollivier, *British North America Acts and Selected Statutes, 1867-1962* (Ottawa: Queen's Printer, 1962) at 456-457.

⁷ James W.J. Bowden, “1791: The Birth of Canada,” *The Dorchester Review* 5, no.1 (Spring-Summer 2015): 28-32.

2. THE CONSTITUTIONAL ACT, 1791 ESTABLISHES CANADA AS A POLITY

The Imperial Crown first acquired Quebec as a conquest colony after the Kingdom of France ceded it to the United Kingdom through the Treaty of Paris of 1763. The *Royal Proclamation of 1763* and the *Quebec Act, 1774* both treated Quebec as a conquest colony rather than as a settler colony.⁸ Consequently, the Loyalists who fled the Thirteen Colonies (before 1783) and United States of America (after 1783) and settled in the Province of Quebec did not bring with them an inherent right as British subjects to representative political institutions and self-government.⁹ Instead, the Province of Quebec, being a conquest colony, had retained its original body of French law in civil matters.¹⁰ These Loyalists also began to agitate for their rights as British subjects to representative government. London remained mindful of the recent loss of the Thirteen Colonies and that the American rebels had even cited the *Quebec Act, 1774* as one of their grievances against the Imperial Crown in the *Declaration of Independence*.¹¹ The *Constitutional Act, 1791* and the Imperial proclamation that put it into effect partitioned the old Province of Quebec established under the *Quebec Act, 1774* and transformed the Canadas from a conquest colony to a settler colony.

The language of the *Constitutional Act, 1791* also makes clear that it disestablished the “Crown-appointed Legislative Council” set out in the *Quebec Act, 1774* and subsequently created from scratch the Governors, Legislative Councils, and Legislative Assemblies of Upper Canada and Lower Canada.¹² The first section of the *Constitutional Act, 1791* repeals the *Quebec Act, 1774* and disestablishes the old Legislative Council:

⁸ Peter Hogg, *Constitutional Law of Canada, 2nd Edition* (Toronto: The Carswell Company, 1985) at 10, 22-23.

Of course, if it could be demonstrated that either the *Proclamation of 1763* or the *Quebec Act, 1774* had established the Canadian polity that exists today, then it would still have pre-dated Confederation in 1867. Generally, the Doctrine of Reception applied to settler colonies, and thereby allowed British settlers to claim an inherent right of self-government. Settler colonies were also regulated by Imperial statute. However, inhabitants of conquest colonies could not claim an automatic right of self-government, and the Imperial Crown retained the authority to establish via executive instrument the political institutions of a conquest colony, such as the Office of Governor, the Executive Council, the legislature, and courts.

⁹ R. Macgregor Dawson, *The Government of Canada, 5th Edition* (Toronto: University of Toronto, 1973) at 6-8.

¹⁰ Hogg 1985, 21-22; Dawson 1973, 6-7.

¹¹ *Ibid.* The *Declaration of Independence* refers to the *Quebec Act, 1774* and criticizes George III “For abolishing the free System of English Laws in a neighbouring Province, establishing therein an arbitrary Government, and enlarging its Boundaries, so as to render it at once an Example and fit Instrument for introducing the same absolute Rule into these Colonies.”

¹² Maurice Ollivier, *British North America Acts and Selected Statutes, 1867-1962* (Ottawa: Queen’s Printer, 1962) at 18.

1. That to much of the said Act [The *Quebec Act, 1774*] as in any Manner relates to the Appointment of a Council for the Affairs of the said Province of Quebec, or to the Power given by the said Act to the said [Legislative] Council, or to the major Part of them, to make Ordinances for the Peace, Welfare, and good Government of the said Province [...] is hereby repealed.¹³

The *Constitutional Act, 1791* thus also established representative government and the tripartite Crown-in-Parliament in British North America and thereby limited the authority of the Governors of the Canadas to act unilaterally. In section 2, the *Constitutional Act, 1791* then establishes for the first time the representative political institutions of what would become Upper Canada and Lower Canada:

2. [...] there shall be within each of the said Provinces respectively a Legislative Council, and an Assembly [...].¹⁴

The *Constitutional Act, 1791* also established that the Legislative Councils and Assemblies must meet at least once every 12 months and that the legislatures would live for a maximum of four years.¹⁵ In 1791, the Imperial authorities issued new Letters and Instructions to Lord Dorchester and made him Captain General and Governor-in-Chief of Upper Canada and Lower Canada; the Colonial Office also commissioned John Graves Simcoe as Lieutenant-Governor of Upper Canada and Sir Alured Clarke as Lieutenant-Governor of Lower Canada.¹⁶ Lord Dorchester's previous letters and instructions from 1786 had referred to him as "Captain General and Governor-in-Chief of the Province of Quebec," as well as the rest of British North America.¹⁷ An Imperial Order-in-Council dated 24 August 1791 (rather

¹³ *Constitutional Act, 1791* (UK) 31 George III, c. 31, s. 1.

¹⁴ *Constitutional Act, 1791* (UK) 31 George III, c. 31, s. 2.

¹⁵ *Constitutional Act, 1791* (UK) 31 George III, c. 31, s. 27.

¹⁶ Arthur G. Doughty and Duncan A. McArthur, "Commission to Lord Dorchester as Governor in Chief of Upper and Lower Canada, September 12, 1791" in *Documents Relating to the Constitutional History of Canada, 1791-1818* (Ottawa: The Queen's Printer, 1914) at 5-12; Arthur G. Doughty and Duncan A. McArthur, "Instructions to Lord Dorchester as Governor in Chief of Lower Canada, September 16, 1791" in *Documents Relating to the Constitutional History of Canada, 1791-1818* (Ottawa: The Queen's Printer, 1914) at 13-32; Arthur G. Doughty and Duncan A. McArthur, "Instructions to Lord Dorchester as Governor in Chief of Upper Canada, September 16, 1791" in *Documents Relating to the Constitutional History of Canada, 1791-1818* (Ottawa: The Queen's Printer, 1914) at 33-49; Arthur G. Doughty and Duncan A. McArthur, "Instructions to Alured Clark as Lieutenant Governor of Lower Canada, September 16, 1791" in *Documents Relating to the Constitutional History of Canada, 1791-1818* (Ottawa: The Queen's Printer, 1914) at 54; Arthur G. Doughty and Duncan A. McArthur, "Instructions to John Graves Simcoe as Lieutenant Governor of Upper Canada, September 12, 1791" in *Documents Relating to the Constitutional History of Canada, 1791-1818* (Ottawa: The Queen's Printer, 1914) at 55.

¹⁷ Arthur G. Doughty and Duncan A. McArthur, "Commission to Lord Dorchester as Governor in Chief of Upper and Lower Canada, September 12, 1791" in *Documents Relating to the Constitutional History of Canada, 1791-1818* (Ottawa: The Queen's Printer, 1914) at 5.

than the *Constitutional Act, 1791* itself) bifurcated Quebec into Upper Canada and Lower Canada.¹⁸ Since Quebec was still a conquest colony at this stage, the executive retained wide latitude in reorganizing it administratively. An Imperial proclamation then brought the *Constitutional Act, 1791* into force on 19 November 1791.¹⁹

However, section 33 of the *Constitutional Act, 1791* does acknowledge one continuity between it and the *Quebec Act, 1774* such that Lower Canada could retain its French law in civil matters:

33. all Laws, Statutes, Ordinances which shall be in force on the Day to be fixed in the Manner herein-after directed for the Commencement of this Act [...] shall remain and continue to be of the same Force, Authority, and Effect in each of the said Provinces, respectively [...] except in so far as the same [...] may hereafter, [...] be repealed [...] by and with the Advice and Consent of the Legislative Councils and Assemblies of the said Provinces, respectively [...].²⁰

This provision achieved two purposes: it both allowed Lower Canada to maintain the French civil law recognized in the *Quebec Act, 1774* and allowed Upper Canada to repeal French civil law within its borders and replace it with the basic principles of English Common Law. And this is precisely what the 1st Legislature of Upper Canada did in 1792 through *An Act Introducing English Civil Law into Upper Canada, 1792* and *An Act Establishing Trial by Jury for Upper Canada, 1792*.²¹ Colonial authorities in London therefore approved of and planned for bijuridicalism in the Canadas as a matter of practical necessity and extended this guarantee to both the Province of Canada in 1841 and the Dominion of Canada in 1867. Bijuridicalism remains constitutionally entrenched today.

¹⁸ Arthur G. Doughty and Duncan A. McArthur, "Order-in-Council Dividing the Province of Quebec into the Provinces of Upper and Lower Canada, August 24, 1791," in *Documents Relating to the Constitutional History of Canada, 1791-1818* (Ottawa: The Queen's Printer, 1914) at 3-5.

¹⁹ Arthur G. Doughty and Duncan A. McArthur, "Proclamation fixing the date for the commencement of the new constitution, November 19, 1791," in *Documents Relating to the Constitutional History of Canada, 1791-1818* (Ottawa: The Queen's Printer, 1914) at 55-56.

²⁰ *Constitutional Act, 1791* (UK) 31 George III, c. 31, s. 33.

²¹ Arthur G. Doughty and Duncan A. McArthur, "*An Act Introducing English Civil Law into Upper Canada, 1792* and *An Act Establishing Trial By Jury for Upper Canada, 1791*" in *Documents Relating to the Constitutional History of Canada, 1791-1818* (Ottawa: The Queen's Printer, 1914) at 83-86.

3. HOW THE *ACT OF UNION, 1840* AND THE *BRITISH NORTH AMERICA ACT, 1867* CODIFIED THE PRINCIPLE OF CONTINUITY OF CANADA AS A POLITY

(a) *Act of Union, 1840*

The *Act of Union, 1840* replaced the *Constitutional Act, 1791* and re-organized Upper Canada and Lower Canada into the Province of Canada when it entered into force by proclamation on 10 February 1841.²² Section 45 of the *Act of Union, 1840* states that the executive authority, and any instrument promulgated under it, of Upper Canada and Lower Canada shall remain in full force and effect under the Province of Canada. Section 46 states that legislative authority and the body of law in effect for the Canadas shall carry over to the Province of Canada intact, and section 47 likewise provides for the continuity of judicial authority:

45. [. . .] all Powers, Authorities, and Functions which [. . .] are vested in or are authorized or required to be exercised by the respective Governors or Lieutenant Governors of the said Provinces [. . .] shall [. . .] be vested in and may be exercised by the Governor of the Province of Canada [. . .].

46. [. . .] all Laws, Statutes, and Ordinances, which at the Time of the Union of the Provinces of Upper Canada and Lower Canada shall be in force within the said Provinces or either of them, or any Part of the said Provinces respectively, shall remain and continue to be of the same Force, Authority, and Effect [...]

47. [...] all the Courts of Civil and Criminal Jurisdiction within the Provinces of Upper and Lower Canada at the Time of the Union of the said Provinces, and all legal Commissions, Powers, and Authorities [...] shall continue to subsist [...] in the same Form and with the same Effect [...].²³

Section 45 amalgamated three offices — the Governor-in-Chief (sometimes known as the “Captain-General and Governor-in-Chief”), the Lieutenant-Governor of Upper Canada, and the Lieutenant-Governor of Lower Canada — into one new office of Governor General without difficulty, because the ultimate source of executive authority remained the same: the Imperial Crown, personified in Queen Victoria. (At this time, the Imperial Crown remained one and indivisible throughout the entire British Empire; it would not multiply into a Personal Union until 1931). Unlike sections 46 and 47, section 45 does not include the word “continue” because a statute would not presume to “continue” the Queen’s authority, which rests, fundamentally, on prerogative and therefore exists independent of any one statute law. Those three sections in the *Act of Union, 1840* ensure the continuity of the institutions and authorities established under the *Constitutional Act, 1791* and thus

²² Suzanne Langevin (ed), *La Procédure parlementaire du Québec*, 3e édition (Québec City: Assemblée nationale, 2012) at 24.

²³ *Act of Union, 1840* (UK) 3&4 Victoria, c. 35, ss. 45-47.

transformed Upper Canada and Lower Canada into the Province of Canada. The *Act of Union, 1840* preserved but re-organized the basic executive, legislative, and judicial authorities that the *Constitutional Act, 1791* had created. But the legislative buildings themselves — the infrastructure — did not carry over from Upper Canada, the capital of which was Toronto, and Lower Canada and its capital of Quebec City; instead, Kingston served as the first capital of the Province of Canada.

(b) *British North America Act, 1867*

The *British North America Act, 1867* entrenches the continuity of executive, legislative, and judicial authority more emphatically and more frequently than does the *Act of Union, 1840*. The *BNA Act* also transferred jurisdictions and functions to and from the Dominion and the provinces in accordance with the division of powers set in sections 91 and 92. It amended and repealed various provisions of the *Act of Union, 1840* and in section 6 bifurcated the Province of Canada into the Dominion of Canada and the provinces of Ontario and Quebec, based on the broader federal-provincial division of powers, and thereby restored the former Upper Canada and Lower Canada of 1791 to 1841 as well. This is why some sections of the *BNA Act* refer to the Dominion of Canada, Ontario, and Quebec but not to New Brunswick and Nova Scotia. Section 6 says:

6. The Parts of the Province of Canada (as it exists at the passing of this Act) which formerly constituted respectively the Provinces of Upper Canada and Lower Canada shall be deemed to be severed, and shall form Two separate Provinces. The Part which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario; and the Part which formerly constituted the Province of Lower Canada shall constitute the Province of Quebec.²⁴

The *BNA Act* also modified and partially codified the executive instruments that had created the colonies of Nova Scotia and New Brunswick and, in sections 7, 64, and 88, turned them into the provinces of Nova Scotia and New Brunswick. Section 7 describes the geographic boundaries of New Brunswick and Nova Scotia, saying:

7. The Provinces of Nova Scotia and New Brunswick shall have the same Limits as at the passing of this Act.²⁵

Having defined the federal and provincial components of the Dominion of Canada, the *BNA Act* then upheld the continuity of executive and legislative authority throughout. Section 9 means that the same executive authority carried over from the Province of Canada and “continued” uninterrupted to the Dominion of Canada:

9. The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.²⁶

²⁴ *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 6.

²⁵ *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 7.

²⁶ *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 9.

The same principle applies to section 15 of the *Act*:

15. The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen.²⁷

Section 64 does for the colonies of Nova Scotia and New Brunswick what section 9 did for the Province of Canada, and section 88 likewise provides for the same principle of continuity for the legislatures of Nova Scotia and New Brunswick:

64. The Constitution of the Executive Authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act.²⁸

. . .

88. The Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act.²⁹

The provinces of Nova Scotia and New Brunswick still commemorate their history before Confederation. As of 2020, the 63rd General Assembly of Nova Scotia maintains an broken continuity from its very first election and sitting in 1758; by 1867, Nova Scotia had already reached its 24th General Assembly.³⁰ Similarly, New Brunswick's legislature held its first session in 1786, and New Brunswickers elected their 59th Legislature in 2018.³¹ Nova Scotia and New Brunswick start counting their list of premiers from the grant of Responsible Government in 1848 and 1854 onward, respectively.³²

Section 129 provides for the “continuance of existing laws, courts, officers, etc.” in Ontario, Quebec, Nova Scotia, and New Brunswick.

129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made [. . .].³³

²⁷ *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 15.

²⁸ *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 64.

²⁹ *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 88.

³⁰ Nova Scotia, Legislature of Nova Scotia, “About the Legislature: History,” 2017.

³¹ Canada, Parks Canada, Directory of Federal Heritage Designations, “First Meeting of the New Brunswick Legislature National Historic Event,” (Parks Canada, 1989).

³² *Ibid.*; New Brunswick, Legislative Library, “Premiers’ Biographies: Charles Fisher,” 12 May 2005.

³³ *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 129.

Section 129 served as the equivalent provision to section 33 in the *Constitutional Act, 1791* and section 46 in the *Act of Union, 1840* and thereby allowed Quebec to keep its French civil law and re-affirmed bijuridicalism in Canada.³⁴ The *British North America Act* then codifies the principle of continuity in several other areas. Sections 41 and 84 bifurcated the Province of Canada's existing body of electoral law and established it as the electoral law for both the Dominion of Canada and the provinces of Ontario and Quebec. These sections then also allowed the Parliament of Canada and the legislatures of Ontario and Quebec to amend this body of electoral law as they saw fit; in both cases, the *British North America Act* emphasizes the “continuance of existing election laws.”³⁵ Sections 122 and 141 provide for the continuation of legal authority over customs and excise laws and prisons, but transfer them to the appropriate order of government based on the new division of powers.

122. The Customs and Excise Laws of each Province shall, subject to the Provisions of this Act, continue in force until altered by the Parliament of Canada.³⁶

...

141. The Penitentiary of the Province of Canada shall, until the Parliament of Canada otherwise provides, be and continue the Penitentiary of Ontario and of Quebec.³⁷

Section 130 pertains to “the transfer of officers to Canada” and meant that any public office-holder in New Brunswick or Nova Scotia whose duties would fall under the jurisdiction of the Dominion of Canada, pursuant to section 91, would be transferred from the provincial civil service to the federal civil service.

130. Until the Parliament of Canada otherwise provides, all Officers of the several Provinces having Duties to discharge in relation to Matters other than those coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces shall be Officers of Canada, and shall continue to discharge the Duties of their respective Offices under the same Liabilities, Responsibilities, and Penalties as if the Union had not been made.³⁸

Sections 137, 139, and 140 bifurcated legislative and executive authorities of the Province of Canada and distributed them to both the Dominion and to Ontario and Quebec in accordance with the division of powers established under sections 91 and 92. Section 137 pertains to “temporary acts” of the Legislature of the Province of Canada and declares that they would apply to either the Parliament of Canada on the one hand or to the Legislatures of Ontario or Quebec on the other, in accordance with the division of powers.³⁹

³⁴ Hogg 1985, 30.

³⁵ *British North America Act, 1867* (UK) 30 Victoria, c. 3, ss 41, 48.

³⁶ *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 122.

³⁷ *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 141.

³⁸ *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 130.

Similarly, sections 139 and 140 provided for the continuity of executive instruments. Section 139 pertains to the “issue of Proclamations before Union, to commence after Union” and mandated that any proclamation made under the Great Seal of the Province of Canada that was scheduled to enter into force *after* 1 July 1867 would still enter into force but would apply instead to either the Dominion of Canada (“that Province”), the new Province of Ontario (“Upper Canada”) or to the new Province of Quebec (“Lower Canada”).⁴⁰ Section 140 did the same for the “issue of Proclamations after Union.”⁴¹

Sections 136 and 138 show that the *British North America Act* restored Upper Canada and Lower Canada as separate entities and renamed them Ontario and Quebec, respectively. Section 136 reinforces the definition of Ontario and Quebec set out in section 6, stating:

136. The Great Seals of Ontario and Quebec respectively shall be the same, or of the same Design, as those used in the Provinces of Upper Canada and Lower Canada respectively before their Union as the Province of Canada.⁴²

Section 138 provides for legal continuity and equivalence of Upper Canada as Ontario and Lower Canada as Quebec “in any Deed, Writ, Process, Pleading, Document, Matter, or Thing.”⁴³

Section 143 on “the division of records” also gives the Governor-in-Council (in practice, on the advice of Cabinet) latitude in transferring certain of the Province of Canada’s records to Ontario and Quebec. It says:

143. The Governor General in Council may from Time to Time order that such and so many of the Records, Books, and Documents of the Province of Canada as he thinks fit shall be appropriated and delivered either to Ontario or to Quebec, and the same shall thenceforth be the Property of that Province; and any Copy thereof or Extract therefrom, duly certified by the Officer having charge of the Original thereof, shall be admitted as Evidence.⁴⁴

According to the Department of Justice’s consolidation of *The Constitution Acts*, the Governor-in-Council made “two orders under this section on January 24, 1868,” and this provision is now “probably spent.”⁴⁵ Order-in-Council 1868-0239 transferred various judicial “records, books, and documents” relating to “Justices of the Peace and Coroners, and Matters connected therewith” from the Dominion government to the provinces of Ontario and Quebec, on those provinces’ requests.⁴⁶ The title of the Order-in-Council, “Papers relative to the affairs of the late Province of Upper [and

³⁹ *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 137.

⁴⁰ *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 139.

⁴¹ *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 140.

⁴² *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 136.

⁴³ *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 138.

⁴⁴ *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 143.

⁴⁵ Canada, Department of Justice, *A Consolidation of the Constitution Acts, 1867 to 1982* (Ottawa: Her Majesty the Queen in Right of Canada, 1 January 2013) at 38.

Lower] Canada,” hints that some of these records date back prior to even the *Act of Union, 1840* but instead refer to the Provinces of Upper Canada and Lower Canada of 1791-1841; the text of the Order-in-Council confirms that the Dominion government transferred to Quebec “also the Registers containing the Records of the Commissioners of Notaries from 1830 to the latest date.”⁴⁷ The transfer also includes some records of the Province of Canada in the form of “medical Licences recorded from 1842 to 1849.”⁴⁸ The Government of Ontario had also requested documents on “Justices of the Peace and Coroners” and “Returns of the Accounts received by County Registrars and any Reports presented by the Inspector of Registry Offices,” but these records came mostly from the Province of Canada (1841-1867) rather than from Upper Canada (1791-1841).⁴⁹ This Order-in-Council neatly illustrates the continuity between Upper Canada and Lower Canada, the Province of Canada, and the Dominion of Canada.

On 1 July 1867, the parliament buildings, Legislative Assembly, and Legislative Council of the Province of Canada became the parliament buildings, House of Commons, and Senate of the Dominion of Canada. Alpheus Todd himself, who had served as the last Parliamentary Librarian of the Province of Canada, became the first Parliamentary Librarian of the Dominion of Canada. Ottawa, the last capital city of the Province of Canada, became the capital of the Dominion of Canada pursuant to section 16 of the *British North America Act*: “Until the Queen otherwise directs, the Seat of Government of Canada shall be Ottawa.” While, in theory, the Prime Minister of Canada could, through an Instrument of Advice, counsel Her Majesty the Queen to issue a proclamation declaring that a new city be made the capital of the Dominion of Canada, in practice, this would pose great logistical difficulties and is unlikely to occur. Furthermore, the Governor General, Prime Minister, and civil service (as far as the division of powers in sections 91 and 92 allowed), and militia of the Province of Canada became the Governor General, Prime Minister, civil service, and militia of the Dominion of Canada. However, sections 96 to 101 of the *British North America Act, 1867* left the superior courts with the provinces and gave the Parliament of Canada the authority to establish new federal courts as required.⁵⁰

⁴⁶ Canada. Privy Council Office, Order-in-Council 1868-0238, “Papers relative to the affairs of the late Province of Upper [and Lower] Canada,” 24 January 1868.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *British North America Act, 1867* (UK) 30 Victoria, c. 3, ss. 96-101.

4. THE CONTINUITY OF THE EXECUTIVE FROM THE PROVINCE OF CANADA TO THE DOMINION OF CANADA

(a) The Macdonald Ministry Continues from the Province to the Dominion of Canada

Section 9 of the *British North America Act* provided for the continuity in executive authority from the Province of Canada to the Dominion of Canada. Governor General Monck and Prime Minister Macdonald transitioned seamlessly from the offices that they held in the Province of Canada to those within the Dominion of Canada. Since the Province of Canada and the Dominion of Canada were a colony of the Imperial Crown, the ultimate source of executive authority — Queen Victoria — remained intact, which, in turn, allowed the authority delegated to the Governor General, and exercised on the advice of the Prime Minister and Cabinet, to remain intact.

The transition of the executive authority of the Province of Canada to the Dominion of Canada came first and took place in four crucial steps between 22 May and 1 July 1867, and the transition of the legislative continuity took place between August and November 1867, in the following steps:

1. 22 May 1867: Her Majesty-in-Council proclaimed that the *British North America Act, 1867* would enter into force on July 1st of that year.
2. 24 May 1867: the British government drew up a new commission for Viscount Monck, which revoked his old commission of 2 November 1861, replaced the old title “Captain-General and Governor-in-Chief in and over the Province of Canada, and over the Province of Nova Scotia and its Dependencies, and in and over the Province of New Brunswick, and also Governor-General of all Provinces in North America and of the Island of Prince Edward” with “Governor General of Canada”, and took effect on 1 July 1867.⁵¹
3. 24 May 1867: Governor General Monck, in turn, formally commissioned Sir John A. Macdonald as the first Prime Minister of the Dominion of Canada, with the appointment becoming operative on 1 July 1867.⁵² He had already been prime minister of the Province of Canada since 30 March 1864, which marked the start of the Great Coalition between Macdonald’s Conservatives and Liberal-Conservatives in Canada West, George-Étienne Cartier’s Bleus in Canada East, and, crucially, George Brown’s Clear Grit Liberals in Canada West. This reveals the first duty of the Governor General: to ensure that there is always a duly-appointed ministry in office so that the Queen’s business always carries on.⁵³ Just as there must always be a Sovereign,

⁵¹ United Kingdom. Foreign Office, “Draft of a Commission Viscount Monck Governor-General of Canada,” 24 May 1867.

⁵² Canada. Privy Council Office, “Guide to Canadian Ministries Since Confederation, First Ministry,” 26 March 2014.

⁵³ Canada, Department of Canadian Heritage, *Ceremonial and Protocol Handbook*. (Ottawa: Government of Canada, c. 1998): G.4-2; Henri Brun, Guy Tremblay, and

there must always be a ministry in office that can take responsibility for all acts carried out in the Sovereign's name.⁵⁴ Nothing illustrates this principle so starkly as the fact that Sir John A. Macdonald governed as prime minister without a parliament in session from 15 August 1866 to 6 November 1867.

4. 1 July 1867: Prime Minister Macdonald, as "the senior member of the Privy Council," then advised Governor General Monck to appoint the rest of the cabinet on 1 July 1867 through the Dominion of Canada's second Order-in-Council, entitled "Appointing Heads of Departments Provisionally".⁵⁵
5. 7 August 1867 to 20 September 1867: The first federal general election takes place with staggered writs.⁵⁶

Eugénie Brouillet, *Droit constitutionnel*, 5th Ed. (Montreal: Éditions Yvon Blais, 2008): 371.

⁵⁴ Robert Macgregor Dawson, "The Constitutional Question," *Dalhousie Review* VI, no. 3 (October 1926): 332-337; Eugene Forsey and Graham C. Eglinton, *The Question of Confidence in Responsible Government* (Ottawa: Parliament of Canada, 1985) at 16-17; Sir John George Bourinot, *Parliamentary Procedure and Practice*, 4th ed. (Montreal: Dawson Brothers Publishing, 1916): 102; Dawson 1947, 175; Alpheus Todd, *Parliamentary Government in the British Colonies*, 2nd Edition (London: Longmans, Green, and Co., 1894) at 760-761.

⁵⁵ Canada. Privy Council Office, Order-in-Council 1867-0002 "Appointing Heads of Departments Provisionally," 1 July 1867. The Dominion of Canada's first Order-in-Council (1867-0001) appointed the first Lieutenant Governors. The second Order-in-Council, which I quoted partially in the main text of this article, reads, "On a memorandum for the Honourable Sir John A. Macdonald, senior member of the Privy Council, recommending that the following offices be constituted until the Parliament of Canada otherwise provides [...]." By 1896, Prime Minister Tupper passed the first iteration of the order-in-council "on the special prerogatives of the prime minister," which defined a quorum of cabinet as four.

Interestingly, on 1 July 1867, before the rest of the ministry was appointed, only Queen Victoria, Governor General Lord Monck and Prime Minister Macdonald constituted the executive branch of government. Judging by its title and wording, Macdonald saw the Order-in-Council as a stop-gap measure and a provisional appointment, until the Parliament of Canada passed legislation giving some of the departments a statutory foundation. However, it was legitimately and undoubtedly within the scope of the Crown's executive authority under section 9 of the *British North America Act* to establish these departments through an Order-in-Council, which could even then serve as the only legal-constitutional foundation for their continuing existence. In other words, Macdonald chose to call this Order-in-Council a "provisional" appointment because he had planned to table bills that would put those departments on a statutory footing later, but he was not required to take the latter step. For instance, the office of the prime minister was not authorized by any statute, nor for matter, by Order-in-Council 1867-0002; instead, that office originally emerged and still exists through constitutional norms and conventions alone.

⁵⁶ Canada. Parliament of Canada, Parl Info: "Length of Federal Election Campaigns," 26 August 2015. The first two general federal elections were staggered, with some ridings in northern and remote areas of Ontario and Quebec returning later.

6. 23 October 1867: Her Majesty Queen Victoria summons the first group of Senators by proclamation, pursuant to sections 25 and 127 of the *British North America Act, 1867*.⁵⁷
7. 6 November 1867: the 1st session of the 1st Parliament of Canada convenes in Ottawa.⁵⁸

On 24 May 1867, Monck wrote a letter to Macdonald noting that the proclamation of Her Majesty-in-Council had gone through and appeared in the *London Gazette* on 22 May and that this included the names of the first group of Senators for the Dominion of Canada (though they would not formally take up their appointments until October). Monck concluded happily, “[...] our work, so far, has been finished” with respect to promulgating the *British North America Act* itself.⁵⁹ But now they needed to establish the executive administration of the Dominion of Canada — including the appointment of provincial Lieutenant Governors — so that the new federal structure of British North America would take immediate effect on 1 July. Through this same letter, Monck then appointed Macdonald as the first prime minister of the Dominion of Canada, ostensibly because he had taken the lead of the British North American colonies at the London Conference of 1866 but also because he had already served as the last Premier of the Province of Canada. He instructed him to set up the rest of the cabinet for 1 July 1867 and establish a timetable for the first federal general election as soon as possible; Monck fully recognised the aberration of a government remaining in office on his commission alone in the absence of any House of Commons at all, let alone the confidence of a majority of MPs.

It now remains for us to take the necessary steps to put in motion the machinery which we have created, and I write this note to authorize you to take the needful measures, so as to have a ministry ready to be sworn into office and to commence the performance of their several functions on the first July. I entrust this duty to you as the individual selected for their chairman and spokesman by unanimous vote of the delegates when they were in England, and I adopt this test for my guidance in consequence of the impossibility, under the circumstances, of ascertaining, in the ordinary constitutional manner, who possesses the confidence of a Parliament which does not yet exist.⁶⁰

Monck also suggested that Sir Frederick Fenwick Williams, who had served as Governor of Nova Scotia since 1865, continue as Lieutenant Governor of

⁵⁷ Canada. Parliament of Canada, Parl Info: “Senators, 1st Parliament,” 6 January 2017.

⁵⁸ Canada. Parliament of Canada, Parl Info: “1st Parliament,” 4 August 2015.

⁵⁹ Sir Joseph Pope, “Letter From Governor-General the Viscount Monck to the Hon. John A. Macdonald from 24 May 1867,” in *Correspondence of Sir John A. Macdonald* (Toronto: Doubleday, Page and Company, 1921) at 45.

⁶⁰ Sir Joseph Pope, “Letter From Governor-General the Viscount Monck to the Hon. John A. Macdonald from 24 May 1867,” in *Correspondence of Sir John A. Macdonald* (Toronto: Doubleday, Page and Company, 1921) at 45-46.

Nova Scotia after 1 July but that General Sir Charles Hastings Doyle replace Arthur Hamilton-Gordon as Lieutenant Governor of New Brunswick.⁶¹

Macdonald prepared two Orders-in-Council on 1 July 1867, one appointing the rest of cabinet and another appointing the first Lieutenant Governors of Ontario, Quebec, Nova Scotia, and New Brunswick (the latter two in accordance with Monck's suggestions).⁶² The Order-in-Council marked 1867-0002 served as both the means of appointing the first ministry of the Dominion of Canada and as constituting the departments of the federal civil service "until Parliament otherwise provides." Though it does not say so directly, this Order-in-Council probably relates to section 131 of the *BNA Act*, which allows the Governor-in-Council to legislate "for the appointment of new officers" as a temporary and transitional measure:

131. Until the Parliament of Canada otherwise provides, the Governor General in Council may from Time to Time appoint such Officers as the Governor General in Council deems necessary or proper for the effectual Execution of this Act.⁶³

The 1st Parliament of Canada then put most departments on a new statutory footing in 1868 and 1869. However, even without section 131, it was legitimately and undoubtedly within the scope of the Crown's executive authority under section 9 of the *British North America Act* to establish these departments through an Order-in-Council, which could even then serve as the only legal-constitutional foundation for their continuing existence. For instance, the office of the prime minister itself was not authorized by any statute, nor for that matter, by Order-in-Council 1867-0002; instead, that office originally emerged and still exists today through executive prerogative authority and precedent. Even aside from Monck's letter, Macdonald had intended all along that the executive of the Dominion of Canada would be in place before the election of the first parliament. During the Quebec Conference of 1864, Macdonald told a confused Sir Charles Tupper as much:

Mr. Charles Tupper – How do you construct an Executive before the Legislative Council?

Mr. John A. Macdonald – An Executive Council for the Federal Government must be the first thing. It will be in its nature

⁶¹ Pope 1921, 46.

⁶² Canada. Privy Council Office, Order-in-Council 1867-0001 "Sir John A. Macdonald – Appointment of Lieutenant Governors of the Several Provinces of Canada," 1 July 1867; Canada. Privy Council Office, Order-in-Council 1867-0002 "Sir John A. Macdonald – Appointment of Several Heads of Departments Provisionally," 1 July 1867. However, looking at the two Orders-in-Council suggests that the Privy Council Office and Library and Archives have mixed up their order. The Order-in-Council appointing the Lieutenant Governors should, in fact, be counted as 0002 because it lists the names of all Ministers and was counter-signed by the President of the Privy Council, Adam Johnston Fergusson Blair. In contrast, the Order-in-Council marked 1867-0002 appointed the rest of Cabinet and bears no ministerial counter-signature, indicating that it should count as the first Order and not the second.

⁶³ *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 131.

provisional. After the elections, the party not having support must go.⁶⁴

Thankfully for Macdonald, his coalition of Conservatives and Liberal-Conservatives did win a parliamentary majority in August and September 1867, which allowed him to remain prime minister. In total, 9 of the 13 Privy Councillors for the Dominion of Canada and ministers in Macdonald's cabinet post-1867 had been Executive Councillors for the Province of Canada and ministers in Macdonald's cabinet from 1864 to 1867.⁶⁵ Macdonald himself served as the Attorney General for Upper Canada from 30 March 1864 to Confederation and then appointed himself as Attorney General for the Dominion of Canada. The ministers who served in Macdonald's ministry continuously, both before and after Confederation, were Hector Louis Langevin, Alexander Tilloch Galt, William Pierce Howland, Alexander Campbell, Jean-Charles Chapais, Adam Johnston Fergusson Blair, William McDougall, and George-Étienne Cartier. The other four ministers came from the Maritimes, with Samuel Leonard Tilley and Peter Mitchell from New Brunswick and Edward Kenny and Adams George Archibald from Nova Scotia.⁶⁶ The only ministers from Macdonald's last cabinet in the Province of Canada who did not serve in his first cabinet in the Dominion of Canada were Sir N.F. Belleau, Receiver General, and J. Cockburn, Solicitor General for Upper Canada. George Brown — the Clear Grit Liberal MP and long-time political rival of Macdonald whose participation made the Great Coalition possible — had served initially as President of the Executive Council starting on 30 March 1864 but resigned on 21 December 1865 once agreement in principle to the federal union of British North America had been reached.

Table 1: Continuity in the Ministry

Minister	Cabinet in the Province of Canada	Cabinet in the Dominion of Canada
John A. Macdonald	Premier and Attorney General for Upper Canada: 30 March 1864-30 June 1867	Prime Minister and Attorney General: 1 July 1867-5 November 1873
George-Étienne Cartier	Premier and Attorney General for Lower Canada: 30 March 1864-30 June 1867	Minister of Militia and Defence: 1 July 1867-20 May 1873
Hector Louis Langevin	Solicitor General for Lower Canada:	Secretary of State of Canada: 1 July 1867-7 December 1869

⁶⁴ G. P. Browne, editor, *Documents on the Confederation of British North America* (McGill-Queen's University Press, 2009) at 105; Sir Joseph Pope, editor, *Confederation: A Series of Hitherto Unpublished Documents Bearing on the British North American Act* (Toronto: The Carswell Company Ltd Law Publishers, 1895) at 65.

⁶⁵ Côté 1866, 4-9. The cover page indicates that Côté was a clerk in the Executive Council Office of the Province of Canada.

⁶⁶ Côté 1866, 4; Privy Council Office, "Guide to Canadian Ministries Since Confederation: First Ministry," 26 March 2014.

	30 March 1864-30 June 1867	
Alexander Tilloch Galt	Minister of Finance: 30 March 1864-30 June 1867	Minister of Finance: 1 July 1867-7 November 1867
William Pierce Howland	Postmaster General: 24 November 1864-30 June 1867	Minister of Inland Revenue: 1 July 1867-14 July 1868
Alexander Campbell	Commissioner of Crown Lands: 30 March 1864-30 June 1864	Postmaster General: 1 July 1867-30 June 1873
Jean-Charles Chapais	Commissioner of Public Works: 30 March 1864-30 June 1867	Minister of Agriculture: 1 July 1867-15 November 1869
Adam J.F. Blair	President of the Executive Council, Minister of Agriculture: 3 January 1866	President of the Privy Council: 1 July 1867-29 December 1867
William McDougall	Provincial Secretary: 30 June 1864-30 June 1867	Minister of Public Works: 1 July 1867-27 September 1869
Sir N.F. Belleau	Receiver General: 7 August 1865-30 June 1867	
J. Cockburn	Solicitor General for Upper Canada: 30 March 1864-30 June 1867	
Samuel Leonard Tilley		Minister of Customs: 1 July 1867-21 February 1873
Peter Mitchell		Minister of Marine and Fisheries: 1 July 1867-5 November 1873
Edward Kenny		Receiver General: 4 July 1867-15 Nov. 1869
Adams George Archibald		Secretary of State for the Provinces: 1 July 1867-30 April 1868

Federalism and the division of powers had also made the bifurcated portfolios of co-premier, attorney general, and solicitor general for each section redundant upon Confederation. Given the significant overlap between the last cabinet of the Province of Canada and the first cabinet of the Dominion of Canada and the well-established principle of Responsible Government in Canada that the tenure of the prime minister determines the tenure of the ministry as a whole,⁶⁷ Alpheus Todd reasonably treated them as the same ministry that remained in office from 30 March 1864 to 5 November 1873. Incidentally, Todd's definition makes Sir John A. Macdonald the longest-serving first minister of the Crown in Canadian history and relegates William Lyon Mackenzie King to the longest-serving prime minister since

⁶⁷ Canada. Privy Council Office, *Manual of Official Procedure of the Government of Canada*, Henry F. Davis and André Millar. (Ottawa, Government of Canada, 1968): 77-79.

Confederation. Macdonald’s four terms over 28 years greatly surpasses King’s non-consecutive tenure of around 21 years.⁶⁸

Table 2: The Longest-Serving First Minister in British North America

Sir John A. Macdonald	William Lyon Mackenzie King
24 May 1856 to 2 August 1858 (801 days; 2 years, 2 months, 10 days) ⁶⁹	29 December 1921 to 28 June 1926 (1643 days; 4 years, 5 months, 30 days)
6 August 1858 to 24 May 1862 (1388 days; 3 years, 9 months, 19 days)	25 September 1926 to 7 August 1930 (1412 days; 3 years, 10 months, 13 days)
30 May 1864 to 5 November 1873 (3447 days; 9 years, 5 months, 7 days)	23 October 1935 to 15 November 1948 (4773 days; 13 years, 24 days)
17 October 1878 to 6 June 1891 (4616 days; 12 years, 7 months, 21 days)	Total Non-Consecutive Tenure: 7828 days; 20 years; 15 months; 67 days 21 years, 154 days
Total Non-Consecutive Tenure: 10,252 days; 26 years, 23 months, 57 days ~ 28 years	

(b) The Continuity of the Civil Service

The Dominion of Canada inherited automatically the militia and the portions of the civil service of the Province of Canada that the *British North*

⁶⁸ The system of responsible government itself emerged between 1841 and 1848 (depending on the historian); as such, the relevant cut off date for determining the longest-serving prime minister of Canada should be 1848, at the latest, and not 1867. Aizenstat et al. 2003, 90N. Paul Romney observed the difference in historiography on when Responsible Government first emerged in the Province of Canada: “The Reform Party took [the resolutions of 3 September 1841] as a formal expression that responsible government prevailed in the province, and therefore a surrender of the crown’s discretion in making executive appointments. This understanding formed the basis for the nineteenth-century view that Canada had attained responsible government in 1841 rather than later in the decade.”

James W.J. Bowden, “1841: The Year of Responsible Government?” *The Dorchester Review* 6, no. 2 (Autumn-Winter 2016): 69-72. Historians of the 19th century, including Alpheus Todd and John George Bourinot (another Librarian of Parliament), place the grant of Responsible Government in 1841. Most mid-20th century historians place it to 1848, when Lord Elgin appointed a new ministry based on a vote of non-confidence in the legislature. Still others, like Joseph Adolphe Chapleau, a minister in Macdonald’s last cabinet, put the date at 1847, when Colonial Secretary Earl Grey issued his instructions to Lord Elgin and when Elgin first arrived in Canada.

⁶⁹ Côté 1866, 30-35. Macdonald also served as Deputy Premier from 24 May 1856 to 26 November 1857. In his account in *Parliamentary Government in the British Colonies*, Todd did not include Macdonald’s two earlier non-consecutive terms as prime minister in the Province of Canada before 1864; he also served in this capacity from 1857 to 1862, apart from the four days in August 1858 that constitute the Double Shuffle Incident.

America Act's division of powers had assigned to the federal order of government. This is because the aforementioned section 129 of the *British North America Act* ensured their legal continuity, until the Parliament of Canada or the provincial legislature, as the case may be, provided otherwise.⁷⁰ The terms of the Province of Canada's *Militia Act, 1855* and the *Civil Service Act, 1857* thereby carried over to the Dominion of Canada until the Parliament of Canada passed the new federal *Militia Act* and a new *Civil Service Act* in 1868. Furthermore, sections 9 and 15 of the *British North America Act, 1867* provide that the executive authority in general and the authority over the armed forces in particular continued from the Province of Canada to the Dominion of Canada and were vested in the Imperial Crown personified by Queen Victoria.⁷¹ Canadian historian J.M.S. Careless explained in the 1960s:

The basic governmental machinery of modern Canada developed during the union period. [...] Hence much of the post-1867 administrative structure had been established in the Canadian union by the later fifties. Further than that, a sizeable body of trained public servants was being developed, which would mainly staff the new Dominion public service after Confederation.⁷²

Other parts of the civil service that carried over from the Province of Canada to the Dominion of Canada include the Geological Survey of Canada, which was established in 1842 and celebrated its 175th anniversary in 2017.⁷³ As its website indicated in 2017, "The GSC is the country's oldest scientific organization and one of Canada's first government organizations."⁷⁴ The *Canada Gazette*, the official newspaper of the Government of Canada, extends back not to 1867, but rather to 1841 and the Province of Canada.⁷⁵ The Dominion of Canada also re-purposed the Decennial Census of the Province of Canada. The Province of Canada had carried out a decennial census for 1851 and 1861 in order to gather "information relative to the Trade, Manufactures, Agriculture, and Population of the Province."⁷⁶ The first

⁷⁰ J.M.S. Careless, *The Union of the Canadas: The Growth of Institutions, 1841-1857* (Toronto: McClelland and Stewart, 1967) at 218-219; *An Act to regulate the Militia of this Province, and to repeal the Acts now in force for that purpose*, 1855 (Province of Canada) 18 Victoria, c. 77; *An Act respecting the Militia and Defence of the Dominion of Canada*, 1868 (Dominion of Canada) 41 Victoria, c. 40.

The Parliament of Canada did not pass its first *Militia Act* until 1868, which effectively replaced the Province of Canada's *Militia Act* of 1855.

⁷¹ Philippe Lagassé, "The Crown's Powers of Command-in-Chief: Interpreting Section 15 of the Constitution Act, 1867", *Review of Constitutional Studies*, 18, no. 2 (December 2013): 189-220.

⁷² Careless 1967, 218-219.

⁷³ Canada. Natural Resources Canada, "Geological Survey of Canada," 16 November 2016.

⁷⁴ *Ibid.*

⁷⁵ Canada, *Canada Gazette*, "Understand the Canada Gazette," 13 March 2018.

⁷⁶ *Act for Taking the Census of this Province and Obtaining Statistical Information Therein, 1847* (Province of Canada) 10 & 11 Victoria, c. 14; David A. Worton,

constitutionally required Decennial Census under section 51(1) of the *British North America Act, 1867* therefore occurred in 1871; these Dominion censuses built upon the mandate of the Board of Registration and Statistics of the Province of Canada and also became the benchmark for determining the representation by population of the provinces in the House of Commons. Furthermore, the Province of Canada's currency under the *Provincial Notes Act, 1866* became the currency of the Dominion of Canada upon Confederation; Parliament then renamed the Province of Canada's notes and made them legal tender in New Brunswick and Nova Scotia through the *Dominion Notes Act, 1868*.⁷⁷

Careless adds that the *Civil Service Act, 1857* of the Province of Canada also established the principle of and precedent "for a permanent, non-political head in each department," and that the said Act even established the term "deputy minister," still in use in Canada today, to describe this vital expert function.⁷⁸ Canadian historian Patrice Dutil notes that it was Macdonald himself who tabled the *Civil Service Bill* in 1857, which established the "pyramidal shape and vertical accountabilities" of the civil service that still exist today.⁷⁹ Following Confederation, Macdonald also tabled legislation for the Dominion of Canada's first *Civil Service Act, 1868*, which consolidated the "transfer of offices" authorized by section 130 of the *British North America Act, 1867*; this legislation took the elements of the civil services of New Brunswick and Nova Scotia that pertained to federal jurisdiction and combined them with the elements of the Province of Canada's civil service that fell with federal jurisdiction after Confederation.⁸⁰ Dutil has also shown that several of these deputy ministers of various executive departments in the Province of Canada continued to serve as the deputy ministers of the executive departments in the Dominion of Canada.⁸¹

"Statistics in the Province of Canada," Chapter 1 in *The Dominion Bureau of Statistics: A History of Canada's Central Statistical Office and Its Antecedents, 1841-1972*, by David A. Worton, 3-14 (Montreal-Kingston: McGill-Queen's University Press, 1998) at 3-4.

⁷⁷ James Powell, *A History of the Canadian Dollar* (Ottawa: Her Majesty the Queen in Right of Canada, Bank of Canada, 2005) at 26-27; Ben Fung, Scott Hendry, Warren E. Weber, *Canadian Bank Notes and Dominion Notes: Lessons for Digital Currencies* (Ottawa: Bank of Canada, February 2017) at 9.

⁷⁸ Careless 1967, 219.

⁷⁹ Patrice Dutil, "Macdonald, His 'Ottawa Men,' and the Consolidation of Prime Ministerial Power," chapter 10 in *Macdonald at 200: New Reflections and Legacies*, edited by Patrice Dutil and Roger Hall, 282-310 (Toronto: Dundurn, 2015): 290-291.

⁸⁰ Dutil 2015, 291.

⁸¹ J.O. Côté, editor, *Political Appointments and Elections in the Province of Canada, 1841-1865, 2nd Edition* (Ottawa: G. E. Desbarats, 1866): 11-14; Dutil 2015, 305-306.

Table 3: Continuity in the Civil Service

Deputy Minister	Province of Canada	Dominion of Canada
William Henry Lee	Executive Council Office, 1841-1867	Privy Council Office, 1867-1873
Hewitt Bernard	Office of Attorney General for Upper Canada, 1858-1867	Justice, 1867-1873
George Futvoye	Office of Attorney General for Lower Canada, 1851-1867	Militia and Defence, 1867-1873
Étienne Parent	Provincial Secretary's Office, 1847-1867	Secretary of State, 1867-1873
Edmund Allen Meredith	Provincial Secretary's Office, 1847-1867	Secretary for the Provinces, 1867-1873
T. Douglas Harington	Receiver General's Office, 1858-1867	Receiver General, 1867-1873
William Dickinson	Finance, 1863-1867	Finance, 1867-1869
Robert S.M. Bouchette	Crown Lands Department, 1857-1867	Customs, 1867-1873
Toussaint Trudeau	Public Works Department, 1864-1867	Public Works, 1867-1873
W.H. Griffin	Postmaster General's Office, 1857-1867	Post Office, 1864-1873
J.C. Taché	Bureau of Agriculture and Statistics, 1864-1867	Agriculture and Statistics, 1867-1873

The 1st Parliament then passed several statutes which put the departments of the federal civil service on a new statutory footing. Governor General Lord Monck closed the 1st session in May 1868 by giving Royal Assent to new legislation for the Department of Justice, the Department of the Secretary of State of Canada, the Department of Customs, the Department of Inland Revenue, the Department of Agriculture, the Department of Marine and Fisheries, the Geological Survey of Canada, the Department of the Militia, and new foundational statutes for the federal civil service, the office of Governor General and the Civil List, and the Dominion's Consolidated Revenue Fund.⁸² Legislation putting the Department of Finance and the

⁸² *An Act respecting the Consolidated Revenue Fund*, 31 Victoria, Chapter 32 (Canada). Section 1 says, "All Duties and Revenue over which the respective Legislatures of the late Province of Canada, Nova Scotia and New Brunswick, before and at the time of the passing of the British North America Act, 1867, had, and over which the Parliament of Canada now has the power of appropriation, shall form and are hereby declare to have formed since the Union, one Consolidated Revenue Fund to be appropriated for the public service of Canada [...]"; *An Act respecting the Department of Justice*, 31 Victoria, Chapter 39; *An Act respecting the Militia and Defence of the Dominion of Canada*, 31 Victoria, Chapter 40; *An Act providing for*

Treasury Board cabinet committee on a statutory footing soon followed at the close of the 2nd session in June 1869.⁸³ These statutes fulfilled the promise of Order-in-Council 1867-0002 and provided the departments founded provisionally on executive prerogative authority with a permanent statutory underpinning.

5. THE CONTINUITY OF THE LEGISLATURE BETWEEN THE PROVINCE OF CANADA AND THE DOMINION OF CANADA

The 5th and final session of the 8th Parliament of the Province of Canada opened on 8 June 1866;⁸⁴ it was prorogued on 15 August 1866, and the prorogation was extended several times to 1 July 1867, though it never met again as such.⁸⁵

The *Canada Gazette* does not record a proclamation of dissolution, so either the 8th Parliament of the Province of Canada, which had first convened on 3 July 1863, dissolved by efflux of time on 3 July 1867 (because the *Act of Union, 1840* set its maximum life at four years),⁸⁶ or it dissolved *de facto* on 1 July 1867 when the *British North America Act, 1867* entered into force and effectively replaced the *Act of Union, 1840*.⁸⁷ The absence of a session of parliament for 15 months (15 August 1866 to 6 November 1867) would have violated section 31 of the *Act of Union, 1840* and, likewise, section 20 of the *British North America Act, 1867*.⁸⁸ However, section 19 of the *British North America Act, 1867* exempted the 1st Parliament from that requirement, stating

the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands, 31 Victoria, Chapter 42; An Act constituting the Department of Customs, 31 Victoria, Chapter 43; An Act constituting the Department of Inland Revenue, 31 Victoria, Chapter 49; An Act for the Organization of the Department of Agriculture, 31 Victoria, Chapter 54; An Act for the organization of the Department of Marine and Fisheries of Canada, 31 Victoria, Chapter 57; An Act respecting the Geological Survey of Canada, 31 Victoria, Chapter 67; An Act respecting the Governor General, the Civil List, and the Salary of certain Public Functionaries, 31 Victoria, Chapter 33; An Act respecting the Civil Service of Canada, 31 Victoria, Chapter 34.

⁸³ *An Act respecting the Department of Finance, 32-33 Victoria, chapter 4.*

⁸⁴ *The Canada Gazette*, Extra, (Ottawa: The Queen's Printer, 8 June 1866): 1-2.

⁸⁵ *The Canada Gazette* 25, no. 44 (Ottawa: The Queen's Printer, 18 August 1866): 2825-2896; *The Canada Gazette* 25, no. 44 (Ottawa: The Queen's Printer, 11 November 1866): 4498; *The Canada Gazette* 25, no. 49 (Ottawa: The Queen's Printer, 8 December 1866); *The Canada Gazette* 26 (Ottawa: The Queen's Printer, 2 March 1867): 700; *The Canada Gazette* 26 (Ottawa: The Queen's Printer, 6 April 1867): 1126; *The Canada Gazette* 26 (Ottawa: The Queen's Printer, 18 May 1867): 1610-1611; *The Canada Gazette* 26 (Ottawa: The Queen's Printer, 8 June 1867): 1967.

⁸⁶ *Act of Union, 1841 (UK) 3 & 4 Victoria, c. 35, s. 31.*

⁸⁷ Côté 1866, 2. For more on dissolution by efflux of time, see James W.J. Bowden, "When the Bell Tolls for Parliament: Dissolution by Efflux of Time," *Journal of Parliamentary and Political Law* (2017): 129-144.

⁸⁸ *Act of Union, 1840 (UK) 3&4 Victoria, c.35, s. 31; British North America Act, 1867 (UK) 30 Victoria, c. 3, s. 20.*

instead that “The Parliament of Canada shall be called together no later than Six Months after the Union.”⁸⁹ That would have made 1 January 1868 the deadline for holding the first general election to the House of Commons. Section 5 of the *Constitution Act, 1982*, which now contains the equivalent requirement that Parliament and the provincial legislatures meet at least once every 12 months, later repealed and replaced section 20 of the *British North America Act*.

The first general federal election took place between 7 August 1867 and 20 September 1867,⁹⁰ and the 1st session of the 1st Parliament convened on 6 November 1867.⁹¹ The Order-in-Council through which the Macdonald government advised Lord Monck to issue the writs of the Dominion of Canada’s first election acknowledged the aforementioned section 19 of the *British North America Act*.⁹² Electing members of the House of Commons would prove simple and straightforward enough under the *British North America Act*’s single-member plurality electoral system (apart from a handful of exceptional dual-member districts enumerated in section 40)⁹³ and representation by population. But converting the elected Legislative Council of the Province of Canada into an appointed Senate of Canada required specific statutory provisions and executive instruments to promulgate them into force. Section 127 of the *British North America Act* contained the general framework that the Legislative Council of the Province of Canada would become the Senate of Canada, and that the Legislative Councillors of Nova Scotia and New Brunswick would have the option either of transferring to the Senate of Canada and representing their provinces in Ottawa, or, alternatively, remaining in their home provinces’ Legislative Councils:

127. If any Person being at the passing of this Act a Member of the Legislative Council of Canada, Nova Scotia, or New Brunswick, to whom a Place in the Senate is offered, does not within Thirty Days thereafter, by Writing under his Hand addressed to the Governor General of the Province of Canada or to the Lieutenant Governor of Nova Scotia or New Brunswick (as the Case may be), accept the same, he shall be deemed to have declined the same; and any Person who, being at the passing of this Act a Member of the Legislative

⁸⁹ *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 19.

⁹⁰ Canada. Parliament of Canada, Parl Info: “Length of Federal Election Campaigns,” 26 August 2015]. The first two general federal elections were staggered, with some ridings in northern and remote areas of Ontario and Quebec returning later.

⁹¹ Canada. Parliament of Canada, Parl Info: “1st Parliament,” 4 August 2015.

⁹² Privy Council Office, Order-in-Council 1867-0040, “Minister of Justice respecting Calling together of Parliament and issue of Writs of Election,” 6 August 1867. Through the accompanying Order-in-Council 1867-0041, the Macdonald government then advised Governor General Monck to summon and call together the House of Commons following the standard procedure under section 38 of the *British North America Act*. Privy Council Office, Order-in-Council 1867-0041, “Minister of Justice recommending Summoning of the House of Commons to meet at Ottawa,” 6 August 1867.

⁹³ *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 40.

Council of Nova Scotia or New Brunswick, accepts a Place in the Senate shall thereby vacate his Seat in such Legislative Council.⁹⁴

Furthermore, section 25 of the *British North America Act* then gave Queen Victoria the authority to promulgate the royal proclamation to appoint this first group of Senators.⁹⁵

25. Such persons shall be first summoned to the Senate as the Queen by Warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their Names shall be inserted in the Queen's Proclamation of Union.⁹⁶

The Legislative Council of the Province of Canada became the Senate of the Dominion of Canada; the 24 Legislative Councillors for Canada West became the first 24 Senators for Ontario, and the 24 Legislative Councillors for Canada East became the first 24 Senators for Quebec. Ironically, many of them had first been *elected* as Legislative Councillors, since the Legislative Council of the Province of Canada had been transitioning from an appointed to an elected chamber between 1856 and 1866.⁹⁷ Almost all of the Legislative Councillors from the Province of Canada and several Legislative Councillors from New Brunswick and Nova Scotia were appointed en masse, by royal proclamation, as the first Senators representing Ontario, Quebec, New Brunswick, and Nova Scotia in the 1st Parliament.⁹⁸ Only William Todd of New Brunswick and Edward Chandler of Nova Scotia declined the appointment to the Senate of Canada, under the terms of section 127.⁹⁹

Queen Victoria issued the proclamation appointing the first group of Senators pursuant to section 25 "by and with the advice of our Privy Council," and they took their seats on 23 October 1867.¹⁰⁰ In practice, such wording signified that the British Cabinet advised her to issue the proclamation (even if

⁹⁴ *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 127.

⁹⁵ Canada, Department of Justice, "Schedule to the *Constitution Act, 1982: A Modernization of the Constitution*" in *A Consolidation of the Constitution Acts, 1867 to 1982* (Ottawa: Her Majesty the Queen in Right of Canada, 1 January 2001) at 8. Like a bee's sting, sections 19, 25, and 127 could only be used once; their built-in obsolescence made them easy targets for the *British Statute Law Revision Act*, which repealed them in 1893 along with various other spent provisions of the *British North America Act*.

⁹⁶ *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 25.

⁹⁷ Janet Ajzenstat, "Bicameralism and Canada's Founders: The Origins of the Canadian Senate," in *Protecting Canadian Democracy: The Senate You Never Knew*, ed. Serge Joyal (Toronto: University of Toronto Press, 2003): 3; Wikipedia, "Legislative Council of the Province of Canada," 28 November 2016; Canada, Senate of Canada, "A Legislative and Historical Overview of the Senate of Canada," May 2001; Statute 19-20 Victoria, chapter 140: An Act to Change the Composition of the Legislative Council by Rendering the Same Elective, 1856. The Governor General had even reserved the bill so that London could give it Royal Assent.

⁹⁸ Canada. Parliament of Canada, Parl Info: "Senators, 1st Parliament," 6 January 2017.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

they did so after consulting the Premiers in British North America), given that the cabinets of the self-governing Crown colonies had not yet gained the authority to advise the Sovereign directly. However, the *Canada Gazette* contains a copy of the Imperial proclamation; it also includes a separate concurring Canadian proclamation, which reproduced Queen Victoria's proclamation for Canada, and was issued by Governor General Lord Monck "with the advice of the Queen's Privy Council for Canada" (i.e., the Canadian Cabinet) and counter-signed by Sir John A. Macdonald.¹⁰¹

This procedure also upheld the legitimacy and neutrality of the appointments by putting them above any colonial partisanship. The *Quebec Resolutions* of 1864 emphasize that with respect to the first group of Senators, "[...] due regard shall be had to the claims of the Members of the Legislative Council of the opposition in each Province, so that all political parties may as nearly as possible be fairly represented."¹⁰² The proceedings of the Quebec Conference also record a key compromise within the Province of Canada. George Brown noted that he, Sir John A. Macdonald, and George-Étienne Cartier had agreed that the 24 Legislative Councillors from Canada West and 24 Legislative Councillors from Canada East should simply continue as Senators for Ontario and Quebec, respectively, in order to prevent their Grand Coalition — formed for the express purpose of bringing about federal union — from collapsing into bitter partisan acrimony.¹⁰³ These standings, with 24 Legislative Councillors and thus 24 Senators each for Ontario and Quebec, formed the basis of the "regions" within the Senate and determined that New Brunswick and Nova Scotia would receive 12 Senators each upon Confederation and, further, that they would each have to give up two in order to make room for Prince Edward Island within the Maritime Region. Of Quebec's first 24 Senators, 16 were Conservatives or Liberal-Conservatives, and 8 were Liberals;¹⁰⁴ Ontario sent 14 Conservatives or Liberal-Conservatives and 10 Liberals to the Senate.¹⁰⁵ The first twelve Senators for New Brunswick maintained partisan balance between six Liberals and six

¹⁰¹ *Canada Gazette*, 1, no. 1 (Ottawa: The Queen's Printer, 1 July 1867) at 1; *Canada Gazette*, 1, no. 1 (Ottawa: The Queen's Printer, 1 July 1867) at 2.

¹⁰² Maurice Ollivier, editor, "The *Quebec Resolutions*," Part I in *British North America Acts and Selected Statutes*, 39-49 (Ottawa: Queen's Printer, 1962) at 41. At this stage, the British North American Framers referred to the upper chamber of what would become the Parliament of the Dominion of Canada as the "Legislative Council" instead of as the Senate.

¹⁰³ Joseph Pope, editor, *Confederation: A Series of Hitherto Unpublished Documents Bearing on the British North American Act* (Toronto: The Carswell Company Ltd Law Publishers, 1895) at 64. Brown says, "We [in the Province of Canada] could not leave to the Executive the choice of Legislative Councillors. A conflict might have arisen in the Cabinet before the choice was made, and a party administration might have been formed."

¹⁰⁴ Canada. Parliament of Canada, Parl Info: "People: Parliamentarians, 1st Parliament".

¹⁰⁵ Canada. Parliament of Canada, Parl Info: "People: Parliamentarians, 1st Parliament".

Conservatives; of the first twelve Senators for Nova Scotia, however, eight were Conservatives and four were Liberals.¹⁰⁶

6. THE BRITISH NORTH AMERICA ACT CONTINUES THE PROVINCIAL POLITIES AND ENTRENCHES RESPONSIBLE GOVERNMENT

On 8 February 1865, George Brown argued that Confederation would allow the Dominion of Canada to attract European immigrants away from the United States, open up the Prairies for colonization, and “set in motion the governmental machinery that will one day, we trust, extend from the Atlantic to the Pacific.”¹⁰⁷ He reiterated his prediction of Canada’s Manifest Destiny more emphatically on 1 July 1867 when he stated that the new country stood “destined long to embrace the larger half of this North American continent from Atlantic to Pacific.”¹⁰⁸ The *British North America Act* also contains the blueprint for incorporating all other British North American Crown colonies and territorial possessions into the Dominion of Canada, transforming it into a three-ocean country, and setting up both a territorial and ideological rival to the United States of America. This Canadian Counter-Manifest Destiny¹⁰⁹ flows from the *British North America Act, 1867*: the fourth recital of the preamble lays claim to territory, section 146 provides the legal means for incorporating that territory into the Dominion of Canada, and section 90 makes an ideological guarantee of constitutional monarchy and Responsible Government for all the provinces formed from that territory. These latter two are analogous, respectively, to the *Northwest Ordinance* of 1787 (an Act of Congress that provided a blueprint for territorial expansion and the admission of new States) and the Guarantee Clause of the *US Constitution* by which “The United States shall guarantee to every State in this Union a Republican Form of Government.”¹¹⁰ No monarchical polity could ever become part of the United States of America because the US Constitution defined monarchical forms of government as unconstitutional,¹¹¹ and section 90 of the *British North America Act, 1867* guarantees the opposite: that every province in the

¹⁰⁶ Canada. Parliament of Canada, Parl Info: “People: Parliamentarians, 1st Parliament”.

¹⁰⁷ Janet Aizenstat, Paul Romney, Ian Gentles, and William D. Gairdner, editors, *Canada’s Founding Debates* (Toronto: University of Toronto Press, 2003) at 133.

¹⁰⁸ George Brown, “Confederation Day: The Dominion of Canada — Historical Notes, How Confederation Has Been Brought About,” *The Globe*, 1 July 1867.

¹⁰⁹ James W.J. Bowden, “Manifest Destiny,” *The Dorchester Review* 8, no. 1 (Spring-Summer 2018): 44-47.

¹¹⁰ United States Constitution, Article IV, Section 4. And by “United States,” the section means the federal order of government in Washington, D.C.

¹¹¹ In 1893, a group of American businessmen overthrew the Kingdom of Hawaii with the support of the US Navy and US Marine Corps and forced Queen Liliuokalani to abdicate. Without this American-backed *coup d’état*, Hawaii could not have become a US territory in 1898.

Dominion of Canada shall enjoy the blessings of Responsible Government under a constitutional monarchy.

The fourth clause of the preamble of the *British North America Act, 1867* says, “And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America.”¹¹² Section 146 also specifically provides for the eventual admission of Newfoundland and Labrador, Prince Edward Island, Rupert’s Land, the North-western Territory, and British Columbia into the Union.¹¹³ Imperial Orders-in-Council transferred British Columbia and Prince Edward Island to the Dominion of Canada in 1871 and 1873, respectively. Section 146 of the said act also specifically provides for the eventual admission of Newfoundland and Labrador, Prince Edward Island, Rupert’s Land, the North-western Territory, and British Columbia into the Union.¹¹⁴ Imperial Orders-in-Council transferred British Columbia and Prince Edward Island to the Dominion of Canada in 1871 and 1873, respectively. An Imperial Order-in-Council in 1870 transferred both Rupert’s Land and the North-western Territory to the Dominion of Canada, and another Imperial Order-in-Council from 1880 then completed the annexation of all other “British possessions and Territories in North America and islands adjacent thereto”¹¹⁵ (i.e., the Arctic Archipelago) to the Dominion of Canada. These territories gave rise to the northern parts of Quebec and Ontario, as well as all of Manitoba, Saskatchewan, Alberta, Yukon, the Northwest Territories, and Nunavut. The Parliament of Canada legislated Manitoba into existence in 1870, followed by Saskatchewan and Alberta in 1905, by carving them all out from the Northwest Territories. Newfoundland and Labrador then joined the Union in 1949 in accordance with an amendment to the *British North America Act* passed by the Westminster Parliament and a referendum on the question. All of the aforesaid Imperial Orders-in-Council and statutes and Canadian statutes ultimately flowed from the authority of section 146, and the Orders-in-Council should be regarded as delegated legislation;¹¹⁶ these British and Canadian executive instruments and statutes now form part of the Constitution of Canada because they are enumerated in the schedule to the *Constitution Act, 1982*.

London granted the British North American colonies Responsible Government in the 1840s and 1850s via the Colonial Secretary’s letters and instructions to the Governor General of the Province of Canada and the Governors of Nova Scotia, New Brunswick, Prince Edward Island, and

¹¹² Canada, Department of Justice, *A Consolidation of the Constitution Acts, 1867 to 1982* (Ottawa: Her Majesty the Queen in Right of Canada, 1 January 2001) at 1.

¹¹³ Hogg 1985, 31.

¹¹⁴ Hogg 1985, 31.

¹¹⁵ Canada, Department of Justice, “Schedule to the *Constitution Act, 1982: A Modernization of the Constitution*” in *A Consolidation of the Constitution Acts, 1867 to 1982* (Ottawa: Her Majesty the Queen in Right of Canada, 1 January 2001) at 79-82.

¹¹⁶ Ollivier 1962, 174 (Footnote 1).

Newfoundland. Henceforth, the Governor had to appoint as Ministers of the Crown a group of MPs who can maintain the confidence of a majority in the elected lower house and thus carry out the Queen's business and obtain supplies. As Sir John George Bourinot, a successor to Alpheus Todd as the Librarian of Parliament observed, Responsible Government therefore means that "Ministers of the Crown take responsibility for all acts of the Crown"¹¹⁷ and that the Governor would act, not on his own initiative, but on and in accordance with ministerial advice, save for exceptional circumstances. The Governor could only refuse to implement ministerial advice where he could dismiss the incumbents and appoint another set of ministers in their place, such as in refusing to dissolve a legislature early when the assembly could support an alternative government. The *BNA Act* does, in fact, codify the basic precepts and structure of Responsible Government.¹¹⁸ Section 10 states that the Governor General acts "on behalf of and in the name of the Queen," section 12 states that the Governor General acts alone (thus, conventionally, on the Prime Minister's advice) or on the advice of the Privy Council (thus, conventionally, on the Cabinet's advice), and section 13 further clarifies that the Governor-in-Council refers to "the Governor General acting by and with the advice of the Queen's Privy Council for Canada" (and thus, conventionally, on the advice of Cabinet). Where the *BNA Act* mention the Governor General, the Prime Minister by convention tenders and takes responsibility for that advice; where they mention the Governor-in-Council, the cabinet collectively tenders advice and takes responsibility for those acts of the Crown.

Responsible Government is all about the money: who proposes taxation and spending (the executive), who approves taxation and spending (the legislature), and who takes responsibility for taxation and spending (the executive). The Origination Principle and the Royal Recommendation, contained in sections 53 and 54 of the *BNA Act*, respectively, are necessary conditions for Responsible Government itself and the narrow separation of powers between the executive and legislature that this system entails.¹¹⁹ The Governor General grants Royal Recommendation on and in accordance with ministerial advice, which means that Ministers of the Crown must take responsibility for all money bills that would levy tax or appropriate revenue, and the Origination Principle means that they must table these money bills in the House of Commons.

¹¹⁷ Sir John George Bourinot, *Parliamentary Procedure and Practice*, 4th ed. (Montreal: Dawson Brothers Publishing, 1916) at 102.

¹¹⁸ Janet Ajzenstat, *The Once and Future Canadian Democracy: An Essay in Political Thought* (McGill-Queen's University Press, 2003) at 64, 66-67.

¹¹⁹ Janet Ajzenstat, *The Once and Future Canadian Democracy: An Essay in Political Thought* (McGill-Queen's University Press, 2003) at 65-67; Dennis Baker, "'The Real Protection of the People': The Royal Recommendation and Responsible Government," *Journal of Parliamentary and Political Law* 4 (2010); Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (McGill-Queen's University Press, 2010) at 61.

53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.¹²⁰

Lord Durham referred to the tandem between the Origination Principle and the Royal Recommendation as “the real protection of the people” because the two together guarantee that parliament only approves appropriations which have the support of a majority of elected MPs, and thus those who represent the majority of the people.¹²¹ By entrenching the elected lower house’s control of the purse and the executive’s control over Royal Recommendation, section 90 of the *British North America Act, 1867* guarantees Responsible Government to all provinces in the Dominion of Canada. In fact, Sir John A. Macdonald himself left no doubt that this is precisely what section 90 means; on 6 February 1865, he described both these features as necessary:

We have introduced all those provisions which are necessary in order to [allow] the full working out of the British Constitution in these provinces. We provide that there shall be no money votes, unless those votes are introduced in the popular branch of the legislature on the authority of the responsible advisors to the Crown [...].¹²²

George Brown championed Representation by Population from 1857 onward in order to complete Lord Durham’s promise of Responsible Government.¹²³ Brown argued that the sectional equality of the Province of Canada, where Canada West and Canada East each returned 65 MPs even though Canada West had surpassed Canada East in population, rendered the principle that money bills be introduced in the lower house moot and farcical. This is because the Legislative Assembly of the Province of Canada did not fairly assign seats so that each constituency would contain approximately the same number of people, and thus grant Canada West’s larger population a proportionately larger influence over how the Province spent public monies.

Hitherto, we [in Canada West] had been paying a vast proportion of the taxes, with little or no control over expenditure. But under this plan, by our just influence in the lower chamber, we shall hold the purse strings. [...] We in Upper Canada had complained that though we paid into the public treasury more than three-fourths of the whole

¹²⁰ *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 53-54.

¹²¹ Lambton 1839, 211.

¹²² Janet Ajenstat, Paul Romney, Ian Gentles, and William D. Gairdner, editors, *Canada’s Founding Debates* (Toronto: University of Toronto Press, 1999) at 71.

¹²³ Paul G. Cornell, *The Great Coalition* (Ottawa: The Canadian Historical Association, 1966) at 13.

revenue, we had less control over the system of taxation and expenditure of public monies than the people of Lower Canada.¹²⁴

Sections 53 and 54 together with section 51 of the *British North America Act, 1867* (the latter of which contains the formula through which provinces are allocated representation by population in the House of Commons) enshrine the classical liberal principles of good government by inextricably linking taxation, expenditure, and representation together. The most populous provinces which contribute the most revenue also elect the most MPs.

Without the Royal Recommendation, a collection of individual members could introduce an eclectic and incoherent mix of spending proposals — and worse still, would not have to take responsibility for them. This is precisely what happened in the Canadas prior to the grant of Responsible Government on the recommendation of Lord Durham. Prior to the introduction of Responsible Government in British North America in the 1840s, Lord Durham himself noted that the legislatures of Upper Canada and Lower Canada frequently engaged in pork-barrelling, which he called “tacking”; he lamented that backbenchers would pile on their own expenditure projects to vast omnibus bills and dare the Legislative Council to reject it or the Governor to withhold Royal Assent.¹²⁵ Without the Royal Recommendation, the assembly could not hold the government responsible for all financial decisions nor withdraw its confidence from the Government by refusing to grant supply.¹²⁶ The Royal Recommendation thus “denies the legislative branch a policy-making function” and ensures that members of parliament instead “‘monitor, evaluate, judge and decide on the proposals, policies and actions of ‘the Government’ on behalf of the people whom they represent.’”¹²⁷ In addition, the House of Commons cannot force the Government to spend money on projects for which it refuses to take responsibility; instead, the House of Commons would have to withdraw its confidence in the Government, and the Opposition would attempt to form an alternate government or force fresh elections and take its case to the people. The assembly does not govern; the assembly chooses who governs by expressing its confidence, or want of confidence, in Cabinet. Canadian political scientist Dennis Baker argues that sections 53 and 54 must be regarded as “inseparable and complementary.”¹²⁸ They ensure that “the Commons may reject the Cabinet’s tax and spending plans but that they may not initiate their own,” and that in turn, “Cabinet can propose a cohesive plan but cannot enact it

¹²⁴ Ajzenstat *et al.* 1999, 287.

¹²⁵ John Lambton (The Earl of Durham), *The Report and Despatches of the Earl of Durham, Her Majesty’s High Commissioner and Governor-General of British North America* (London: Ridgways, 1839) at 61-62.

¹²⁶ David E. Smith, *The Invisible Crown: The First Principle of Canadian Government* (Toronto: University of Toronto Press, 1995) at 66.

¹²⁷ Smith 1995, 122.

¹²⁸ Dennis Baker, “‘The Real Protection of the People’: The Royal Recommendation and Responsible Government,” *Journal of Parliamentary and Political Law* 4 (2010): 213.

without the approval of the people's representatives."¹²⁹ Section 54 "makes 'budgeting' possible" in the first place because Cabinet must take collective ministerial responsibility for all proposed spending and can then present a "coherent program of taxing and spending legislation."¹³⁰ These sections mandate the "partial agency" of the political executive and the legislature in the other's affairs and the balance of Responsible Government between the Cabinet and Commons.¹³¹

Without section 90, no province could exercise its heads of legislative power contained in section 92; they would be reduced to a territory administered by a Commissioner appointed by the federal government.¹³² While the federal executive and the Parliament of Canada can and have granted the three modern territories heads of legislative power and Responsible Government or Consensus Government, these devolved authorities are neither constitutionally entrenched nor guaranteed like the authority and heads of power of the provinces. This principle through which the *British North America Act* spread an ideological guarantee to all British North America is most readily demonstrated in the Terms of Union of British Columbia and Newfoundland and Labrador. Since British Columbia had not already been granted Responsible Government by London, its Terms of Union specified that it should achieve Responsible Government soon after joining Confederation in 1871.¹³³ The Macdonald government then reiterated and made good on this pledge in the letters and instructions issued to the first Lieutenant-Governor of British Columbia.¹³⁴ British Columbia's Terms of Union provide for the legal-constitutional continuity of the polity in its transition from Crown colony to province, and section 90 layered on Responsible Government to the existing structure of Representative Government:

The Constitution of the Executive Authority and of the Legislature of British Columbia shall, subject to the provisions of the *British North America Act, 1867*, continue as existing at the time of the Union until altered under the authority of the said Act, it being at the same time understood that the Government of the Dominion will readily consent to the introduction of responsible government with desired by the inhabitants of British Columbia and it being likewise understood that it is the intention of the Governor of British Columbia, under the authority of the Secretary of State for the Colonies, to amend the existing Constitution of the Legislature by providing that a majority of its members shall be elective.¹³⁵

¹²⁹ *Ibid.*, 207.

¹³⁰ Baker 2010, 207; Aizenstat 2003, 65.

¹³¹ Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (McGill-Queen's University Press, 2010) at 62.

¹³² Aizenstat *et al.* 1999, 32-35, 32N, 35N.

¹³³ Maurice Ollivier, "British Columbia's Terms of Union," in *British North America Acts and Selected Statutes, 1867-1962* (Ottawa: Queen's Printer, 1962) at 178.

¹³⁴ Hogg 1985, 33.

The Terms of Union of Prince Edward Island contain similar wording. However, Prince Edward Island had already attained Responsible Government in 1851 and so already met the requirement under section 90 long before joining Confederation in 1871.¹³⁶

That the constitution of the Executive Authority and of the Legislature of Prince Edward Island shall, subject to the provisions of the British North America Act, 1867, continue [...].¹³⁷

Similarly, Newfoundland and Labrador's Terms of Union restored Responsible Government as a condition of joining Confederation in 1949.¹³⁸ Responsible Government had gone into abeyance in 1934, when the Dominion of Newfoundland voluntarily relinquished it in favour of a Commission Government and direct rule from London. Section 9 of the Terms of Union restored Responsible Government by declaring that the executive authority of Newfoundland and Labrador would revert back to what had prevailed from 1855 to 1934:

The Constitution of the Executive Authority of Newfoundland as it existed immediately prior to the sixteenth day of February, 1934, shall, subject to these Terms and the British North America Acts, 1867 to 1946, continue as the Constitution of the Executive Authority of the Province of Newfoundland from and after the date of Union, until altered under the authority of the said Acts.¹³⁹

They do likewise for the province's legislature:

[...] the Constitution of the Legislature of Newfoundland as it existed immediately prior to the sixteenth day of February, 1934, shall, subject to these Terms and the *British North America Acts, 1867 to 1949*, continue as the Constitution of the Legislature of Newfoundland from and after the date of Union, until altered under the authority of the said Acts.¹⁴⁰

These Terms of Union carve out the Commission Government Era from 1934 to 1949 as an aberration and expressly restore the continuity from 1855 to 1934, uninterrupted in legal terms, from 1949 to present.

The *British North America Act* combined the political institutions first created or re-organised by the *Constitutional Act, 1791* and the *Act of Union, 1840*; it converted the unitary Province of Canada into the federal Dominion of Canada, but it also recognized the former Upper Canada and Lower

¹³⁵ Ollivier 1962, 178 (Emphasis added).

¹³⁶ Prince Edward Island, Legislative Assembly of Prince Edward Island, "History," 25 April 2017.

¹³⁷ Ollivier 1962, 185 (Emphasis added).

¹³⁸ Peter Hogg, *Constitutional Law of Canada, 2nd Edition* (Toronto: The Carswell Company, 1985) at 35; Maurice Ollivier, editor, "*Terms of Union of Newfoundland With Canada Act*," in *British North America Acts and Selected Statutes, 1867-1962* (Ottawa: Queen's Printer, 1962) at 247.

¹³⁹ Ollivier 1962, 247.

¹⁴⁰ Ollivier 1962, 248.

Canada and restored them to their old boundaries as the provinces of Ontario and Quebec, respectively. Federalism cut the Gordian Knot of organizing the British North American colonies: it allowed both the Province of Canada on the one hand and Upper Canada and Lower Canada on the other to exist simultaneously. It also guaranteed the legal-constitutional continuity of the Crown colonies of Nova Scotia and New Brunswick after they became the provinces of Nova Scotia and New Brunswick within the Dominion of Canada. The Terms of Union of Prince Edward Island, British Columbia, and Newfoundland and Labrador likewise provided for the legal-constitutional continuity of these polities pre- and post-Confederation. The *Manitoba Act, 1870*, the *Saskatchewan Act, 1905*, and the *Alberta Act, 1905* all expressly apply the provisions of the *British North America Act, 1867* “as if [they] had been one of the Provinces originally united” in 1867.¹⁴¹ Those provisions include section 90. As such, these three enabling statutes all also establish their offices of Lieutenant Governor, Executive Councils, and Legislatures (Lieutenant-Governor and Legislative Assembly) so that the provinces can practise Responsible Government. Furthermore, the *British North America Act* entrenched Responsible Government in both the federal and provincial orders of government. All the provinces that now form part of the Dominion of Canada, except Manitoba, Saskatchewan, and Alberta, existed prior to Confederation in 1867.

7. THE BRITISH NORTH AMERICA ACT DISCONTINUES THE DOUBLE MAJORITY CONVENTION AND CONSOCIATIONALISM

While the general executive and legislative authorities of the Province of Canada continued with the Dominion of Canada, some of the constitutional conventions that characterized the Province of Canada did *not* survive Confederation. Constitutional conventions are unwritten, politically enforceable norms that exist in order to complement or regulate the exercise of constitutional principles, statute laws, and the codified elements of the Constitution of Canada.¹⁴² As such, when the constitutional or statutory provisions which sustain a convention are amended or repealed, any constitutional conventions which derive from them thereby must also change or go extinct. In 1867, the *British North America Act* replaced the *Act of Union, 1840* as Canada’s foundational legislation and *de facto* codified constitution and thereby discontinued some constitutional conventions which flowed from the *Act of Union* and animated the politics of the Province of Canada.

¹⁴¹ *Manitoba Act, 1870*, 33 Victoria, c. 3, s. 2; *Saskatchewan Act, 1905*, 4-5 Edward VII, c. 42, s. 3; *Alberta Act, 1905*, 4-5 Edward VII, c. 3, s. 3.

¹⁴² James W.J. Bowden and Nicholas A. MacDonald, “Writing the Unwritten: The Officialization of Constitutional Conventions in Canada, the United Kingdom, New Zealand, and Australia,” *Journal of Parliamentary and Political Law* 6, no 2 (August 2012): 367.

A political culture of consociationalism and elite accommodation between equivalent English- and French-speaking political parties developed in the Province of Canada in light of some key provisions of the *Act of Union, 1840* itself. For example, section 46 deliberately entrenched bijuridicalism by preserving French civil law in Canada East, the former Lower Canada, and English civil law in Canada West, the former Upper Canada; moreover, section 12 assigned an equal number of seats (known as “sectional equality”) between Canada West and Canada East, irrespective of population.¹⁴³ Between 1841 and 1854, Canada West and Canada East each returned 42 MPs, for an Assembly of 84 MPs; from 1854 to 1867, the Assembly expanded to a total of 130 MPs, with 65 each from Canada West and Canada East.¹⁴⁴ These codified constitutional provisions on sectional equality between Canada West and Canada East and two separate legal systems combined with the grant of Responsible Government to give rise to a system of consociational practices, like the Double Majority Convention, and a unique structure of what Canadian historian J.M.S. Careless called a “double-compartmented government.”¹⁴⁵ Under this system, a premier for Canada West and a premier for Canada East jointly headed a ministry as co-premiers and took responsibility primarily for the other ministers from their respective sections of the Province of Canada. The ministry also bifurcated the roles of Attorney General and Solicitor General, with one each for the Common Law Canada West and the Civil Law Canada East.¹⁴⁶ Responsible Government under the Province of Canada thus, in effect, bifurcated collective ministerial responsibility into two separate streams for Canada West and Canada East; consociationalism, in turn, ensured that the two tracks remained roughly in parallel.

The party system itself of the Province of Canada also grew up around the confines of sectional equality and the perpetual double-compartmented coalition ministries. Canadian political parties in the mid-19th century were far less organized and rigid than they became by the end of the 19th century, but distinct Tory and Reformer formations mirroring their British metropolitan counterparts existed within the legislatures of British North America. As in modern Belgium where most political parties remain separate between Dutch-speaking Flanders and French-speaking Wallonia,¹⁴⁷ the

¹⁴³ Hogg 1985, 29; *Act of Union, 1840* (UK) 3&4 Victoria, c.35, ss.12, 46.

¹⁴⁴ Langevin 2012, 25.

¹⁴⁵ Careless 1967, 209.

¹⁴⁶ *Ibid.*

¹⁴⁷ Régis Dandoy, “Regionalist Parties and Immigration in Belgium,” chapter 10 in *The Politics of Immigration in Multi-Level States: Governance and Political Parties*, edited by E. Hepburn and R. Zappata-Barrero, 200-222 (London: Palgrave-MacMillan, 2014) at 201. As Dandoy says, “The Belgian party system presents one unique characteristic when compared to other federations: there are no federal (or statewide) parties. The Belgian electoral system is divided according to linguistic lines. Broadly speaking, Flemish parties do not address French-speaking voters and vice versa, even in the officially bilingual city of Brussels. [...] As a result, it might be better

English-speaking Conservative and Liberal parties of Canada West remained separate from the French-speaking Conservatives (*les Bleus*) and Liberals (*les Rouges*) of Canada East. In practice, the English-speaking and French-speaking Conservatives and the English-speaking and French-speaking Liberals would form coalition governments with one another with roughly equal cabinet representation, including the co-premiership and the bifurcated portfolios for Attorneys and Solicitors General of each section.

In practice, however, preserving bijuridicalism in a unitary state meant that the legislature could not always effectively distinguish between issues affecting the whole Province of Canada versus those affecting only either Canada West or Canada East.¹⁴⁸ In other words, the Legislature of the Province of Canada also suffered from its equivalent of the West Lothian Question, because even when the legislature passed laws that affected only one section or the other (for instance, on matters of education or the two legal systems), all parliamentarians, from both sections, had to vote on the issue at hand.¹⁴⁹ This state of affairs could sometimes produce politically awkward outcomes, such as when the half of the province not affected by a bill would pass it over the objections of the other half of the province to which the bill pertained.¹⁵⁰ The “Double Majority” Convention thereby emerged as a kind of bifurcation of the confidence convention and collective ministerial responsibility: the cabinet often needed to obtain both an overall majority in the assembly as well as a majority of MPs in the section of the province that the bill affected in order to make a policy politically viable.¹⁵¹ In purely practical terms, one section could not govern against the will of the other for too long.

Sir John A. Macdonald, Canada’s longest-serving prime minister, first came to power by manipulating the Double Majority Convention.¹⁵² In May 1856, the MacNabb-Taché Ministry won a vote of confidence overall, 70 to 47, but fell 6 votes short of a majority amongst the Upper Canadian MPs.¹⁵³ Sir Allan MacNabb, a Conservative politician who served in both the Legislative Assembly of Upper Canada and that of the Province of Canada, had become mired in corruption over railway contracts. Canadian historian Barbara Messamore points out the irony that Macdonald, the younger Conservative who orchestrated MacNabb’s ousting, would also have become embroiled in a

to speak of two party systems – the Flemish and the French-speaking ones – rather than of one party system in Belgium.”

¹⁴⁸ *Ibid.*, 210.

¹⁴⁹ Careless 1967, 209-210; Hogg 1985, 29.

¹⁵⁰ Careless 1967, 210.

¹⁵¹ *Ibid.*, 210-211.

¹⁵² Barbara J. Messamore, “Macdonald and the Governors General: The Prime Minister’s Use and Abuse of the Crown,” chapter 9 in *Macdonald at 200: New Reflections and Legacies*, edited by Patrice Dutil and Roger Hall, 253-281 (Toronto: Dundurn, 2014); 253-254.

¹⁵³ Messamore 2014, 253-254.

railway contract scandal of his own which forced him to resign in disgrace as Prime Minister of the Dominion of Canada in 1873. Sir Étienne-Paschal Taché, a prominent French-speaking Conservative in the “bleu” formation, served in the Legislative Assembly of the Province of Canada from 1841 until his death in 1865 and later supported Macdonald and Cartier in promoting Confederation. Macdonald himself led a cabinet coup against Sir Allan MacNabb by convincing all the other Upper Canadian cabinet ministers to resign along with him, leaving MacNabb as the only cabinet minister for Canada West. MacNabb then resigned, after which Governor Head re-appointed the other six ministers to cabinet and made Macdonald co-premier of Canada West, but *de facto* deputy premier to Sir Étienne-Paschal Taché.¹⁵⁴ Meanwhile, Taché and all the ministers for Canada East remained in cabinet throughout Macdonald’s successful purge of Canada West’s cabinet representation. When the Taché-Macdonald Ministry also failed to achieve a double majority on its first vote of confidence, Macdonald and his half of the ministry chose to remain in office and carry out the Queen’s business,¹⁵⁵ which illustrates that, as in modern votes of confidence in the House of Commons, the ministry of the Province of Canada retained a degree of discretion in determining whether something constitutes a vote or loss of confidence in matters other than supply and overt motions of non-confidence.¹⁵⁶

Governor General Lord Monck recognised that federalism would replace consociationalism and that the re-establishment of self-government in the Province of Quebec would protect the French Fact in British North America. In his letter and instructions to Sir John A. Macdonald from 24 May 1867, he argued that the co-premiership which prevailed in the Province of Canada should immediately give way to a single premiership in the Dominion of Canada:

In authorizing you to undertake the duty of forming an administration for the Dominion of Canada, I desire to express my strong opinion that, in future, it shall be distinctly understood that the position of First Minister shall be held by one person, who shall be responsible to the Governor-General for the appointment of the other ministers, and that the system of dual First Ministers, which has hitherto prevailed, shall be put an end to.

¹⁵⁴ Careless 1967, 201.

¹⁵⁵ *Ibid.*

¹⁵⁶ Philip Norton, “Government Defeats in the House of Commons: The British Experience,” *Canadian Parliamentary Review* (Winter 1985-1986): 6. This category of confidence vote generated controversy in the recent series of minority parliaments in Canada between 2004 and 2011, where the Government often adopted the tactic of declaring key government bills, particularly those flowing from the Speech from the Throne, matters of confidence in order to provoke the Opposition into withdrawing confidence from the Government, which would in turn seek early dissolution and fresh elections. *Ottawa Citizen*, “Tories Declare Another Confidence Test As Parliamentary Stare Down Continues,” 7 February 2008. Only constructive non-confidence could eliminate the government’s discretion in such matters.

I think this is of importance, not only with reference to the maintenance of satisfactory relations between the Governor-General and his cabinet, but also with a view to the complete consolidation of the Union which we have brought about.¹⁵⁷

The aberration of co-premierships, unique in the British Empire, died out. But even if Monck had not written this letter to Macdonald, the double-compartmented cabinet, bifurcation of collective ministerial responsibility, and the Double Majority Convention would still have died out because once the *Act of Union, 1840* became defunct upon Confederation, so, too, did the constitutional conventions which flowed from it and upheld it. Monck merely recognised and affirmed an external variable.

Sir John A. Macdonald himself also left open the possibility that federalism would replace consociationalism as early as the Quebec Conference in October 1864. In one exchange, Robert B. Dickey, a Legislative Councillor from Nova Scotia who became one of the first group of Senators for Nova Scotia in 1867, and Macdonald debated whether the new federal constitution should fetter the Crown's authority by limiting the number of cabinet ministers and whether the Province of Canada's double-majority convention would carry over to the British North American federation. On the first question, Macdonald argued against; on the second, he left room for either possibility.

Mr. John A. Macdonald – We cannot limit or define the powers of the Crown in such respect. [...] There is not even any resolution on our own journals as to the number of the Executive. [...] In Canada it was found convenient that both sections of the Province should be represented in the Cabinet, and in time it grew practically into an equal division. The same principle must obtain as to the body of advisors of the Governor-General of the Federation. That must be a provisional cabinet, and it probably will be very few and merely for necessary purposes. The Federal Parliament being elected, the person charged with the formation of the Ministry will probably increase the number. We must leave such arrangements as to the equality in the Cabinet to change or necessity.¹⁵⁸

In this case, Macdonald meant that the principle that the constitution would not limit the authority of the Crown by capping the number of cabinet ministers, and not sectional equality, would apply to what became the Dominion of Canada. As he had explained to Tupper at the Quebec Conference, Macdonald reiterated here that his ministry from the Province of Canada would continue provisionally as the first ministry of the Dominion of Canada until the results of the first federal election either sustained it or forced its resignation. Finally, Macdonald concluded that while sectional equality had proven “convenient” and “practical” within the Province of Canada, it might not carry over to the Dominion of Canada if it were no longer necessary. Either way, he believed, the Quebec Conference should leave this question as a

¹⁵⁷ Pope 1921, 46.

¹⁵⁸ Browne 2009, 116. Emphasis added.

matter of constitutional convention instead of recommending that the Imperial Parliament codify any restrictions on the Crown's authority to appoint ministers, whether by capping the total number of ministers or whether by imposing a quota for provincial representation. Governor General Lord Monck agreed and in May 1867 sustained Macdonald's argument from October 1864.

In short, the federalism and representation by population of the Dominion of Canada replaced the quasi-federal consociationalism and sectional equality of the Province of Canada and thus rendered the Double Majority Convention, the co-premiership, and the bifurcated portfolios of attorney general and solicitor general, moot. These conventions and practices therefore all became defunct and lapsed into desuetude upon Confederation. Interestingly, the *Charlottetown Accord* would have revived a form of the Double Majority Convention in an elected Senate where "a bill that materially affects the French language or culture in Canada must, in order to be passed by the Senate, be approved by a majority of senators voting and a majority of French-speaking senators voting."¹⁵⁹ But since Canadians rejected it in a referendum in 1992, the closest relatives to the co-premiership and bifurcated cabinet remain the Quebec Lieutenant and the federalized cabinet.

8. CONCLUSION: CANADA'S PRE-CONFEDERATIVE HISTORY IS TOO IMPORTANT TO BE FORGOTTEN OR IGNORED

The near-invisibility of Upper Canada, Lower Canada, and the Province of Canada in Canadian historiography shows how even political scientists and historians have overlooked or taken a dim view of this stage of the Canadian polity and Canadian history. Most serious scholarship on the Province of Canada petered out by the late 1960s, which reflected a broader turn in political science and in history away from institutions and political history and toward political culture and social history.¹⁶⁰ The *Constitutional Act, 1791* and the *Act of Union, 1840* have largely been forgotten; if they are remembered at all, they are generally seen as failures or mere teleological stepping stones on an inevitable road to Confederation.

The Westminster Parliament established Upper Canada and Lower Canada, each with representative political institutions, in order to accommodate Loyalists exiled from the former Thirteen Colonies and French-Canadians alike. However, the disharmony between the executive and legislature in these provinces, which smouldered throughout the 1820s and 1830s, exposed the *Constitutional Act, 1791* as an inadequate vehicle for self-government. This discord culminated in the Rebellions of 1837. In response, the Imperial Parliament re-organized Upper Canada and Lower Canada into the Province of Canada and granted the province Responsible Government in local affairs in order to bring the executive and legislature into harmony with

¹⁵⁹ Canada, Privy Council Office, *Draft Legal Text of the Charlottetown Accord* (Ottawa: Her Majesty the Queen in Right of Canada, 9 October 1992).

¹⁶⁰ Aizenstat *et al.* 2003, 478-479.

one another.¹⁶¹ But the Province of Canada also subsequently saw its share of political violence and deadlock. In 1849, after Governor General Lord Elgin gave Royal Assent to the *Rebellion Losses Bill*, English-speaking rioters burned down the Province's parliament building in Montreal and destroyed most of its official records housed there. The next parliament, located in Quebec City, also fell victim to fire in 1854, which, though accidental, also destroyed various public records. Perhaps best symbolizing the tenuousness and instability of the Province of Canada was its non-permanent, rotating capital city, which oscillated between Kingston, Montreal, Quebec City, and Toronto. Between 1841 and 1844, the legislature met in Kingston. The legislature then sat in Montreal from 1844 until Loyalist rioters destroyed the building in 1849. The seat of government then alternated between Toronto (1850-1851 and 1855-1859), and Quebec City (1852-1854 and 1860-1865).¹⁶²

The Province of Canada did not formally receive a permanent capital city in Ottawa until 1857-1858, when Queen Victoria named Ottawa on the advice of Sir Edmund Head, Governor General of the Province of Canada, and Henry Labouchere, the Colonial Secretary. The selection of the capital city being an Imperial matter, the Governor General reported directly to his superior, the Colonial Secretary, without the knowledge of and without advice from the government of the Province of Canada, led by Sir John A. Macdonald and George-Étienne Cartier.¹⁶³ Head frankly acknowledged in his memorandum to Labouchere that Ottawa should become the capital if only because its selection would provoke the least offence elsewhere in the Province:

On the whole, therefore, I believe that the least objectionable place is the City of Ottawa. Every city is jealous of every other city, except Ottawa. The second vote of every place (save, perhaps, for Toronto) would be given for Ottawa. The question, it must be remembered, is essentially one of compromise. Unless some insuperable bar exists to its selection, it is expedient to take that place which would be most readily acquiesced in the majority.¹⁶⁴

Even the construction of these new buildings, fraught with delay and well over budget, seemed emblematic of the tenuousness of the Province of Canada. Construction began in 1859, and the Prince of Wales (who later reigned as King Edward VII) laid the cornerstone to great fanfare in 1860. But work halted from 1861 to 1863 as a committee of inquiry investigated spiraling costs.¹⁶⁵ Finally, the very last session of the last parliament of the Province of Canada met in Ottawa in 1866 — after Confederation had already been

¹⁶¹ Todd 1894, 26.

¹⁶² Langevin 2012, 24-25.

¹⁶³ David B. Knight, *Choosing Canada's Capital: Conflict Resolution in a Parliamentary System* (Ottawa: Carleton University Press, 1991) at 242.

¹⁶⁴ Knight 1991, 254.

¹⁶⁵ Public Works and Government Services Canada, "History of the Hill: Construction and Expansion, 1859-1916," 3 September 2019. Online: <https://www.tpsgc-pwgsc.gc.ca/citeparlementaire-parliamentaryprecinct/histoire-history/index-en-g.html#a2>.

achieved in principle — and closed out its own existence. The following year, the Victoria Building would serve as the Parliament of the Dominion of Canada instead until it burned down on 3 February 1916.

The absence of Upper Canada, Lower Canada, and the Province of Canada and the years 1791 to 1867 in Canadian national memory and history extends also to the official records of most current political institutions. Even though the Dominion of Canada is the continuator of the Province of Canada, neither the Government of Canada nor the Parliament of Canada has taken responsibility for the custody of the Province's records, which remain difficult to access and have been consigned to collect dust in the select few libraries which house the legislative proceedings, sessional papers, and statutes of the era. Records for Upper Canada and Lower Canada are more difficult to find and access still. For instance, the Parliament of Canada has compiled details of all parliaments and elections and profiles on all parliamentarians for the Dominion of Canada, but "Parl Info" includes nothing on the Province of Canada. The Parliament of Canada's digital portal for the Historical Debates of the Parliament of Canada likewise begins in 1867 and excludes the Parliament of the Province of Canada and the Legislatures of Upper Canada and Lower Canada. This is all the more disappointing given that the Parliament of the Dominion of Canada has recognized in the *Publication of Statutes Act* that it is the continuator of the Parliament of the Province of Canada and the Legislatures of Upper Canada and Lower Canada. Section 3 of the statute defines the role of the Clerk of Senate (*ex officio* the Clerk of the Parliaments) as holding "custody of original Acts":

3. All the original Acts passed by the Legislatures of the former Provinces of Upper Canada and Lower Canada, or of the former Province of Canada, transferred to and deposited of record in the office of the Clerk of the Senate, and all original Acts of the Parliament of Canada assented to by the Governor General, shall be and continue to remain of record in the custody of the Clerk of the Senate of Canada, who shall be known and designated as the Clerk of the Parliaments.¹⁶⁶

This statute contains the germ of a general principle that the Parliament of Canada inherited the records of its predecessor legislatures. Sadly, the Parliament of Canada has not extended the principle of the *Publication of Statutes Act* to the custody of other official parliamentary records. Furthermore, the Privy Council Office pointedly maintains records only on the 29 ministries since Confederation and not before, and Library and Archives Canada has created a digital database of Orders-in-Council, but only from Confederation onward.¹⁶⁷ As of 2020, the only reliable historical record of the Province of Canada accessible online is the *Canada Gazette*. The

¹⁶⁶ *Publication of Statutes Act*, R.S.C., 1985, c. S-21.

¹⁶⁷ Canada, Privy Council Office, *Guide to Canadian Ministries Since Confederation* (Ottawa: Her Majesty the Queen in Right of Canada, 2018); Canada, Library and Archives Canada, "Orders-in-Council," 18 January 2018.

Legislature of Ontario similarly shows no interest in or ownership over the legislatures of the Province of Canada or Upper Canada.

In contrast, the National Assembly of Quebec has demonstrated an appreciation for its history and at least acknowledges the legislatures of Lower Canada and the Province of Canada. The National Assembly deserves commendation for devoting sections to the constitutional history of Canada since 1791 to its website and for having commissioned *La procédure parlementaire du Québec*, which includes some of the most accessible historical information on the Province of Canada and Lower Canada.¹⁶⁸ As historian Gary Caldwell has noted, “Historians of the Assembly [of Lower Canada] maintain that it existed between 1840 and 1867 within the Union, the Union being a fusion of both legislatures rather than a new creation.”¹⁶⁹ In short, the Parliament and Government of Canada and the Legislature and Government of Ontario have shirked their duty to maintain the history of Upper Canada and the Province of Canada, and this general ignorance manifests itself most strongly in the oft-mentioned claim that 2017 marked “Canada’s 150th Anniversary” instead of the sesquicentennial of Confederation.¹⁷⁰ The year 2017 did not mark the sesquicentennial of Canada itself. Since the Canadian polity dates to 1791, “Canada’s 150th Anniversary” occurred, rather inconveniently, in the midst of the Second World War in 1941 where government-sponsored celebration would not have seemed so appropriate. The year 2017 certainly did not mark the 150th anniversary for Nova Scotia, Prince Edward Island, New Brunswick, Newfoundland and Labrador, and British Columbia, all of which existed before Confederation.

The Atlantic colonies and British Columbia were established by executive instruments through the prerogative authority of the Imperial Crown.¹⁷¹ The Canadian polity, first established in 1791, is therefore unique and stands as the only British North American polity created by an act of the Westminster Parliament instead of through the Imperial Crown’s executive prerogative authority. If Upper Canada, Lower Canada, and the Province of Canada were failures, they were necessary failures without which the Constitution of Canada would not have evolved in the way that it did. The *Constitutional Act, 1791* entrenched Representative Government and bijuridicalism and the *Act of Union, 1840* accommodated Responsible Government and a quasi-federal consociationalism between English and French. Introducing federalism to

¹⁶⁸ Québec, Assemblée nationale du Québec, “Histoire,” le 3 mars 2015; Suzanne Langevin (ed), *La Procédure parlementaire du Québec*, 3e édition (Québec City: Assemblée nationale, 2012).

¹⁶⁹ Gary Caldwell, “The Quebec Assembly,” *The Dorchester Review* 6, no.1 (Spring-Summer 2016): 44.

¹⁷⁰ James W.J. Bowden, “1791: The Birth of Canada,” *The Dorchester Review* 5, no .1 (Spring-Summer 2015): 28-32.

¹⁷¹ Janet Ajzenstat, “Celebrating 1791: Two Hundred Years of Representative Government,” *Canadian Parliamentary Review* (Spring 1991): 26; Dawson 1973, 6; Hogg 1985, 26.

British North America cut the Gordian Knot and allowed Upper Canada and Lower Canada, in their new incarnations of Ontario and Quebec, and the Province of Canada, as the Dominion order of government, to exist simultaneously and more harmoniously with one another. Overall, the transition from the Province of Canada and the Dominion of Canada is clearer and easier to illustrate than the transition from Upper Canada and Lower Canada to the Province of Canada. This is because the institutions of government had become more entrenched and had matured considerably, especially in light of the grant and development of Responsible Government. The text of the *British North America Act, 1867* leaves no doubt that the Dominion of Canada is the successor state or continuator of the Province of Canada, just as the text of the *Act of Union, 1840* states plainly that the Province of Canada is the continuator of Upper Canada and Lower Canada. It is incontrovertible, even if it is not obvious.

