

Université de Montréal

**Societal Cleavages and Institutional Change in Canada**  
**Retention, Reform and Removal of Nominee Councils**

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Thèse présentée à la Faculté des études supérieures et postdoctorales  
en vue de l'obtention du grade de doctorat  
en philosophie

Décembre, 2011

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Université de Montréal  
Faculté des études supérieures et postdoctorales

Cette thèse intitulée:

Societal Cleavages and Institutional Change in Canada

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## Résumé

En concevant que toute société a deux clivages dominants, l'un social et l'autre partisan, cette thèse développe une théorie sur le changement institutionnel. L'hypothèse initiale, selon laquelle les groupes sociaux créés par le premier clivage agiront pour restreindre le changement institutionnel et que le changement aura lieu lors de l'émergence d'un groupe partisan capable de croiser le clivage social, fut testée par les processus traçant les changements qui furent proposés et qui ont eu lieu au sein des conseils nommés en Amérique du Nord britannique. Ces conseils furent modifiés un bon nombre de fois, devenant les chambres secondaires de législatures provinciales avant d'être éventuellement abolies. La preuve supporte l'hypothèse, bien qu'il ne soit pas suffisant d'avoir un groupe partisan qui puisse croiser le clivage qui mène le changement : un débat partisan sur le changement est nécessaire. Ceci remet aussi en cause la théorie prédominante selon laquelle les clivages sociaux mènent à la formation de partis politiques, suggérant qu'il est plus bénéfique d'utiliser ces deux clivages pour l'étude des institutions.

**Mots-clés** : clivage sociétal, clivage social, clivage partisan, gouvernement responsable, gouvernement représentatif, gouvernement responsable de parti, conseil du roi, conseil souverain, conseil du gouverneur, conseil des nommés, conseil législatif, chambre haute, deuxième chambre, conseil exécutif, assemblée, législature, parlement, groupe social, parti politique, mouvement politique, constitution.

## **Abstract**

By conceiving of any society as having two dominant cleavages, one ‘social’ and one ‘partisan’, this dissertation develops a theory on institutional change. The initial hypothesis that social groups created by the former will act to restrain institutional change and that change will occur when a partisan group emerges that can cross the social cleavage was tested by process tracing the changes which were proposed and which occurred to the appointed councils established in British North America. These councils were modified a number of times, becoming second chambers in the provincial legislatures, and were eventually each abolished. The evidence found supports the hypothesis, though it is not sufficient to have a partisan group that can cross the cleavage drive change, a partisan debate over the change was necessary. This also challenges the prevailing theory that social cleavages lead to political party formation, suggesting the benefit of using these two cleavages for the study of institutions.

**Keywords** : societal cleavage, social cleavage, partisan cleavage, responsible government, representative government, responsible party government, king’s council, sovereign council, governor’s council, nominee council, legislative council, upper chamber, senate, upper house, second chamber, executive council, assembly, legislature, parliament, social group, political party, political movement, constitution.

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*Dedicated to the late J.R. Mallory of McGill  
University, who was able to make the  
Westminster model of government interesting  
to a young undergraduate.*

## Acknowledgements

A version of chapter 3 has been published as:

- Hicks, Bruce M., 2010, “Crown’s Democratic Reserve Powers”, *Journal of Canadian Studies*, 44(2), 5-31

I would like to thank the staff of the Library and Archives Canada and the British National Archives. Most especially I would like to thank the Canadian Parliamentary Library. And I would like to thank my mother, Sidney A. Hicks, who in addition to the obvious debt I owe her as child to mother, has repeatedly acted as research assistant and editor for me, including this dissertation.

I want to thank my supervisor, André Blais. While I understand it is *pro forma* to thank one’s supervisor, there is nothing routine about the relationship that Prof. Blais has with his doctoral candidates and the appreciation his doctoral candidates have for him. I have studied under and worked with a number of academics, and I can say without reservation that Prof. Blais is unique in the way he guides his students. He challenges their scholarship without limiting their creativity. That ability is probably only found in academics so comfortable in their own scholarship that they can be supportive of yours. It was a very stimulating learning environment.

I would like to thank Richard Nadeau. In his capacity as my instructor and then as chair of my defence committee, he was instrumental in focussing my research in terms of (i) question, (ii) case studies, (iii) the most current academic approaches and (iv) the most appropriate format for presenting my research. His suggestions went well beyond what he was required to do as either instructor or committee chair, and his capacity to cut to the heart of my research always surprises me. He is a teacher in the true sense of the word and I can only hope that I offer similar insights to students I teach.

I would like to thank the Université de Montréal and the Canada Research Chair in Electoral Studies for initially funding my studies at the university, followed by the “Fonds de recherche sur la société et la culture du Québec” (FRSCQ) which replaced and increased this initial funding. More recently I am indebted to the “Social Sciences and Humanities and Research Council” (SSHRC) for taking over and increasing that funding through a Joseph-Armand Bombardier Canada Graduate Scholarship (i.e. CGS Doctoral Scholarship) and I thank them in anticipation of my upcoming post-doctoral fellowship.

## Chapter 1: Introduction

Legislative institutions in a democracy are invariably designed around principles of representation. Once chosen, these principles often remain static in spite of frequent demands for change, usually advanced under the populist label of ‘reform’. What factors restrain institutional change and, by extension in the instances where change has proven to be possible, how are these restraints overcome and what then drives successful institutional change? Nowhere is this question more relevant than for ‘upper chambers’, as these bodies were often created in the distant past, when ideas surrounding representation may have been markedly different.<sup>1</sup>

Change has long been advocated for the upper chamber in Canada’s federal legislature, the appointed or ‘nominee’ Senate. Just seven years after the first four of the British provinces in North America agreed to form a federation<sup>2</sup>, the new federal lower chamber, the house of commons, gave unanimous consent to hold a debate on whether or not to entirely restructure the senate, including a different method of selection based on

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<sup>1</sup> The terms ‘senate’, ‘upper chamber’ or ‘upper house’ and ‘second chamber’ will be used interchangeably throughout this dissertation. In most legislatures which have two deliberative bodies, the one whose representational structure comes closest to representing the population on a proportionate basis is always given the label ‘first’ or ‘lower’ chamber (or house), though it can have any number of formal appellations (e.g. House of Representatives in the U.S., National Assembly in France). The label ‘first’ for this chamber is because this chamber is seen as closest to the people (Patterson et Mughan 1999a, 2), though one can make a case that the label second is what drives the terminology and is indicative of the fact that often these second chambers are seen as junior or secondary (Massicotte 2001, 151). ‘Senate’ is the most common formal appellation which countries have used to designate the chamber least oriented to representation by population and ‘second chamber’ is the most common term used for it in the political science literature. The hierarchical designation ‘upper house’ arose in countries where that chamber was used to represent aristocratic birth. The one exception to the afore stated rule is the Netherlands, where the name of the popularly elected chamber is *Tweede Kamer*, translated as ‘second chamber’, and the formerly aristocratic chamber or ‘upper house’ is *Eerste Kamer* or ‘first chamber’ since it came into existence first and is feudally closest to the King.

<sup>2</sup> ‘Federal’ systems have two formal levels of government to which the constitution has assigned different or shared legislative and administrative responsibilities, though Riker suggests that three conditions must be met for a country to be considered federal namely that “(1) two levels of government rule the same land and people; (2) each level has at least one area of jurisdiction in which it is autonomous; and (3) there is some guarantee (even though merely a statement in the constitution) of the autonomy of each government in its own sphere”. Federalism, not unlike bicameralism, was designed to be a divided government and in the process create a series of checks on authority, ensure a diversity of representation and protect minority and sectional interests. Unitary systems of government have only one constitutional level of government; though there are invariably local governments (such as city governments) established and assigned delegated authority to deliver certain services by the central government.

proportional representation, the allotment of six senators for each province, and the fixing of terms of eight years, staggered to ensure the election of only half the Senate at a time. Over the next 132 years, there have been repeated attempts to alter this second chamber in Canada's bicameral<sup>3</sup> parliament, with many proposals repeating elements from this attempt at institutional change – a 'reform' bandwagon that reached a fevered pitch by the end of the 20th Century with 28 serious initiatives to reform the Senate including a country-wide referendum on a constitutional amendment endorsed by Conservative Prime Minister Brian Mulroney and all the provincial premiers (see Stilborn 2003). Yet, the Canadian Senate remains virtually unchanged from the design agreed to by the Fathers of Confederation at Quebec City in 1864 (Hicks 2007; Seidle 1991; Ajzenstat 2003).

The most common explanation among Canadian scholars for the lack of change is the restraint imposed by the Canadian *Constitution* (Smith 2003a, 2003b; Forsey 1984; Mallory 1984; Franks 1987). To get around this constraint, the Conservative government of Prime Minister Stephen Harper proposed legislation aimed at incremental changes within what the government claims is the purview of the federal parliament. The two pieces of legislation were first introduced in 2006 as the 'Senate Appointment Consultations Bill' and the 'Senate Tenure Bill', which were to have the combined intended effect of transitioning the Canadian Senate to an elected chamber using single transferable voting with eight year terms (see Hicks et Blais 2008).<sup>4</sup> Neither of these made it through parliament, even though the government bills were reintroduced the following session with several changes that had been proposed in the Senate. At the end of the next parliament, in 2010, the government again introduced two reform bills, and this time the new 'Senatorial Selection Bill' only proposed giving the provinces the option to hold elections for senators to be appointed from their province. Again these bills did not make it through parliament.

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<sup>3</sup> 'Bicameral' legislatures are simply those which have two distinct assemblies within a single legislature – though Trivelli (1975) offers a more extensive definition which includes separate sessions for each assembly, separate vote outcomes, and different membership.

<sup>4</sup> One of the Prime Minister's advisors, Senator Hugh Segal, also introduced a motion in the second chamber (Senate Motion No. 6, 2007) which would have in the alternative held a country-wide referendum on abolition. It did not proceed.

They have since been combined into a single ‘Senate Reform Bill’ that is currently before parliament. It would allow provinces to hold elections and change senators’ terms to nine years. The government of Quebec, Canada’s only predominantly francophone province, has stated repeatedly that it will challenge any legislation that alters the Senate in court if it does make it through parliament.

Constitutional rules for changing institutions of governance do generally require higher levels of concurrence than what is required for ordinary pieces of legislation, but this is not unique to Canada and they are rarely prohibitive. Additionally, it was only in 1980 that the federal government was told by the supreme court of Canada in a reference related to that government’s attempt to change the Senate (*Re: Upper House*) that there were constraints on the federal parliament’s capacity to alter the Canadian senate. That Liberal government of Prime Minister Pierre Trudeau was under the impression that the federal parliament had the capacity to change this body on its own; and previous governments had done so unimpeded when they added additional senators for new provinces in the federation or when it imposed mandatory age 75 retirement on senators. Clearly, the Canadian *Constitution* cannot be the primary explanation for why institutional change has not occurred in Canada.

The other explanation in the older Canadian literature for why its Senate had not been changed was that the upper chamber itself is able to block change (Ross 1914; MacKay 1963; Kunz 1965; Campbell 1978). But in 1982, an amending formula was put in place which set the formal constitutional rules for altering the “powers of the Senate and the method of selecting Senators”, “the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators” (*Constitution Act, 1982*, s.42) under the less onerous formula of requiring only the agreement of seven of Canada’s ten provincial legislatures plus the federal house of commons.<sup>5</sup> The Senate’s veto

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<sup>5</sup> Other institutional arrangements, such as abolition of the Senate or ending the monarchy, require all 10 provincial legislatures to concur.

on any such change would only be a temporary or ‘suspensive’ 180 day delay (*ibid.*, s.47), a clause specifically placed in the *Constitution* to allow for ‘reform’ of this institution.<sup>6</sup>

While the Canadian Senate may appear at first glance to have been impervious to change, when looked at from its institutional origin, this and other upper chambers in Canada have undergone significant changes over time. The first colonial or ‘provincial’ settlements, under both the French and the British in North America, had an appointed nominee council of officials and landed gentry to advise and assist the governor. Later an elected lower chamber was added to this and, then, in each of the British provinces of North America, the upper chamber was subsequently divided into two, thereby separating the executive and legislative function, leaving the appointed legislative council as the upper chamber in the bicameral legislature. Responsible government was later obtained in each province, which saw the executive council transformed from being a body of appointed elites who enjoyed the confidence of the governor to a body of leading elected members of the lower chamber who enjoyed the confidence of that chamber. In the provinces of Canada and Prince Edward Island, the upper chamber was successfully transitioned to election. The province of Ontario was the first to eliminate its upper chamber while Quebec’s chamber reverted to an appointed body at Confederation, which itself was a major institutional redesign in the creation of a federal country. In the provinces of Nova Scotia and Quebec, the upper chamber’s veto was reduced to a suspensive one; and abolition of the upper chambers was accomplished successively in Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Quebec. So, institutional change has occurred in Canada.

While these were the changes that have been made to the nominee councils in Canada, numerous other changes were unsuccessfully proposed. These events offer an

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<sup>6</sup> After the 180 days, the house of commons need only adopted the resolution or ‘address’ calling for the change again. Other items require the agreement of all ten provincial legislatures (see chapter 3).

opportunity to examine institutional change in terms of constraints and in terms of what factors may lead to change.<sup>7</sup>

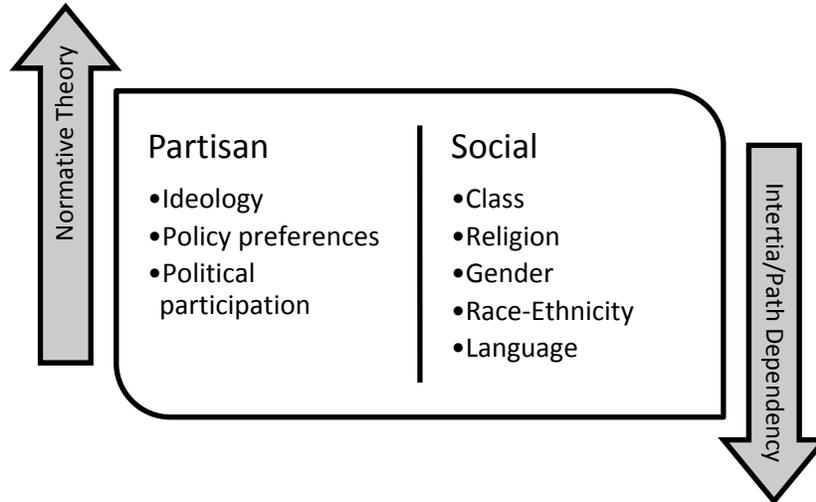
The initial hypothesis for this dissertation is that societal cleavages directly impact on institutions and thus affect change. We are interested in two types of societal cleavages, both of which can become embodied in legislative chambers through their representational function, and these we define as being either ‘partisan’ or ‘social’. Partisan cleavages emerge due to differences over ideology or policy or simply through coordinated political action aimed at public office. In the modern era this cleavage is reflected in a legislature by organized political parties, but the time period we are interested in includes the rule by a governor and elites, and the so-called era of ‘loose fish’ when political parties were emerging but as yet unstructured so membership was seen to be fluid. In each of these eras, it is believed there will be an identifiable partisan cleavage that will emerge surrounding governance at the elite level. Social cleavages, on the other hand, arise from group identity markers and form around race-ethnicity, class, religion and/or linguistic differences, whether ascriptive or constructed. Both of these cleavages, it is posited, influence elite political behaviour and will either align or be cross-cutting. Figure 1.1 models how this interaction is expected to work.

Normative theory will be advanced in support of a change to the institution of governance being advocated by any group. It is expected that inertia and path dependency will neutralize normative arguments, no matter how compelling or temporally popular they might be. What will determine the success or failure of the proposed change, it is posited, is the interaction of elite representatives on the two sides of the competing societal cleavages.

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<sup>7</sup> This dissertation is concerned with formal state ‘institutions’, specifically the deliberative bodies which have been constitutionally constructed as bodies ‘corporate and politic’ and assigned legislative or administrative responsibilities for governance. In French civil law, bodies that are able to take a collective decision and act as a single unit are referred to as a ‘personne morale’.

Figure 1.1: Societal Cleavages and Institutional Change



More specifically it is hypothesized that:

- 1) *In instances where change occurs, the partisan cleavage will have created one group that can overcome resistance to change from the other group.*
- 2) *The social cleavage is a stronger determinant of the success or failure to achieve change than the partisan cleavage. The more socially divided a society is, the harder it is to achieve institutional change.*
- 3) *When the social cleavage and the partisan cleavage are aligned, change does not occur because the 'out' and 'in' groups each have a different preference for change and each distrusts the change proposed by the other social group.*
- 4) *When the social and the partisan cleavages are cross-cleavages:*
  - a. *If change is seen to come from a social group it will be resisted as outlined in 3.*
  - b. *When proposals for change come from only one side of the partisan cleavage, it is successful only if the group has elite representatives from both sides of the social cleavage among its leadership.*
  - c. *Change that is supported by both sides of the partisan cleavage will be the easiest to achieve.*
- 5) *The changes to institutions that will encounter the least resistance will be those that do not significantly alter the balance between social group representation in either (i) the institution or (ii) the overall structure of governance.*

- 6) *A change to the balance in social group representation in an institution or in the overall structure of governance will only be possible if a shift in the social cleavage has occurred that either (i) reduces or eliminates the social group's perceived need for representation or (ii) replaces the cleavage with another as the dominant social cleavage in that polity.*

As noted, partisan cleavages are the result of the fluid and overlapping fault-lines of ideology, policy preferences and political participation, and each can be expected to drive demands for institutional change.

The period covered by this research, from the time of the royalist French and British regimes up until the abolition of upper chambers in each of Canada's provinces in the 20<sup>th</sup> century, allows for an examination of institutional change in both non-democratic and democratic environments. The methodological approach is to process trace each change: changes that were successful and seriously considered proposals that were unsuccessful. It is by placing these changes in their temporal and societal context that the interaction of social and partisan forces can be examined. The research is then reported in this dissertation as an historical narrative which is used to test the propositions advanced in the original hypotheses.

## **I. Institutional Change**

With the dominance by behaviouralism of political science beginning in the 1960s, the study of institutions fell out of favour. It has begun to see a rebirth, beginning in economics (North 1990). This 'new institutionalism' emerged in opposition to the focus on individual action and choice (March et Olsen 2006).

New institutionalism has not been focused on institutional change, but rather on how much institutions resemble each other, something surprising given their differing histories and contexts around the world and across time (DiMaggio et Powell 1983; Meyer et Rowan 1977; Meyer, Ramirez, Rubinson et Boli-Bennett 1977).

There is a "superstability to institutions because they are woven into an historical and normative fabric" (Rhodes, Binder et Rockman 2006, xvi). They generate social rules

and norms (North 1990). And proposals for institutional change will provoke resistance, even in the face of a rational level of objective knowledge, because they are seen to violate these strongly held norms. As Halal puts it:

“Institutional concepts are so deeply engrained in the prevailing social culture that they seem inviolate, accepted as matters of faith, the only reasonable way the world is presumed able to function effectively. Institutional rules are the sacred cows of society” (Halal 2009).

The natural resistance of institutions to change has resulted in such metaphors as ‘immortal’ (Kaufman 1976), ‘frozen’ (Lipset et Rokkan 1967) and the permanent and imperceptibly changing ‘coral reef’ (Sait 1938). Institutions endure because they become taken for granted through repeated use (Berger et Luckmann 1967; DiMaggio et Powell 1991) or are seen as ‘legitimate’ through the endorsement of authoritative individuals and organizations (Meyer et Rowan 1977). Path dependency (Thelen 1999; Pierson et Skocpol 2002) and inertia (Williamson 1985, 1975; North 1990, 1994) further restrain change.

This focus on stability and constraint make the insights offered by this literature poorly suited to explain institutional change (North 1981; Orren et Skowronek 1994; Powell 1991). For the political sociologist, change is understood to be the result of an exogenous shock that disrupts the constraining all-powerful state (Krasner 1984; Thelen et Steinmo 1992). From the rational choice perspective, institutional change is expected to be driven by actors who want to maximize their own benefits in that institution or in a larger game (Tsebelis 1990) or a governing party which see its future success threatened (Boix 1999; Rokkan 1970). Normative ideas can also be expected to have resonance across borders leading to transnational movements for change (Hall 1993; Blais, Dobrzynska et Indridason 2004).

Even in the management literature, where institutional studies have experienced the greatest growth, it is generally acknowledged that “neo-institutional theory is weak in analyzing the *internal* dynamics of organizational change that links organizational context and *intraorganizational* dynamics” (Greenwood et Hinings 1996, 1023). The neo-institutional theory across disciplines is helpful in pointing to the distinction between

convergent and radical change, and by signalling the contextual dynamics that precede the need for change (Dougherty 1994, 108; Leblebici, Salancik, Copay et King 1991; Oliver 1992). Convergent change is the fine tuning of an existing orientation and will happen slowly and gradually (Pettigrew 1985, 1987 #683). Radical change happens swiftly and impacts on virtually all aspects of an organization (Tushman, Newman et Romanelli 1986).

The management literature offers some support for this particular study is in its growing interest in how cultures restrain institutional variation. There is an emerging belief that the reason institutions are so similar by country is because of cultural habits. The population ecologists tend to discount the possibility of radical change due to environmental determinism (e.g. Hannan et Freeman 1989). They do not consider the impact of a socially divided society on institutional design, but it is a logical extension of this reasoning that change should be easier (and not harder) in a society with a social cleavage.

Strategic choice theorists originally focussed on the role senior actors in an institution played in bringing about change (e.g. Child 1972; Tichy 1983; Tichy et Devanna 1986). This has been replaced by a focus on choice and context (Hrebiniak et Joyce 1985; Ven et Poole 1988). Yet, in spite of pleas for a theoretical understanding of how contextual pressures are interpreted and responded to by organizational actors (Ven et Poole 1988; Hrebiniak et Joyce 1985; Pettigrew 1985), they have “not been successful” (Ven et Poole 1988, 327) and are of “limited help” (Ledford, Mohrman et Lawler 1989, 4).

While institutional change at the level of formal institutions of governance is a still largely under-theorized field, the Marxist perspective on institutional change had long suggested a connection between social cleavages and institutional change. Capitalism’s need for workers to produce wealth for the bourgeoisie, which benefits from these workers due to the protection afforded by the state, would lead to the workers altering the state institutions through revolution. Similarly, identity classifications imposed by empires in colonial settings, but equally by the creation of administrative units in federations, construct ‘minorities’ and ‘nations’ that challenge the institutional structures of the empire or state

(Anderson 1983; Brubaker 1996). From the Marxist perspective, the social cleavage created by state control will create an ‘out’ group that will drive change, though it is significant that change is expected to be achieved through revolution given resistance to change by the ‘in’ group.

## **II. Societal Cleavages**

The word cleavage has its origins in mineralogy, where a crystallized substance can be split along definite planes, and in geology, where fissures in rocks develop perpendicular to stress in the earth’s surface. While the term is often used loosely in politics to describe any political division in society, whether it be between groups or within groups, the use of the word in this dissertation is specific to the dominant division in a polity that forms around partisan identity and social identity.

Groups are constructs and, as individuals, people form identities in conjunction with other citizens from any number of group boundaries, which are imposed upon them by others or adopted by themselves, and reflect anything from shared physical characteristics to similar beliefs (Anderson 1983). As a result, individuals are often members of a number of groups. Cleavages result when individuals form political divisions large enough to create in-groups and out-groups.

Lipset and Rokkan, in their seminal work on the emergence of political parties, begin with the following observation about a sociological approach to political behavior:

“It has often been suggested that systems will come under much heavier strain if the main lines of cleavage are over morals and the nature of human destiny than if they concern such mundane and negotiable matters as the prices of commodities, the rights of debtors and creditors, wages and profits, and the ownership of property. However, this does not take us very far; what we want to know is when the one type of cleavage will prove more salient than the other, what kind of alliances they have produced and what consequences these constellations of forces have had for consensus-building within the nation-state.” (Lipset et Rokkan 1967)

By searching out that single dominant social cleavage, they concluded that there were four cleavages that could explain the emergence of political parties in the post-reformation and post-industrial revolution period in Western Europe: owner/worker, church/state, urban/rural and centre/periphery.

Cleavages are not only based on sociological attributes, they can also form around long-standing issues in a political system (Dahl 1966). Thus the very nature of governance will form cleavages. These partisan cleavages will shift over time as the issues change and political parties realign (Butler et Stokes 1974; Sundquist 1973; Burnham 1970).

In the voting behaviour literature, the idea that social identity can influence individual support for political parties has a long tradition (Lazarsfeld, Berelson et Gaudet 1944; Berelson, Lazarsfeld et McPhee 1954; Alford 1967; Butler et Stokes 1974; Hout, Manza et Brooks 1999). Class, gender, age, race and religion all have been found to affect voting. Social connections lead to different concerns and these concerns, in turn, are mediated by both social and political attitudes (Vanneman 1980; Schwartz et Huisman 1995; Brint 1984; Kelley et Evans 1995; Weakliem 1991, 1993 #625). Shifting values can render social cleavages less relevant (Inglehart 1987, 1990, 1997).

Using both a psychological and sociological approach to voting behaviour, behaviouralist scholars argue that social identity is at one end of a ‘tunnel of causality’ with party identification at the other end (Campbell, Converse, Miller et Stokes 1960). Though they acknowledge that depending on the question a researcher is exploring and the circumstance that the voter finds herself in, either sociological or psychological factors can be used to explain vote choice. This funnel idea has been developed by Miller and Shanks (1982, 1996; 1990, 1991) into what Sniderman *et al.* (1990, 121) call a “consensual approach” to the study of voting. A causal chain of variables are organized in temporal order with personal characteristics at the beginning, partisan factors along the chain and vote choice at the end.<sup>8</sup>

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<sup>8</sup> This approach has been criticized on the grounds that voters have different cognitive abilities and access to political information, so where items appear on the causal chain can have significant theoretical and

At the elite level, social groups will come to be represented variously by some formal mechanism or because a person in public office comes to be identified by a group as representing them, either because they share the characteristics of the group or because they advance the group's interests within the institution (Pitkin 1967; Pennock et Chapman 1968; Schwartz 1988; Rehfeld 2006). Thus members of governing bodies, even appointed ones, can come to reflect the social cleavages in a society, even if there is no formal mechanism for group representation.

That more than one cleavage can impact on politics at the same time and in competition was first noted by Rokkan (1967), in the same book where he and Lipset identified the dominant cleavage which impacted on national political party formation in Western Europe. More recently, the idea of 'cross-cutting cleavages' has been used to analyse shifts in party politics (Burnham 1970; McKay 1983). That cleavages are in competition can also be found in Marx (1970), who famously argued that religion needed to be abolished because it competed with ideology, dismissing the former as illusory.<sup>9</sup>

### **III. Conceptualizing Institutional Change**

This dissertation is interested in changes to formal institutions of governance. The latter have rules that must be followed in order to alter their structure. The rules, which govern the structure, are almost always referred to as 'constitutional', though it will vary by society whether there is a written constitution that formally sets an amending formula or unwritten conventions.<sup>10</sup> These constitutional constraints often set the bar for decision making for institutional change higher than that used for ordinary legislation and are likely unique in some way to each country based on its history and its social contract. While

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methodological consequences (Sniderman, Griffin et Glaser 1990; Sniderman, Brody et Tetlock 1991; Rivers 1991; Achen 1992).

<sup>9</sup> Organized religion has equally vilified ideology and has frequently been in direct competition with secular ideas and policies (Dawkins 2006).

<sup>10</sup> A written constitution, which may include a formal constitutional document, and judicial interpretation of that document form part of the constitution. As for conventions, these are usually not subject to any judicial interpretation, though in Canada the courts have been asked to identify their existence through the somewhat unique mechanism of a 'reference' (see Chapter 3).

these rules may include the population through a mechanism such as a referendum, the exercise will be driven by elites.<sup>11</sup>

The elites, who most directly control the process, are members of the various legislative and executive bodies; in a federation there will be actors at both the federal and the provincial level often involved, and in an empire there is a similar multilevel process that will be involved in making changes. Given the period being examined, the bodies which control the change and the rules will vary by time. Our unit of analysis is therefore our cases.

The theory to be examined in this dissertation is that societal cleavages create groups that drive and restrain institutional change. While it is accepted that inertia and the formal decision rules established for changing that institution, including but not limited to a constitution, will naturally constrain change, these are posited to be passive forces. Societal cleavages are conceived of as active forces.

Constitutional and institutional arrangements bound second chambers and operate on two levels, as they in the first instance set specific rules for chamber design and alteration, and in the second they are themselves the objects of change. Altering a second chamber will mean altering the constitution and the institutional arrangements. Institutional arrangements include, but are not limited to, bicameral and federal relationships and structures.

It is assumed that there will always be agitation for change emerging from transnational ideas for system design and from home-grown ‘reform’ initiatives aimed at

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<sup>11</sup> There are instances where referendum can be initiated by the public itself and the legislature is entirely removed from the decision making process by the constitution, but even in these instances it will be an elite-driven exercise as administrative hurdles, such as the collection of signatures and the financing and management of a campaign, require direction and structure. These instances are by definition driven by partisan cleavages. Additionally, in all cases, elites, who are members of an institution, are likely to offer opinion on the merits of change that impact on their institution, which for voters, and some members of other institutions involved in the approval process, will be seen as informed advice or heuristics. The rules for constitutional change are different in each instance, so the use of referenda or an institution only having a suspensive veto over its own alteration are simply variations on the rules and thus fall under the rubric of the constitutional and institutional arrangements, which bound the institution and its change.

the institution in question, but as these require a critical mass of support for adoption they are naturally offset by inertia. What will be operating within a second chamber are any number of possible partisan and social relationships and the exact ones will be the result of this chamber's representational structure as determined by the constitutional and institutional arrangements. If a social cleavage is reflected in the representational role for this chamber it is expected that this will be an institution which produces the greatest resistance to its own change.

This approach to cleavages is distinct from the approach used by other scholars to study cleavages (e.g. Jenkins 1983; Alber 1995; Hout, Manza et Brooks 1999). Our interest is not in how cleavages emerge and operate at the societal level (membership, boundaries, etc.), but in how these cleavages are reflected in the institution in question and how they may be restraining or driving actors.

The third difference with other scholarship is that we do not require either a connection between political organization and the group or an awareness of group identity at the societal level. What matters is that there be an acceptance of the existence and relevance of a social cleavage by the elites, and while it is expected that elites will have some sensitivity to actual cleavages in their society, this need not be accurate or informed by particular events. It is the salience of the social cleavage and thus the need for the institution to represent the out-group(s) which is significant as it will dictate an actor's individual and collective agency on behalf or in opposition to that group.

It is not important that a second chamber has performed its function as a chamber in which sectional interests are protected – a point of discussion with respect to senate reform in a number of countries – but simply that the sectional interests that were identified as worthy of formal representation continue to be relevant to the elites who control the mechanisms for institutional change.

The relevance of cleavages is expected to vary by time and by polity. For example, class may be seen to have less significance now as a social group identifier in many

industrialized societies, but in a developing society it may just be now emerging as a relevant cleavage. Shifts may also happen to diminish one cleavage, such as race and religion, only to see it replaced with a parallel cleavage, such as language and culture, using almost identical group identity boundaries, as was the case in Quebec.

The existence of a social cleavage will result in representational demands within a legislature and are often the reason federalism, bicameralism and constitutionalism<sup>12</sup>, jointly or severally, are adopted by some polities. It is also evident that second chambers, as the bodies least likely to be predicated on population proportionality are the legislative chambers in which these cleavages are most likely to obtain formal or informal representation. Therefore, once a cleavage is accommodated and certain groups are identified as worthy of representation in an upper chamber is likely more difficult to alter that chamber unless either there is a shift in the relative significance of the groups or alternately, the cleavage persists but the changes proposed do not substantively alter the representational balance. No group, even an in-group, will ever be entirely satisfied with an institution.<sup>13</sup> Nevertheless, ‘out-groups’ are expected to be the most desirous of change. So change will be proposed by ‘out’ social groups. But it is expected that this will be opposed by ‘in’ social groups out of a lack of willingness to share power and the spoils that go with political influence. It is also expected that each social group will mistrust the motives of the other when changes are proposed.

In the absence of social groups opposing change, change will happen along the direction of the partisan cleavages in society, namely ideology, policy preferences or

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<sup>12</sup> ‘Constitutionalism’ in the modern sense refers to the institutional restraints on power, which usually require a written constitution (though McIlwain 1947 illustrates a number of other historic and less formal dimensions of restraint of which the more modern model can be seen to include separation of powers, electoral accountability and a system of checks and balances). It was the Philadelphia Conference of 1787 which resulted in the combination of bicameralism, constitutionalism and federalism for the purposes of governance for the uniting provinces, re-labelled states, of America.

<sup>13</sup> In-groups, and even some out-groups, might prefer the *status quo* because change poses a large number of unknowns and the current configuration has provided them with some success, but even in this conceptualization the argument is that these groups would prefer change but are opting for a less desirable outcome based on the available win-set (Tsebelis 2002).

political participation. Ideology will pressure for institutional change which can facilitate a set of outcomes which reflect that group's advocates' conceptualization of how society should function. Policy preferences will encourage actors to favour configurations which permit the implementation and protection of specific policies. Membership in a loose political organization or a more formal political party will orient the actors towards an institutional design which favours their organization's or party's control of that institution and of governmental power more generally. The three dimensions of partisan cleavages are not always clearly delineated, given the fact that many actors are influenced by more than one partisan interest and the fact that these preferences will often work in tandem. Nevertheless, they do offer various dimensions upon which to examine institutional change.

#### **IV. Cases**

The cases studied in this dissertation are the nominee councils of the royalist French and British regimes. By process tracing changes made to them up until the abolition of the legislative councils in each of Canada's provinces, we have eight separate appointed chambers which underwent a half dozen changes each. The French province of Canada became the province of Quebec under the British. It was then divided into Upper Canada and Lower Canada, which was subsequently reunited as the province of Canada in 1840. At Confederation in 1867, a federal legislature was created and Upper Canada or Canada West became Ontario and Lower Canada or Canada East became Quebec. Newfoundland, Nova Scotia, New Brunswick, Prince Edward Island and Manitoba provide the additional provincial nominee councils.

The first goal in theory formation through process tracing is to "identify apparent causal mechanisms and heuristic rendering of these mechanisms as potential hypothesis for future testing" (Bennett et George 1997, 5). Bennett and George argue that a single case study, especially one studied across time, offers a great deal of internal data for the testing of independent variables (see also George et Bennett 2005). King, Keohane and Verba's (1994) admonition that researchers should always try to increase their 'N', even in

qualitative research, commends the examination of more than one province in this fashion. Studying eight councils from inception to abolition over a period of 300 years, in both undemocratic and democratic eras, has a symmetry that ensures events are not artefacts of a single era or polity, which is important for this specific research inquiry given that societal cleavages are the independent variable.

There are three schools of thought concerning institutional development in the colonies of the British empire, all of which conceive of change being imposed on a colony rather than obtained locally. The first is legalistic and argues that the local institutions were the product of British constitutional law with only small variations allowed for by law (Payne 1904; Speyer 1906; Fiddes 1926; Keith 1928, 1929, 1930, 1936; Simmons 1949; Young 1961; Lee 1967; Evatt 1967; Bell 1968; Madden et Fieldhouse 1985, 1987). This would suggest a common design for every ‘settler’ colony and a common design for every ‘ceded’ colony, and we know neither to be the case.

The second explanation is that the institutions given to a colony were the product of the prevailing model of the day at the colonial office in London (Jeffries 1938, 1972 #672; Stahl 1950; Heussler 1963; Swinfen 1970; Lloyd 1996). While this allows for variations in design, as officials adopted new models, it does not explain why changes occurred at different times in different provinces. Neither does the third explanation, political economy, which prescribes specific institutions for the colonies based on British economic interests and the need to create economically viable colonies (Wakefield 1914; Wright 1962; Winch 1965; Armitage 2000).

## **V. Overview of Dissertation**

The chapters in this dissertation that follow, reflect specific stages in the dissertation, as each period was examined chronologically and each province examined separately. Each chapter was initially written following that stage of research. The

findings of each chapter thus reflect the evolution of the original hypothesis due to the evidence observed in that set of process traces.

Following this chapter, Chapter 2 provides a review of the literature. As there is little consideration of how social cleavages may interact with institutions, the literature concerning variously social cleavages, institutionalism, colonial studies and bicameralism is reviewed. This review points to a number of voids, both in Canada's historic institutional record and in the political science discipline's approach to and understanding of institutions, particularly upper chambers.

An examination of the constitutional rules that governed Canada through the eras in question is reviewed in chapter 3. This includes a review of recent failed attempts to amend the constitution. In light of this review, the third proposition above was revised.

In Chapter 4, the institutional changes for the French province of Canada, which became the British province of Quebec is reviewed, from the 1600s to the 1791. During this period there was no partisan cleavage based on ideology or political participation, and while there were elite interests with respect to policy outcomes, these could not be seen to form a partisan cleavage. The French under British rule resisted change. From 1791 to 1840, a partisan cleavage is seen to emerge in each half of the province. In both the provinces of Lower Canada, later Quebec, and Upper Canada, later Ontario, where institutional change is seen to come from the 'out' social group, it is resisted.

In Chapter 5, the union and, thus, the united province of Canada is examined. Not surprisingly, this union resulted in shifts in the partisan cleavage and altered the social cleavage. These shifts are examined closely and their implication for institutional change from 1840 until 1867 is explored. This was a period of significant change, where responsible government emerged and the upper chamber was changed from an appointed chamber to an elected. The changes occurred when a partisan group emerged on one side of the partisan cleavage that could cross the social cleavage.

In Chapter 6, the evolution of institutions in the British provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland are examined. Each of these provinces obtained bicameralism, division of the nominee council into executive and legislative and responsible government at different times. In the case of Prince Edward Island, it transitioned to an elected upper chamber. In all provinces the group that achieved these changes was able to claim to have support from both sides of the social cleavage. In New Brunswick, however, which was divided socially between Acadians and English, there was no evidence that the ‘out’ group advocated either institutional change or for the *status quo*.

Chapter 7 deals with Confederation and reviews the shifts in the social and partisan cleavages that Confederation wrought. This provides the context for the two subsequent post-Confederation chapters. The chapter also briefly examines the creation of the Canadian Senate, which, as a continuation of developments in Chapter 5, provides further evidence in support of our claim that institutional change occurs only when a partisan group emerges to drive that change which can cross the social cleavage.

Chapter 8 examines the Canadian province of Manitoba. A principle argument in the colonial studies literature is that colonial institutions of governance were the result of British law and colonial office design, and as Manitoba was created by the Canadian government and followed the same provincial developmental trajectory from governor’s council to representative government to responsible government, this allows for an examination of these developments removed from direct British influence. Manitoba also is the first province to abolish the upper chamber. Again, change was possible when a partisan group emerged that could cross the social cleavage.

Chapter 9 examines the four provinces that joined Canada with upper chambers and abolished them: Nova Scotia, New Brunswick, Prince Edward Island and Quebec. A movement in favour of abolition began at roughly the same time in each province (and each province shared ideas in support of abolition). We find that for change to occur it is not

sufficient to have a partisan group that could cross the cleavage. It was also necessary to have a partisan debate over change. In Nova Scotia, Prince Edward Island and Quebec, it was only when the two political parties differed that change occurred. In New Brunswick, the parties agreed over change but it was only when it became an election issue that abolition occurred. What is key is that change has to become a public issue over which the government has a stake.

It should be noted that this ninth chapter fills a significant void in the historical and constitutional literature, being the first systematic examination and reporting on the abolition of upper chambers at the provincial-level in Canada.

In Chapter 10, which is the conclusion, the model hypothesized at the outset is revised based on what was found during the dissertation.

## **Chapter 2: Situating this Research**

The purpose of this chapter is to situate this study in the broader literature. As there has been little consideration of the relationship between social cleavages and institutional change, it is necessary to draw on the literature concerning variously social cleavages, institutionalism, colonial studies and bicameralism. The chapter is thus organized along those four groupings.

### **I. Social Cleavages**

Social cleavages were first posited as explanatory factors for political party development by Lipset and Rokkan (1967). They set three criteria for a cleavage to be seen to exist. First, there must be a division in the society based on demographics or socioeconomics that separates one group of people from other members of the society. Second, members of one side of the cleavage must be aware of the characteristics that bind them and they must be willing to work together in the interests of the group. Third, there must be some sort of institution available to provide organizational support to the advantage of one side of the social divide.

They grouped cleavages as either territorial or functional. The territorial cleavage defined the nation and was formed in the revolutions that swept Europe beginning in France. The functional cleavage emerged through the industrial revolution and was interest-based.

In response to the advantages each state provided to one side of the country's cleavage, political parties emerged to further the interests of the other side. Thus, in addition to the then popular Marxist identification of a class cleavage, they found three other principle cleavages that could explain the emergence of the opposition party: centre versus periphery, which stems from the conflict between the central nation building authorities and the resistance found in ethnically, linguistically and religiously distinct populations in the regions; urban versus rural, which stems from conflict between the

industrial class arising in cities and the traditional propertied class of the rural areas; and church versus government, which stems from conflict between the centralizing nation-state and the historically privileged church (Lipset et Rokkan 1967, 14).

Kriesi et al. (1995) went on to argue that these ‘traditional’ cleavages had been since joined by ‘new’ cleavages of gender, generation, peace and war, and ecology. Eckstein (1966) suggested that cleavages could be grouped into ‘segmental cleavages’, which align with sociological characteristics, ‘cultural divergence’, which in general reflects a group’s shared-world view, and ‘specific disagreements’, which align with policy. Rae and Taylor (1970) also grouped cleavages within three categories, namely: ascriptive, which includes race and ethnicity; attitudinal, which includes ideology; and behavioural, which includes membership in an organization and political participation; and argued that these in turn should be evaluated on five dimensions based on the strength of connection felt by the community and how the membership divides its relationships between the three. The three level categorization of cleavages, without the more complicated five dimensional interactions, was used effectively by Sisk (1995) in his examination of the democratic movement in South Africa. Recent interest in cleavages has been in how cleavages lead to social movement formation (Klandermans 2001).

Lipset and Rokkan (1967) found that once the parties initially formed, they became frozen, because these parties proved to have the capacity to absorb new issues within them; and Mair (1997) found that this continued through the 1980s and 1990s. The implication was that the political and the social dimensions of a society might operate independently from one another, something that did not encourage an examination by scholars of how cleavages might impact on formal institutional structures.

When Tocqueville (2000) observed the growing and irrepressible ‘tendency’ towards democracy, he noted that this will be tempered by a polity’s sociological circumstance. Hanna Pitkin (1967) illustrated how societal groups can be represented in legislatures along four distinct dimensions – formal, descriptive, substantive and symbolic

representation – something that has become central to the examination of both demands for representation and the role legislators fulfill as political actors. Lijphart (1968, 1969, 1977) has observed the existence of consociational democracies where ideological and ethnic conflicts have been resolved through elite accommodation.<sup>14</sup>

None of these scholars suggest that there is a direct connection between social cleavages and the formal institutions of governance. Lipset and Rokkan were interested in political party formation within those institutions. Lijphart is only interested in the sharing of executive authority, and even recommends that the powers of second chambers be limited since “two legislative chambers with equal, or substantially equal, powers and different compositions is not a workable arrangement” in parliamentary systems and “smaller-unit overrepresentation in the federal chamber violates the democratic principle of ‘one person, one vote’” (Lijphart 2004, 105). Interestingly, Lijphart (1977) defined Canada as a non-consociational country which had consociational elements.

There is evidence of cleavage accommodation in legislative institutions beyond political parties and cabinet power-sharing arrangements. Htun (2004), in a survey of 50 countries that officially accommodate representation based on gender, ethnicity or both, found that while it is through the political parties that gender representation is often facilitated, it is through the institutions themselves (e.g. set-aside seats or specific constitutional or electoral rules) that ethnicity most often finds participation. So it would seem logical, given the function of an upper chamber to provide an alternative representational role than the representation by population of the lower chamber, to examine the link between social cleavages and the emergence of bicameralism and the later abolition of upper chambers.

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<sup>14</sup> Lijphart’s (1977) countries of study, which he identified as consociational democracies, were the European plural societies of the Netherlands, Belgium, Switzerland and Austria.

## II. Institutionalism

The study of institutions was made less central to political science scholarship when, beginning in the 1960s, behaviouralism came to dominate the discipline. At that time, it was widely concluded that “formal laws, rules, and administrative structures did not explain actual political behavior or policy outcomes” (Thelen et Steinmo 1992, 3). The study of government institutions, constitutional issues and public law was deemed “unpalatably formalistic and old-fashioned” (Drewry 1996, 191), and it was argued that research that involved comparing and contrasting institutional configurations in different countries did not lend itself to the development of new explanatory theory (Eckstein 1963).

The pendulum has swung back and it is now virtually unanimously accepted across the social sciences that institutions matter (Thelen et Steinmo 1992), with some going so far as to declare that “we are all institutionalists now” (Pierson et Skocpol 2002, 706). Yet, while institutionalism has found a rebirth within political science, it does so often in competition with the rational actor perspective and the cultural community perspective (March et Olsen 2006). Appointed bodies of governance, which evolved in response to the addition of democratic elements, offer a unique opportunity to examine these various threads. As government institutions created by a constitution, they embody formalistic laws, rules and structures (see Drewry 1996). As ‘structured institutions’, they are subject to both exogenous constraints and endogenous behaviour, two of the threads in rational choice (see Shepsle 2006). When the history and norms of a polity become embedded into institutions, they cease being the creations of self-interested political actors and instead become independent entities that over time shape a polity by influencing actors’ preferences and identities (Rhodes, Binder et Rockman 2006, xxcv-xvi). If these appointed bodies can be used to accommodate societal cleavages, separated from the public mechanism of periodic elections, then they should be uniquely situated to examine how the three dimensions – institution, actor and cultural community – combine and interrelate.

Institutionalism from a public choice, historical and sociological perspective each offer explanations, albeit limited, as to what drives institutional change.<sup>15</sup> Change may be brought about by the rational actor who wants to maximize benefits in that institution or in a larger game (Tsebelis 1990), governing parties which see future success threatened (Boix 1999; Rokkan 1970) or paradigm shifts stemming from normative transnational ideas (Tocqueville 2000)<sup>16</sup>. These would each point to explanations for why governments might favour abolition of an upper chamber or specific selection mechanisms. Additionally, it has been noted that ‘upper chambers’, even when elected, are conservative bodies (Campbell 1978; Mastias 1999) that resist social change and possibly favour parties of the ‘right’, which would suggest that abolition might be ideologically driven.<sup>17</sup>

### **III. Colonial Institutions**

Eckstein’s (1963) suggestion that comparing institutional configurations does not lead to the development of explanatory theory was an indictment of what is now sometimes referred to as ‘old institutionalism’, and is an appropriate criticism of the colonial studies literature. But the period in time which so interested these scholars was a period of institutional change. A re-examination of this period would seem to be warranted precisely because the scholarly approach was so limited.

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<sup>15</sup> There are other approaches to institutionalism, such as constructivist institutionalism and network institutionalism, but the public choice, historical and sociological approaches offer three alternative conceptions of what might be driving and constraining change (see Rhodes, Binder et Rockman 2006).

<sup>16</sup> See, also, Hall (1993) on how transnational ideas influence public policy and Blais (2004) on how they influence electoral system choice.

<sup>17</sup> Campbell (1978) has attributed the conservative nature of the Canadian Senate to elite accommodation that is facilitated by the prime minister appointing business and political elites. This is disputed by Ross (1914) and more recently by Smith (2003a). The French Senate is not appointed but rather indirectly elected by electoral colleges based on local election results, and the clerks of the French Senate suggest that the explanation for their senate’s dominance by parties of the right is due to the seat distribution favouring rural regions (interviews, December, 2007).

## Colonial ‘Studies’

Colonial studies, which had its heyday in the 19th and early 20th Century, was preoccupied with institutional development and variation and its approach was decidedly historic and legalistic.<sup>18</sup> This literature suggests a largely consistent developmental pathway for institutions of governance after the establishment of administrative authority, and this began with the addition of elected representatives, followed by institutional control over legislation and finally the emergence of responsible government (Keith 1928, 1930). Bicameralism was the norm, and was prescribed for any colony which had self-government, though it could be abolished in “small communities, and in provinces where the business of legislation is mainly of a municipal description” as two chambers can be “cumbrous and needlessly expensive” (Todd 1880, 472), and this explanation is advanced for why smaller colonies began to use mixed councils beginning in the 20th Century (Wight 1946). While technically those variations are unicameral, they are designed to maintain the function of bicameralism, namely review and restraint by appointed councillors in counterbalance to public interest being advanced by elected assemblymen.

The composition of the colony in terms of race and ethnicity emerges in this literature as directly tied to representation in legislative councils, with federal and seemingly homogeneous societies turning to territorial representation and pluralistic societies turning to communal and corporate representation, though no explanation is given as to why this occurred.<sup>19</sup>

Given the historical and legalistic approach to the examination of institutions, the simple assumption of these scholars is that institutions of governance were designed by the

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<sup>18</sup> As colonial studies is based largely on legal interpretation, there is a continuous evolution in terminology as the British and local courts came to define ‘colony’, ‘province’, ‘dominion’, ‘territory’ and ‘possession’ . Debates over the meaning of ‘dominion’ and ‘provincial’ still drives Canadian legal and political discourse. The most interesting treatment of this topic is Snow (1902), who traces the etymology of these terms and argues that these terms were historical synonyms.

<sup>19</sup> It is in this literature that the concept of pluralism first emerges, with Furnivall identifying in India: “A plural society; a society, that is, comprising two or more elements or social orders which live, side by side, yet without mingling, in one political unit”, making it different from confederate arrangements since “the constituent elements are not segregated each within its territorial limits” (Furnivall 1939, 449).

imperial government, and while they may have made alterations in design to suit local exigencies, the more important factor in the institutions assigned to a colony was the model of the day preferred by the colonial office.

There are two exceptions in the colonial studies literature that do not suggest institutional design was the whim and wish of the imperial government. Todd (1880), a Canadian parliamentary librarian, argues that colonial second chambers are entirely the product of local direction. This absolutist view would simply on the face of it seem absurd, given the reality that institutional change had to be accomplished through an imperial mechanism. It does not explain why nominated chambers evolved into upper chambers in a bicameral legislature in every single colony in British North America, though it might explain why they did so at such different times.

Ward (1976) argues that elite demands in the colonies, elite direction in London and social agitation interacted to result in changes to colonial governance. While this unique incorporation of the society alongside elite interaction is a definite improvement over the usual colonial studies fare, using agitation as a sole mechanism to measure societal interest is limiting. It would also on the face of it appear flawed since if it was social agitation that resulted in institutional change, then the communities which had the greatest and earliest agitation should have had their institutions altered first and they did not.

Given the era of this scholarship, it is riddled with racial judgments, but even in its commitment to variously European-, Anglo- and White-superiority, and its clear belief in racial determinism, there is one interesting claim advanced concerning institutional change. Wight (1946) has the only book exclusively devoted to legislative councils in the colonies. He too uses the commissions of appointment and instructions issued to governors as his research material so, like his contemporaries, he leaves the reader with the impression that the representational structure for the second chamber was imposed on a colony. But he suggests that second chambers which include ethno-racial representation are harder to change than those where membership is based on a territorial franchise, and that while sectional and commercial interests are sometimes accommodated in second chambers, these

“divisions of which it is the constitutional expression go less deep” than race and ethnicity (*ibid.*, 86). Why this might be the case he does not posit, nor does he cite specific examples.

Armitage (2000) offers a good overview of the historic, religious, geo-political and economic factors that drove the British to empire build during the various stages of expansion. For a more detailed review of the literature surrounding the British colonial theories from 1570 to 1850, see the classic work by Knorr (1944). Of particular note is the forward to Knorr’s review, written by Canada’s Harold Innis, whose own ‘staples theory’ is the classic political economy explanation for early social and political developments in the Canadian provinces (first explored in Innis 1923, 1930, 1940).

At the heart of colonialism was the ‘mercantile’ system, a term made most famous by Adam Smith (1906), which is a system of political economy that uses restraint on imports and targeted exports to enrich the host country. This policy became government policy during the Commonwealth of Oliver Cromwell, which enacted the *Navigation Act, 1651* to prohibit foreign vessels from engaging in coastal trade. The Act required that all goods imported from the continent of Europe be carried on either an English vessel or a vessel registered in the country of origin of the goods and was aimed primarily at curtailing the activities of Dutch seafaring traders, though it made no distinction by country (Gardiner 1894).<sup>20</sup> While most legislation adopted during the Commonwealth was repealed upon restoration of the monarchy, this law was retained and extended by the *Staple Act, 1663*, which required that all colonial exports to Europe be landed through an English port before being re-exported to Europe. The *Plantation Duty Act, 1673* placed the first duties on colonial exports, established the first tax collectors in North America and required that colonial exports be sent only to England.<sup>21</sup>

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<sup>20</sup> This led to the first Anglo-Dutch War of 1652-4.

<sup>21</sup> The *Plantation Duty Act* placed a penny tax on each pound of tobacco and a five-shilling tax for every hundred weight of sugar, and while the requirement that goods only be sent to England and thus not traded

To the British, settlements overseas were in the first instance the establishment of plantations to produce material needed or desired in England, with tobacco, sugar, cotton and fish being the primary staples. This economic policy would drive British imperial policy until (i) Adam Smith's *Wealth of Nations* led to a growing belief among business interests in the merits of a laissez-faire free market and (ii) dissatisfaction among British citizens with long and expensive wars increased. This two pronged challenge undermined mercantilism as the cornerstone of British colonial policy.

In terms of institutional design for the colonies, the most significant contribution is J.S. Mill's *Considerations on Representative Government* (1865). For Mill there are two purposes of government: it must improve the virtue and intelligence of the citizens and it must promote the common good. Governments can be judged on the impact they have on the individual. Little attention is usually paid to Mill's first point: improving the citizen. As Wilff (1996, 194) explains: "One major theme of modern liberalism is that the moral welfare of the citizens is none of the government's business", so the relevance of Mill's writing to modern political philosophy centres on his normative arguments on the government's obligations to its citizens, the benefits of democracy over good despotism in terms of both government services and quality of life for the citizens, and why people flourish in conditions of independence. These, and the idea that each branch of government – civil, penal, judicial, financial or economic – has its own standards of success and failure, have commended his writing to students of modern institutional design.

But it is Mill's thinking on colonial institutional design that is most significant for our purposes. It reflects the normative ideas that came to dominate the Imperial government in the United Kingdom and it reflects the thinking behind the colonial studies scholarship of the 19<sup>th</sup> and 20<sup>th</sup> century. In terms of colonial development, Mill argues that representative government, where the local population chooses representatives that can advise the government, is the best mechanism for developing a polity. He provides

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between colonies was rarely enforced, objection to the principle behind the law led to the first tax rebellion in North America, known as the Culpeper Rebellion (Lovejoy 1987).

guidelines for how governors can effectively spread representative government through imperial tutelage. The premise that is behind Mill's colonial model of representative government is the notion that peoples are situated along an index of civilization evolution. This was a widely held belief among enlightenment scholars, in spite of their beliefs in liberty and individualism.

Mill believed that institutions and practices can reshape local societies; that they first needed to develop the tools to participate in representative government and join modern civilization. The model of government that Mill recommends for a colony is a 'government of leading strings'. This refers to the apparatus that was used at the time to teach children to walk, which involved support straps to prevent the child from falling while it learned to walk on its own. Thus representative government in a colony should have an appointed governor to manage the colony's affairs and oversee the work of officials, but also an elected assembly so that people from that society could participate in their own governance. From Mill's perspective, participation was essential because: "a person has nothing to do for his country and he will not care for it" (1865, 204). Institutions could be tools to help 'civilize' a society.

Wakefield's *A View on the Art of Colonization* (1914) equally argued for the need for representative government in a colony, though he did so from a political economy perspective.<sup>22</sup> Wakefield concluded that cheap available labour was key to a colony's success and that cheap land was the reason New South Wales in Australia had been an economic failure. People would not work for wages if they could obtain land cheaply and then work for themselves. When land was cheap there would be a shortage of labour and capitalists could not employ their money profitably.

In looking at the United States, Wakefield concluded that Americans were not progressing in the 'art of living' because they had so much land. While their numbers were steadily increasing, the population merely dispersed across North America. Key to an

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<sup>22</sup> Wakefield's ideas were first advanced in *A letter from Sydney*, published anonymously in 1829, following the failure of the Swan River settlement in New South Wales, Australia.

improved quality of life, which is again tied into the enlightenment belief that civilization is evolutionary, was concentrated settlement.

To attract this settlement, land needed to be priced, not based on supply and demand but artificially, so as to make it affordable for financially solvent immigrants intent on improving their station in life for whom land was unavailable or unobtainable in the British Isles, yet not so cheap that it would be available to all who immigrated to the colony. The first immigrant landed population would form the colonial elite and would be entitled to elect their own representative assembly, which in turn could levy local taxes so as to finance public works projects for the colony. Representative government was an incentive to attract settlers and the working poor, who lacked such in Britain.

There needed to be a pool of poor immigrants who would work the land owned by capitalists and the propertied class for wages. They, in turn, would do so with the belief that their life would be better in the new territory and in the hope of acquiring enough money to purchase land themselves in the future and be socially mobile. The pool of working poor was necessary to attract sufficient capital to make the local economy sustainable.<sup>23</sup>

Marx in *Das Capital* (1967, 839) rightly noted that Wakefield's political economy model for colonial development was not new, nor uniquely colonial, but simply recognition of "the truth as to the condition of capitalist production in the mother-country". Marx's belief was that all capitalist societies structure themselves similarly so as to enforce capitalism, maintain the bourgeoisie and reproduce themselves. Reproducing themselves is why colonial governments and societies mimic their imperial parent.

Another possibility is that there is an evolutionary nature for British institutional design. This becomes apparent to any Canadian student of responsible government who reads Roberts' *The Growth of Responsible Government in Stuart England* (1966). The

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<sup>23</sup> Wakefield's pricing structure informed the marketing perspectives offered by the Canada Company for land in Upper Canada beginning in 1825, by the New Brunswick and Nova Scotia Land Company and the British American Land Company for the Eastern Townships of Lower Canada beginning in 1834, and by the Hudson's Bay Company for Vancouver Island in 1849.

executive council of Queen Elizabeth was akin to the governments under the British governors in the era of representative government. Lord Burghley, who as the leading member of Elizabeth's council sitting in the British parliament, could have been prime minister and was frequently questioned about his actions, but was clearly not since he would use the queen's commands to justify those actions. This is in contrast to Sir Robert Walpole under George I who could not hide behind the king's commands. Walpole had to answer for his conduct to parliament and was subject to criticism, censure and impeachment. According to Roberts, this was the birth of responsible government in England, as to gain office and stay in office, Walpole needed the confidence of parliament, and not just the king. In England, anyway, responsible government arose because of a change in the attitude of parliament more than a change in the attitude of the governor or the king.

### **Councils and Responsible Government**

The term 'responsible government' is now widely used to refer to a political system in which the government is responsible to the electorate, but for Canada and other British parliamentary systems it has a more specific meaning. It refers to the system of government modelled on the parliament at Westminster wherein members of the executive council or cabinet are chosen from and collectively responsible to the elected members of the legislature. They are entitled to govern only so long as they enjoy the confidence of the lower chamber. The term in Canada first emerged in 1828 in the debates over altering the colonial representative government system, and was first advocated by Robert Baldwin and William Baldwin. In these debates, and throughout the ones to follow in Canada, two major competing concepts of representation were being advanced, that espoused by Edmund Burke and that espoused by James Madison.

Burke in *Reflections on the Revolution in France* (1790), originally published in 1790, argues that a legislature should not be a collection of representatives or, as he put it, "is not a congress of ambassadors from different and hostile interests, which interest each

must maintain, as an agent and advocate, against other agents and advocates". Rather, legislators should be trustees and parliament should be a deliberative assembly of "one nation, with one interest, that of the whole" (Burke 1968). This concept of a trustee requires representatives to follow their own judgment about the proper course of action.

James Madison in *The Federalist Papers* (Madison 1999), published originally between 1787 and 1788, argued for a delegate conception of representation. Delegates are expected to consult with and then to follow their constituent's preferences. *The Federalist Papers*, which is a collection of newspaper articles written under the pen-name *Publius* by Madison, Alexander Hamilton and Thomas Jefferson were a defence of the institutions chosen for the proposed United States of America, including an appointed upper chamber. Collectively they set forth the political theory behind the republic and federalism.

The first substantive written treatise on the merits of responsible government for Canada is found in Lord Durham's *Report on the Affairs of British North America* (1912b), prepared for the British government following the rebellions in the two Canada's and published in 1839. Durham uses the term 'responsible government' in its broader meaning, applying it equally to the United States' republican system, which he points out Canadians could look to with envy, as well to the British parliamentary system. He recommends the two provinces of Upper and Lower Canada be united and given the British model of responsible government wherein the local executive council, chosen from the leadership of the legislature, would be accountable to that legislature and would have complete control of the executive branch of government when it comes to 'local' matters.

From the perspective of British constitutional law (Keith 1930, 1928), the crown had the right to establish government in a territory, but the inhabitants could be legislated for and taxed only by a legislature in which they were represented or by the British parliament itself. In conquered colonies, the crown might legislate as it pleased, though once colonies were granted an assembly, only the British parliament could take that institution away. Also under British constitutional law, a colony could never be given

responsible government since the supremacy of the British parliament and the requirement that all government officials be responsible to that parliament prevented such a change.

That change that did happen was so significant that this development is featured prominently in every book on Canadian history, the constitution and Canadian political institutions of governance. But because colonial institutions are conceived of as having been granted by the British and because of the centrality of British constitutional law, the constitutional studies literature credits the change with an alteration in legal interpretation (Oliver 2005) or the triumph of pragmatism over law (Kennedy 1922). The historical literature focuses on the events of the moment and the role played by leading historical figures on both sides of the Atlantic in obtaining the ‘grant’ of responsible government (Creighton 1965).

A colony in the parlance of sovereignty was a province of the crown. In the first instance the provincial government took the form of a provincial governor who would be assisted by a nominee council. An elected assembly would be added at some point, and the council and assembly would act as a bicameral legislature for the purposes of enacting local laws and ordinances. From this point on the colony is said to have representative government. At some point the nominee council would be split into two, an executive council and a legislative council, with the later having the legislative function in the bicameral legislature. Responsible government would at some point be ‘granted’ and the governor would appoint as members of the executive council those persons who had the confidence of the assembly and these individuals would be accountable to the legislature for the government of the province. Eventually, each legislative council would come to be abolished.

While the ‘standard developmental trajectory’ for institutions in territories under British control might be explained by the historical events in the moment or by the shift in the British constitution and imperial policy, similar changes occurred elsewhere. Not only had responsible government occurred in England a century and a half before, but the growing dominance of the lower house and the widening of the franchise was

simultaneously occurring there (Ward 1976), and in some respects these developments in England lagged behind the colonies (Moore 1997). Second chamber configuration varied by colony, and counter to Keith and the theory of bicameralism discussed below, Todd (1880, 473) argues that the use of either election or appointment was “not based upon any definite or abstract principle, but is simply owing to the prevailing tone of popular opinion in the particular colony, to which upon this question the imperial government has invariably deferred”.

Formally, these changes are the result of commissions and instructions given to governors, the originals of which are in the National Archives in the United Kingdom. The Canadian parliament has at various points in its history ordered the production of some of these documents and despatches between the governors and the colonial secretary and when it has, they are printed as parliamentary sessional papers. Several of these sessional papers were subsequently published by Arthur G. Doughty, who as dominion archivist had been tasked by the Canadian parliament to assemble them; and he carried on this practice of compiling and publishing them for subsequent years on his own. Significant constitutional papers relating to Canada for the years 1759 to 1791 are found in Shortt and Doughty (1907), for 1791 to 1818 in Doughty and McArthur (1914), and for 1819 to 1826 in Doughty and Storey (1935). Kennedy (1930) followed this tradition and published a consolidated set of documents relating to the Canadian constitution for 1713 to 1929.

The first specific study of the development of responsible government in the province of Canada is Stephen Leacock's *Baldwin, Lafontaine, Hincks: Responsible Government* (1907), part of the 'Makers of Canada' series of biographies. It systematically chronicles the electoral and legislative politics within which these three men worked to wrestle decision making away from the governors. It is rich with the detail of provincial politics, though offers no insight beyond the activism of the local politicians in the face of activist governors who ultimately concluded, along with the parent government in London, that representative government was unmanageable and so accepted the change.

As he was compiling the instructions and despatches he found most relevant to Canada's constitutional evolution, Kennedy (1922) wrote *The Constitution of Canada: An Introduction to its Development and Law*. This is the first book that process traces institutional change for all the provinces of Canada. As it is the result of compiling correspondence between governors and British colonial officials when changes were made, the story is one of normative argument and benevolent concession. While it has some societal context, with discussion of the political issues upon which each legislature grappled and campaigned on, the picture that emerges is one of legal developments as local elites navigate British parliamentary sovereignty and imperial interest in making a case for why specific institutional changes should be granted by the imperial government.

Livingston's *Responsible Government in Nova Scotia* (1930) is a more developed examination of the acquisition of responsible government in that province. Livingston argues that Nova Scotia was the laboratory in which the principles and practices that would later be applied to other colonies, and then to the empire, arose and were tested. The normative ideas of Joseph Howe are at the heart of this contention and Livingston shows how the political parties, if one can call them such in this era, in both the colony and in Great Britain, interacted in making this change at both ends. While responsible government is the product of elite interaction in this analysis, the societal context that is noteworthy is a rural-urban cleavage that pits the upper chamber against the lower over this change.<sup>24</sup>

From these initial examinations, responsible government would remain central in all Canadian histories. But they equally fail to consider why responsible government developed in the same way in each province and yet did so at different times. It is simply taken for granted that this was the obvious system for each of Britain's provinces, given their existence under British rule, and the variations in times are simply reported as local historical artefacts. The general conclusion of the literature is summed up by Massicotte

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<sup>24</sup> He would follow this thesis of Nova Scotia having set the normative theory and practical example for responsible government in an examination of Prince Edward Island (Livingston 1931).

and Seidle (1998) who write: “Responsible government was born of a combination of democratic aspirations tempered by loyalty to the Crown and the new attitude of an Empire resigned to losing its absolute powers”.

While responsible government might be the most studied and recounted aspect of this dissertation, and is the one area where institutional change has been examined by many others, it is absent of insight as to how and why change might occur beyond this localized setting and time. The fact that it emerged at different times and in England a century and a half earlier is also ignored, which would suggest that it merits re-examination.

#### **IV. Bicameralism**

As Uhr (2006, 474) notes “bicameralism is surprisingly under-researched and is quite under-theorized”. Currently “two-thirds of democratic national legislatures are bicameral” (Uhr 2006, 477) and while federal countries only account for one-third of bicameral systems in the world (Patterson et Mughan 1999b, 10), the “model of bicameral federalism spread so widely that today all federal countries have bicameral legislatures” (Tsebelis et Money 1997, 6).<sup>25</sup>

As second chambers find their genesis in the writings on mixed government by Plato and Aristotle of ancient Greece and Cicero of Rome (Tsebelis et Money 1997; Patterson et Mughan 1999b), and found their way into the modern era through the emergence of ‘estates’ within feudal Europe (Marriott 1910; Temperley 1910), with the progenitors of the 18th century bicameral model being the colonially minded British (Wight 1946; Wood 1993), some countries have expended great energy considering or responding

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<sup>25</sup> There are four small countries which are exceptions to this rule; though the number and the countries vary based on when and how the list of federations is generated. Tsebelis and Money (Tsebelis et Money 1997, fn 8) used the *Europa Yearbook* (Europa Yearbook: A World Survey 1994) which has two minor exceptions to bicameral federations, namely the Federated States of Micronesia and the United Arab Emirates; Watts (Watts 1996, 84) identifies the exceptions as the U.A.E. and Ethiopia; Massicotte (2001) identifies St Kitts and Nevis, Micronesia and Venezuela; and Hicks and Blais report four (2008), with Comoros added to the ones just mentioned. All are small countries and can be seen as exceptions to the rule. At the lower administrative units level in federal countries unicameralism is the norm, with the exceptions of the United States and Australia where all but one state legislature in each of these countries is bicameral.

to agitation for ‘reform’ due to the chamber’s strong and continued association with ideas such as aristocracy, protection of property and restraint on popular opinion. In the process, a great deal of well-considered material has been generated on such important matters as institutional design and purpose. There has not, however, been a commensurate amount of academic research.

What little scholarly interest has emerged on second chambers can be linked to popular debate over ‘reform’. For example, the handful of British scholars who took an interest in bicameralism in the first half of the 20th century were motivated by their country’s own discussions surrounding reform of the house of lords.<sup>26</sup> Their comparative approach and their attempt to divine an identifiable theory to govern second chambers continue to inform examination of bicameralism today, including the work of Tsebelis and Money (1997), Patterson and Mughan (1999b) and Shell (2001).

## **Comparative Literature**

It was in 1910 that the first comparative looks at second chambers emerged, one each from the universities of Oxford and Cambridge. Marriot’s *Second Chambers: An Inductive Study in Political Science* (1910) provides a detailed history of the British, American, German, Canadian, South African and French senates, along with a less detailed analysis of the other European experiences. While its prescriptions are limited, its summary of the challenge facing British second chamber reformers is similar to what Canadian scholars repeatedly claim is the current challenge for Canada’s Senate, and that is “to discover for it a basis which shall be at once intelligible and differentiating; to give it powers of revision without powers of control; to make it amendable to permanent sentiment

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<sup>26</sup> Lord Rosebery had proposed changes to the house of lords in 1884 and 1888, Lord Salisbury in 1888, Lord Newton in 1907, a Select Committee of Reform of the House of Lords made proposals in 1908, the Bryce Conference of 1918 and the British Government introduced resolutions in 1922. None of these resulted in changes, though *The Parliament Act* of 1911 changed the powers of the house of lords from an absolute to suspensive veto.

and yet independent of transient public opinion; to erect a bulwark against revolution without interposing a barrier to reform” (Marriott 1910, 298).

Temperley’s *Senates and Upper Chambers: Their Use and Function in the Modern State, with a Chapter on the Reform of the House of Lords* (1910) employs a similar detailed survey of British, American, Colonial and European experiences and developments, and offers one of the earliest observations that upper chambers are more powerful when elected, and recommends that the British house of lords transition to election as it is “the best, and probably the only way, of rendering it strong and efficient” (Temperley 1910, 177). In contrast, Lees-Smith’s *Second Chambers in Theory and Practice* (1923), which examines Canada, Australia, New Zealand, France, United States, South Africa, Norway and Ireland, as well as providing useful detail on the workings and findings of the Bryce Conference of 1918 which, as a cabinet committee studying house of lords reform, conducted much of its work in private, concludes that “direct election leads to confusion, labour and expense” (Lees-Smith 1923). In the United States, Johnson’s *The Unicameral Legislature* (1938) offered insights into bicameralism and unicameralism by drawing on the experience of colonial North American bicameral legislatures and of unicameral legislatures abroad, with the ultimate objective of taking a position in his country’s domestic debate over institutional change, in this instance in favour of second chamber abolition.<sup>27</sup>

There is a large gap in the comparative study of second chambers from these meagre beginnings until the turn of the century, and the recently renewed interest appears to be no less attuned to the political debates of their time and place. Smith’s book *The Canadian Senate in Bicameral Perspective* (2003a) is clearly tied to the ongoing debate in Canada over reform of the country’s second chamber and contains a number of modest prescriptive suggestions on how the senate should and could be altered, tempered by what

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<sup>27</sup> Johnson (1938) notes that in the year 1937 alone, 21 states had debated 40 state-constitutional amendments aimed at changing their legislatures from bicameral to unicameral. While he offers this data as evidence of a growing trend, no state moved to unicameralism after Nebraska, which had made the transition in 1934.

is seen as the climate of constitutional fatigue in Canada. His comparative lessons are drawn from Australia, Great Britain, United States and Germany, though his interest is singularly the Canadian Senate. He concludes that senate reform is not possible in Canada because Canada is a double federation – two nations and ten units – where interests overlap and institutions play more than one role, though he suggests that it is the amending formula in the *Constitution of Canada* that prevents change. He also notes that there has been no agreement on what the Canadian Senate is supposed to do and, until this happens, he suggests “there will be no agreement on its modification” (Smith 2003a, 157).

Russell’s *Reforming the House of Lords: Lessons from Overseas* (2000) was directly tied to her country’s commissioned research for the Wakeham Commission<sup>28</sup>, so it is more optimistic about institutional change, and offers comparative lessons for possible institutional redesign from a number of parliamentary systems, including Australia, Canada, Germany and Spain. The conclusions which emerge are that second chambers should have a distinct design from the lower house in terms of composition, party balance and method of selection, for which elections based on territorial regions are the most likely to give the chamber legitimacy, and a second chamber need not have equal, but must have sufficient, power to review the decisions of the lower house.

The fact that all this scholarship is tied to a domestic reform agenda does not make the contribution to comparative analysis of second chambers any less valid. It simply explains the filter through which this scholarship is being undertaken and makes the more restricted lessons that the experiences of other countries are seen to offer, more understandable.

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<sup>28</sup> The Wakeham Commission is more formally known as the Royal Commission on the Reform of the House of Lords and was established by the government to “consider and make recommendations on the role and functions of the second chamber” and to “make recommendations on the method or combination of methods of composition required to constitute a second chamber fit for that role and those functions”. The 12-person commission was chaired by the Rt. Hon. Lord Wakeham and produced 130 recommendations of which the most dramatic change would have been to introduce some elected seats from the regions and some appointed seats based on gender and ethnicity (Wakeham 2000).

The one notable exception is the work by Tsebelis and Money on second chambers, which is entirely an examination of second chambers in pursuit of a political science model. *Bicameralism* (1997) applies game theory to a comparative look at bicameralism in an attempt to determine how the existence of a second chamber in a legislature may constrain or influence decision-making. What makes this contribution so important is its focus on both chambers of a legislature, simultaneously, which is in and of itself a radical departure from most institutional analysis.

Tsebelis effectively builds upon this approach in *Veto Players* (2002), where he argues that all political systems can be seen in terms of the particular person or institution whose agreement is necessary in order to change the *status quo*. Therefore, if one knows the preferences of a veto player, it is possible to identify the set of policies that will not elicit a veto – the “winset of the status quo”: the more veto players, the fewer acceptable policies, the smaller the winset, and thus the existence of institutionalized “policy stability” (Tsebelis 2002, 2). This carries some important lessons for the issue of institutional change, and for bicameralism and federalism, as it illustrates how more veto players result in resistance to change, which suggests there are different degrees of inertia.<sup>29</sup>

In addition to these comparative works, there have also been two compilation works published recently to fill the void in scholarship on bicameralism. Patterson and Mughan have assembled the book *Senates: Bicameralism in the Contemporary World* (Patterson et Mughan 1999b), which offers papers from well-known domestic scholars on their respective country’s second chamber, including the United States, Germany, Australia, Canada, France, Britain, Spain and Poland. In their own contribution to the topic they conclude that, with the exception of the United States, second chambers are always less powerful and prestigious than the lower house, though second chambers are generally becoming more assertive due to their mistreatment by the lower house, increased partisan

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<sup>29</sup> The increase in veto players not only increases policy stability but can lead to the independence of bureaucracies and the judiciary, and government instability in parliamentary systems (regime instability in presidential systems).

competition and changes in popular understanding about majoritarian politics and the nature of democracy.

Baldwin and Shell's *Second Chambers* (2001) also brings together papers from scholars of different countries delineated not by country but by field of research interest, including papers on the history of bicameralism and the functions and powers of second chambers. Among its more interesting 'new' observations are: second chambers do not vary significantly in terms of pay, resources, composition and occupation from lower chambers, though they have a higher average age and a slightly greater, though still under-representative, number of women (Rush 2001); and that even weak second chambers have significant authority over constitutional change and increasingly have been obtaining powers related to human rights protection (Russell 2001). Each book makes a worthwhile contribution to advancing our understanding of bicameralism, though both of these last works are constrained by the lack of cohesiveness that is inherent in compilation volumes.

The handful of comparative works examined above have each in some way attempted to advance a 'theory of bicameralism'; though, as yet, bicameralism is little more than "a concept in search of a theory" (Shell 2001; Smith 2003a). The early comparative works took an approach which today we would consider historical institutionalism, as they derived a theory by combining the historical record with the contemporary comparative experience (Marriott 1910; Temperley 1910; Lees-Smith 1923; Johnson 1938). The modern approach is similar, though decidedly more long term, in that it combines deductive analysis, beginning with an examination of the earliest Greek political philosophers who advocated 'mixed government' and proceeding through the 17th and 18th Century theorists who gave the world the theory of federalism, with inductive analysis, by examining the bicameral legislatures that operate in both federal and unitary states (Tsebelis et Money 1997; Patterson et Mughan 1999b; Shell 2001). The result has been a theory which is surprisingly similar across periods of scholarship, yet, is still little more than a recognition that a second chamber provides both a review and representational function which is distinct from the lower house (Hicks 2007, 22), and even here there is dispute as to which is

the more significant role, since the comparative evidence is that regional and administrative unit representation is not always provided by second chambers, meaning that review might be its primary, if not singular, function (Brennan et Lomasky 1993, 214).<sup>30</sup> This poses an inherent challenge for any who wish to extrapolate from the ‘theory of bicameralism’ in order to identify normative arguments that may emerge in a polity in opposition to institutional change.

On the representation axis, the requirement as currently suggested by the theory of bicameralism is that a second chamber must have a different representational purpose than the lower house, yet any number of configurations can meet this criterion. The British house of lords embodying a historic claim by the aristocracy to the right to participate in governance decision making (Roberts 1926), the German ‘Bundesrat’ or Federal Council being used to represent both the state governments and “the power constellations among the political parties in the states” (Patzelt 1999, 68) and the U.S. Senate which, through the transition to popular election, has come to be similarly constructed as the House of Representatives and yet sufficiently distinct so as to represent “different passions” among the polity (Sinclair 1999, 56), each can lay claim to this broad normative definition; as can virtually every proposal for reform of the Canadian Senate advanced in the last 140 years, including the current appointed body (Hicks 2007).

Clearly representation must be central to any theory of bicameralism. Legislatures are the bodies designed for representation and, even if they were not, all institutions of governance have a dimension of representation. Identifying the nature of that representation should be central to any institutional analysis. If the upper chamber is providing a definable representational role – particularly a representational role that is seen as essential to society and an alternative to the representation being provided by the lower chamber – then it should be more difficult to alter or abolish the upper chamber. If, on the

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<sup>30</sup> Patterson and Mughan argue that this is particularly true in parliamentary systems, where the representational role is largely displaced by the review function (Patterson et Mughan 1999b, 240-2).

other hand, that representational role is lacking then the relevance of the upper chamber to the polity would be less.

A number of countries have adopted federalism and bicameralism specifically because they are mechanisms for accommodating cleavages – particularly cleavages which are geographically bounded and involve race, ethnicity, language or culture. In these instances, it would seem likely that upper chamber transformation would be more difficult since the groups so accommodated would not want to forgo their influence, even if the institution was ‘weak’ in terms of legitimacy or power.

The ‘other’ role of an upper chamber identified by the rudimentary theory of bicameralism is the idea of review. Tsebelis and Money (1997) suggest that the goal of all institutional design, whether unicameral or bicameral, is to manage the interaction between efficient and political. Central to this claim, and the discussion of upper chambers almost a century earlier by Temperley (1910) and Lees-Smith (1923), is the idea of restraint, which can be found in *The Federalist Papers* (1999), Tocqueville (2000) and Mill (1865).

Hamilton argued in *The Federalist Papers* in 1787 that the selection of national senators through appointment by the state legislatures would result in men of “peculiar care and judgment” being in the upper chamber, men who “will be less apt to be tainted by the spirit of faction, and more out of the reach of those occasional ill humors, or temporary prejudices and propensities” (Hamilton 1999, No. 27:143). A senate, noted Madison in the same year, stops the passage of legislation without proper review and reflection, preventing “a variety of important errors in the exercise of legislative trust” (Madison 1999, No. 62:347).

Whether it be called ‘redundancy’ (Patterson et Mughan 1999b, 13), ‘sober second thought’ (John A. Macdonald, 1865; Supreme Court of Canada, 1980), ‘reflection’ (Mastias 1999, 175), ‘review’ (Hicks 2007, 22), protection against ‘tyranny of the majority’ (Hamilton 1999), ‘quality control’ (Tsebelis et Money 1997, 40) or ‘a second opinion’ (Wheare 1967, 140); or framed in a democratic sense as the “interposition of so much

delay” so the opinion of the nation can be adequately expressed [Bryce Conference Report, 1918 in Lees-Smith (1923, 33)] and that legislation can be “submitted to the deliberate judgment of the electorate” (Marriott 1910, 86); every student of upper chambers has identified a function relative to the lower house as central to a ‘theory of bicameralism’ that is to provide a restraint on the lower house and sometimes the executive branch.

Uhr points out that John Stuart Mill is still frequently cited as an authority for the Australian senate and, along with Tocqueville and *The Federalists Papers*, is essential for a proper consideration of not only bicameralism but the Australian senate’s use of proportional representation (Uhr 1999, 106; 1995, 136). Moore illustrates how Edmund Burke’s contribution intersects with these writings and how this scholarship was actively drawn upon by the founders of Canada in their theorizing over institutional design (1997, Ch.3). Ostrom has identified the works associated with institutional formation in the U.S., particularly Tocqueville and *The Federalist Papers*, as a “revolution in political theory” when it comes to federalism (Ostrom 1991, 14), and Whitaker (1983) has illustrated how in addition to federalism these works reconceptualised democratic theory and intertwined the two in the process. All this seems to support the legitimacy of using these works to identify a theory of bicameralism, though the inability of scholars to produce a coordinated or particularly instructive theory suggests that something is lacking either in terms of conceptualization or approach.

Wirls and Wirls, in *The Invention of the United States Senate* (2004), suggest that the shortcoming of earlier theorizing lies in its narrow focus on functional consequences. As an alternative, they offer their own detailed examination of what they see as the theoretical origins of the U.S. Senate, and the intent of that unique breed of philosopher-politicians who attended the Continental Congress and helped fashion that country’s institutions. Their particular contribution to the theoretical debate lies in the identification of differences in underlying concepts employed by the founders and by contemporary and antecedent institutional philosophers. However, in their attempt to avoid a functional explanation they place too much importance on ideas which may be little more than a

justification for a favoured institutional design and for elite restrictions on political participation. What emerges is no more useful as a theory of bicameralism, even if it is a more nuanced explanation of contemporary thought at the time of the American Revolution.

They also, as is common in much of the literature on bicameralism, get sidelined by the debate over how direct the connection between ancient Greek and Roman theory on mixed government is to modern bicameralism, and the debate over how innovative was the U.S. Senate. For example, Shell (2001) argues that the connection between mixed government and bicameralism is itself nothing more than justification after the fact for institutions in Britain, and that the house of lords was the product of historical development and practical necessity during the middle ages rather than philosophical musings. Of course, the adoption of normative arguments advanced by Plato and Aristotle, even if only used to justify an emerging or evolving institution like the bicameral parliament and the house of lords, is *prima facie* evidence of these classical scholars' influence on, and relevance to, the society in question (e.g., Fritz 1954).<sup>31</sup>

For its part, the debate over the originality of the U.S. Senate can be found as far back as Temperley and Marriott, with the former arguing that, in spite of the “strange ingenuities of political architecture in the United States”, bicameralism was adopted

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<sup>31</sup> While a direct connection may not be evident between the house of lords and the Roman senate, Wickham's (2009) recent examination of how Rome's legal and political influence survived and shaped the Middle Ages does give new credence to this claim. While initially the British Isles lost its Roman influences due to how isolated this part of the Roman empire had always been, the Roman traditions continued to dominate medieval Europe and re-emerged in England during the Post-Carolingian period as the legal and institutional influences of Charlemagne (crowned *Imperator Augustus* by Pope Leo III) made it from western Europe to the British Isles even as his influence had begun to wane in Frankish territory. Armitage (2000) shows how by the end of the 15<sup>th</sup> Century, the British king had fully adopted the language and symbols of the Roman *Imperium* for the express purpose of asserting independence from the Roman Catholic papacy and the Holy Roman Empire, and this legal basis for governance encouraged territorial expansion and conquest. In addition to this western Roman empire legacy, several of the British high offices of state are direct importations from the eastern Roman court at Byzantium, including the most senior post in British heraldic law, the Earl Marshall, whose court determines a noble's right to sit in the house of lords (Bruce 1999)). While no direct connection is made in these more works between the house of lords and the Roman senate, their much wider claim of an ongoing Roman legal and institutional legacy would seem to support such a claim.

because of “fidelity of Englishmen to their political traditions” (Temperley 1910, 27), and the latter suggesting that the U.S. “Constitution as a whole was and is native” (Marriott 1910, 91). Given the existence of bicameralism in Britain and in each of the North American colonies prior to the War of Independence, and the writings on bicameralism which were emerging outside of America<sup>32</sup>, it seems reasonable to acknowledge that the British were responsible for introducing the modern world to the principle, if not the form, of bicameralism<sup>33</sup>, though there may be valid disagreement as to whether this was due to an active promulgation of institutional format beginning with its imposition on British colonies (Wood 1993) or due to the spread of ideas via the increasing dominance of the English language as the *lingua franca* (Tsebelis et Money 1997).

### Country Specific Studies

The limited comparative work on upper chambers has been focussed, as a starting point, on classification as a way of structuring analysis. Lijphart (1984) did this first by offering a classification system for upper chambers based on the ‘degree of congruence’ – that is to say the similarity in representation between chambers (independent of selection method) contrasted with formal power asymmetry. Looked at in this way, ‘strong’ bicameral legislatures are those which have differences in composition and relatively symmetrical power, whereas ‘weak’ bicameral legislatures are those which have either asymmetrical power or similarity of representation. Mastias and Grangé (1987) argue that instead ‘legitimacy’ should be the central defining feature of second chambers and that the more direct the role the citizenry has in choosing senators the greater will be its legitimacy, and thus the more extensive its legislative power. Others have waded into the debate with

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<sup>32</sup> Montesquieu’s *Spirit of Laws* (1777) was directed at the British Parliament, though informed in American institutional design and the separation of powers doctrine, and Mill’s *Considerations on Representative Government* (1865) is an early defence of bicameralism in Britain, though was referenced in early North American and Australian scholarship for their own institutional design.

<sup>33</sup> Madison even acknowledged that it was: “The experiences of Great Britain, which presents to mankind so many political lessons, both of the monitory and exemplary kind, and which has been frequently consulted in the course of these inquiries” which informed his ideas on representation (1999, 317).

Russell (2000) also arguing that Lijphart placed too little emphasis on legitimacy, Watts (1996) arguing that in a federation legitimacy would not be tied to directness of election but rather to the relationship to lower administrative units, and Tsebelis and Money (1997) arguing that congruence does not by itself result in agreement between chambers.

While the debate over second chamber classification does little to advance a coordinated theory of bicameralism or provide insight into what might drive or constrain institutional change, it does help explain a divergence in the recent domestic academic literature on second chambers. Within each country, scholars have increasingly been stepping up to fill their particular void in institutional analysis and examine their country's second chamber. In countries where upper chambers would be considered 'weak', the scholarly writing tends to focus on the deficiencies of that upper chamber or on that chamber's usefulness along the review axis, an approach that is in contrast to countries which have 'strong' upper chambers, where scholarship focuses on conflict and power distribution between the two chambers (Tsebelis et Money 1997, 33-5).<sup>34</sup>

In France, for example, scholarship on their Senate is either critical of the upper chamber as being ineffective (e.g., Grangé 1981; Tardan 1988) or tries to make a case for the important role the chamber can and has played due to its independence, expertise and longer terms of office (e.g., Mastias 1980; Grangé 1984), which can be improved upon with relatively minor improvements (e.g., Mastias 1980). Similarly, the literature in Britain is either reform-oriented (e.g., Russell 2000) or straddles the divide between pointing out the limitations of a largely ineffectual upper chamber while acknowledging its previous and continued contribution to thoughtful analysis and legislative improvements (e.g., Adonis 1988).

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<sup>34</sup> Tsebelis and Money suggest that this dichotomy in the academic literature is between federal and unitary systems, but this would not explain the literature in Canada which is clearly on the review axis. Domestic scholarship is likely driven by the particular scholars' 'sense' of strength or weakness in their country's senate, and this subjective evaluation could, in turn, equally be driven by questions of legitimacy - public confidence, congruence in composition, symmetry in powers or some combination thereof.

To complicate matters, domestic scholarship in parliamentary democracies is sometimes subject to normative claims about how responsible parliamentary government should operate, and nowhere is this truer than in countries which have inherited the Westminster model (see Sproule-Jones 1992; Atkinson et Thomas 1993; Malloy 2002). This is found in countries with weak upper chambers as well as in countries with strong senates, the only difference being that in countries with weak senates the scholarship is in response to proposals for reform (e.g., Smith 2003a; Joyal 2003) and in the latter it is over perceived political gridlock, bargaining and trade-offs (e.g., Jackson 1995; see also Uhr 1999).

For its part, the widely acknowledged strong United States Senate has not only concurrent legislative authority with the lower chamber but unique authority with the executive branch to ratify treaties and appointments to the executive, making it “unusual among upper chambers” (Sinclair 1999, 32). This ‘unique’ situation has clearly contributed to the recent volume of literature on its activities. Much of this literature, however, still fits into the aforementioned categorization of that which occurs in countries with strong second chambers, namely conflict and power distribution between the two chambers (e.g., Cox et Kernell 1991; Mayhew 1991; Weaver et Rockman 1993; Thurber 1996).

The literature on the U.S. Senate is extensive and growing, even if in a predictable manner, but the investigations into the 17th Amendment which transitioned the United States from having a Senate appointed by the state legislature to one elected directly by the people is still rather sparse.<sup>35</sup> The most comprehensive resource is Haynes’ *The Election of Senators* (1906), who, like some of his overseas contemporaries, was not only interested in studying this institution but was actively participating in a domestic debate over the issue of senate reform. In his subsequent book, *The Senate of the United States* (Haynes 1936), he

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<sup>35</sup> The 17<sup>th</sup> Amendment of the Constitution restates the first paragraph of Article I, Section 3, of the U.S. Constitution with the phrase “elected by the people thereof” replacing “chosen by the Legislature thereof”. It also allows the executive authority of each state (i.e. the governor), if authorized by the state’s legislature, to fill a vacancy until a general election is held.

offers detailed information, though not systematically organized, on the road which led to election, including the suggestion that the earliest support for election came from the ‘progressives’, that there were significant regional differences in how elections were handled and that by the time of passage of the 17th Amendment the majority of states had taken their own steps towards change and, thus, that the majority of senators in that year’s Congress had been chosen through some popular mechanism.

In addition, Riker’s (1955) paper on the role of the Senate in federalism, Rothman’s (1966) examination of Post-Reconstruction senate elections (which relies on Haynes commentary), and Wirls and Wirls (2004) examination of the formation of the U.S. Senate and congressional party politics in the early period of U.S. history, offer a useful framework from which to examine this period. And the consequences of the transition from state selection to direct election have already garnered some research attention (Stewart 1992; Stewart et Weingast 1992; King et Ellis 1996; Brandes-Crook et Hibbling 1997; Wirls 1998). Additionally, it seems that Schiller and Stewart have been working for several years to assemble a data base which they can use to fill the void in “direct analysis of U.S. Senate elections before direct election” (2007, 1) and also provide insight into factionalism within state assemblies.

In a domestic literature which varies dramatically by country and a comparative literature which includes only a handful of significant forays into bicameralism, it is perhaps not surprising that factors which may lead to or constrain upper chamber reform or abolition have not been central points of research. Yet second chambers provide examples of institutions which have been resistant to change and examples of institutions which have undergone some of the most dramatic institutional changes imaginable, transitioning from appointment to election to even abolition.

### **Canadian Upper Chambers**

In Canada, where there have been dozens of Royal commissions, parliamentary hearings and governmental and non-governmental proposals for reform of the Senate since

Confederation, the lack of academic research has led Franks to refer to the Senate as “both the most written about and the least studied of Canadian political institutions” (Franks 1999, 121). In spite of this interest in reform and abolition, and the fact that each of Canada’s provinces had abolished their upper chambers, there surprisingly has been no study of the abolition of provincial upper chambers, though there is some consideration of provincial upper chambers in books on provincial governments and politics.

### **Senate**

Canada is a country which has a weak senate within the Westminster-model of responsible parliamentary government, and the domestic literature reflects this situation. There have been, to date, four book-length studies of the Canadian Senate, in addition to Smith’s comparative contribution discussed above. The first was Ross’ *The Senate of Canada: Its Constitution, Powers and Duties, Historically Considered* (1914), which in spite of its lofty title is light on historical considerations, instead offering up arguments from elite discourse as to why a senate is not in natural tension with the house of commons and why the Canadian senate, in spite of its method of selection and appointments for life, is not any less connected to and representative of ‘the people’ than the house of commons or the monarch. Of particular note is his acknowledgement that agitation for senate reform in Canada has been tied, even a century ago, to a political party winning the majority in the house of commons and forming a government after long periods in opposition and having to face a second chamber where they remain in a minority for several years, though he draws on the Australian experience to argue that election would not remedy the problem of parity in equilibrium between chambers (Ross 1914, 98).<sup>36</sup>

It is in the next book, MacKay’s *The Unreformed Senate of Canada* (1963), where a detailed history chronicling the colonial experience and the original intentions of the

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<sup>36</sup> Ross reports that senate abolition was debated in the house of commons in 1909, 1910 and 1911, and a motion to make it elective was considered in 1909. When Mackenzie took office in 1873 there was a Conservative majority in the senate of 15. The Conservatives returned to power in 1878 and when the Liberals again took office in 1896 there were only 13 Liberals in the senate. It was only in 1903 when the Liberals gained a majority in the second chamber, before the Conservatives took office in 1911.

Fathers of Confederation is discussed,<sup>37</sup> including the decision to allocate seats in the senate so as to protect sectional interests, specifically relating to language, race and religion. MacKay reviews many of the key pieces of legislation over which the senate and house of commons have differed in order to illustrate the work of the senate and, specifically, to address the accusation that the body is naturally conservative and has been an obstacle to social reform, an approach picked up on both generally and specifically by Kunz.

In *The Modern Senate of Canada, 1925-1963*, Kunz (1965) begins his study in the year MacKay ends his<sup>38</sup>, though his review is more systematic in its consideration of the legislative review function and more categorical in its claim that the senate has never been “the main and principle institutional protector of the federal units”, suggesting that it was simply offered by the Fathers of Confederation as “a constitutional tranquillizer to palliate the sectional fears of the weaker partners to federalism from the numerical majorities of the House of Commons” (Kunz 1965, 317). Kunz is the only Canadian to attempt to identify a theory of bicameralism, though, given his singular interest in Canada and his writing prior to Canada’s adopting a constitutional amending formula in 1982, his contribution is more limited and is aimed at making a case that changes to the senate should be undertaken lightly and that bicameralism should not be undermined through the “sheer force of administrative habit or bureaucratic usage” (Kunz 1965, 23).

Campbell’s *The Senate: A Lobby from Within* (1978) uses the same historical record to show how the senate was designed to be a conservative institution and was expressly intended to defend particular minority interests from which its members would be drawn, though he agrees that the senate has failed to do the latter, something he lays at the feet of its oligarchic nature and propertied interests. His research interest is in the Senate’s

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<sup>37</sup> Mackay (1963) places great stock in the fact that six out of 14 days were spent on discussing the senate, something repeated by Seidle (1991), though Moore (1997) makes an interesting case that the length of time does not reflect active involvement in designing this institution but rather a testing of the resolve of the delegation from Canada by the Maritime delegation as this was the first item on the agenda SEE ALSO (Ajzenstat 2003).

<sup>38</sup> MacKay’s book was based on a doctoral dissertation which was submitted to Princeton in 1924. Kunz’s book also started as a doctoral dissertation submitted to McGill in 1963, and covers the work of the senate between the end of MacKay’s book and the year of his submission.

composition of elites from business and politics, something he chronicles in detail, and argues for the existence of elite accommodation in defence of corporate interests to which senators are linked.<sup>39</sup>

Campbell's work is influenced by Presthus' *Elite Accommodation in Canadian Politics* (1973), which found, after interviewing legislators, senior civil servants and interest group leaders, that there was a pre-existing and informal network of relationships among decision-makers based on common schooling, club memberships and other largely semi-class based social mechanisms,<sup>40</sup> and that this was reinforced by a common commitment to the maintenance of political institutions among the leadership of societal groups and the social benefits that these individuals got through mutual cooperation.

In addition to these books, the Royal Commission on Bilingualism and Biculturalism received, though did not publish, a study by Bonenfant entitled *Le sénat dans le fédéralisme canadien* (1966). This study argues that there was a particular role offered by the senate to accommodate the smaller provinces, "les sénateurs représentent une circonscription alors qu'ils ne devaient pas en représenter dans les autres provinces pour que la minorité anglo-protestante soit protégée" (Bonenfant 1966, 15) and advances the unique premise that Quebec's 24 senate seats from specific ridings within the province was intended to ensure the independence of Quebec senators from the federal government. For the MacDonald Commission, and published in *Intrastate Federalism in Canada* (Smiley 1985b),<sup>41</sup> Smiley and Watts produced a study on the senate which contains a useful caution for scholars who focus on constitutions and the historical record, namely that the

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<sup>39</sup> Campbell's book was also based on a dissertation which he submitted to Duke in 1974. This thesis is repeated in a more sensational book by journalist Claire Hoy (1999), who illustrates the corporate connections of the more recent Canadian senators and combines these with anecdotal evidence of sporadic performance, attendance and the perquisites of office.

<sup>40</sup> This, in turn, draws upon the consociational and power-sharing concepts of Lijphart (1968, 1969).

<sup>41</sup> The MacDonald Commission's formal title is the Royal Commission on the Economic Union and Development Prospects for Canada. It was a 13-person commission under the chair of the Hon. Donald MacDonald. Among its recommendations is that the senate be directly elected using proportional representation, though with reduced powers out of concern for responsible parliamentary government (MacDonald, 1985).

institutional intentions of a country's founders may not be relevant to modern societies. In addition, Smiley (1985a) published his own paper that year on lessons Canada can learn from the Australian elected senate experience, which also has a useful cautionary note about whether in a federal context it is sufficient to simply focus on federal institutions and ignore state/provincial differences. Most recently, the Centre for Management Development has assembled a collection of scholarly and political papers on the senate entitled *Protecting Canadian Democracy: The Senate You Never Knew* (Joyal 2003), which as the title implies, offers a defence of the institution – as do the frequently cited papers and book chapters by Forsey (1982, 1984), Mallory (1984) and Franks (1987, 2003).

With the exception of Campbell, what unites all this scholarship and was expected, given a weak senate in a parliamentary system, is its primary focus on the review function of the second chamber and its advocacy of only modest improvements, so as not to harm either this review function or the supremacy of the house of commons within a Westminster-model of representative government. However, with the exception of concerns about constitutional fatigue and the challenges imposed by the amending formula of the Canadian *Constitution*, which is surprisingly treated as *sui generis*, there is little discussion of what might drive or restrain change.

### **Provincial Legislative Councils**

The only work that systematically looks at the abolition of a provincial upper chamber or 'legislative council' can be found as part of a chapter in Beck's *The Government of Nova Scotia* (1957, 231). Like other scholars on weak chambers, the focus of the chapter is on the work of the chamber in reviewing legislation. He then proceeds to systematically research and recount most of the numerous attempts to abolish or alter the upper chamber in this province. Unfortunately, by beginning with an examination of the work of the council and then by grouping the attempts at abolition by government in order to differentiate them, he is led to the inference that the attempts of some governments were more sincere or less sincere based on the chamber's effectiveness with respect to that

government's legislation. After illustrating the elaborate steps the government took in the end to change the chamber, he then concludes that the council had hurt itself by failing to catch poorly drafted legislation.

There are only two full books on legislative councils in Canada, and they are not surprisingly on the Quebec legislative council which lasted until 1968, of which the years 1963 to its abolition drew great interest as Quebec re-examined its institutional and constitutional arrangements. Turcotte's (1933) book entitled *Le Conseil législatif de Québec* traces the development of the legislative council from time of British conquest. Turcotte was the assistant clerk to the council, so not surprisingly, in addition to tracing the development of the institution through the lens of constitutional change from the *Quebec Act, 1774* forward, it lays out the normative case for a nominee council as the upper chamber in a bicameral legislature.

Orban's (1967) book by the same name, published in the midst of the debate over abolition of the upper chamber, looks at the work and composition of the chamber. It is also reflective of the thinking of the day with particular focus on the inter-relationships with the corporate community the councillors had through the boards of directors they served on, and how these relationships had transformed the chamber from being a protector of regional and minority interests into a protector of corporate interests. Orban, who clearly supports abolition due to its corporatist focus, suggests that the chamber had outlived its usefulness as it was increasingly deferring to the lower chamber in terms of legislation and had abrogated its role as a chamber for legislative review.

There is one U.S. book that purports to have examined the question of upper chambers in Canada; it was cited above, and was published in support of what the author hoped was an abolition movement in the U.S. following the abolition of the upper chamber in Nebraska in 1837. The scholarship of this book with respect to Canada is suspect, given that Johnson (1938) concludes that the abolition of upper chambers occurred in Canada's provinces after a sufficient number of representatives were appointed to the upper chamber

who would vote for abolition. While in New Brunswick and Nova Scotia members were appointed who had committed to vote for abolition, in Manitoba and Quebec the council the government inherited was the one it needed to work with to achieve abolition as there were constitutionally fixed numbers for both councils and appointments were for life (or age 75 in the case of Quebec). Prince Edward Island had the authority to add additional councillors in 1879 when it first tried to abolish its council, but was forced to make it elected with a property qualification instead due to public outcry, and once elected it could not appoint councillors in favour of abolition.

There is a little consideration of provincial upper chambers within a more generalist work on institutions and constitutions, but this does not use original research and its generalizations are flawed. For example, Keith (1928) writes that the political parties which initiated the legislation for abolition in the provinces were parties that came to power after being in opposition and felt frustrated in their administrative and legislative agenda by the second chamber. While this was true in a number of cases, parties equally came to power and initiated abolition and parties that were in power for long periods of time initiated abolition, so it provides no insight as to why abolition occurred in some instances and not in others using this single variable.

There are some details with respect to legislative councils of the provinces in the literature on provincial governments, legislatures and politics. Martin's (1914) political history of Manitoba, Donnelly's (1963) book on the government of Manitoba and MacFarlane's (1940) book on Manitoba's political parties and politics, each include discussion of the legislative council; Morse's (1914) book on the governments of the Maritime Provinces includes reference to the legislative councils in all three provinces; with MacKinnon's (1951) book on the government of PEI, Raymond's book on the political history and Thorburn's (1961) book on the politics of New Brunswick, each including references to the province's upper chamber. Schindeler's (1969, 82-3) book on responsible government in Ontario contains a discussion of why a legislative council was not created for Ontario. These books are interested in the broader narrative of

governmental design and provincial politics and, where institutional evolution is considered, it is focused on the emergence of the elected lower chamber as the dominant chamber and its relationship to the government and upper chamber.

This focus on the lower chamber, like the literature on responsible government, leaves examination of upper chambers subject to political party discourse. The challenge posed by using this generalist literature on provincial governments for a proper understanding of the alteration and abolition of legislative councils is apparent in a paper by Kitchin (1973), who tries to draw on this scholarship to weave together a paper examining the abolition of provincial upper chambers. One is left with the impression that:

- Nova Scotia had the most disagreement between chambers (*ibid.*, 71), when, in fact, it was New Brunswick that had the earliest and most, and this began well before Confederation;
- Manitoba was the province that bought off most legislators in order to achieve abolition (*ibid.*, 68), but in Manitoba there were only five councillors and abolition passed by one vote with the two cabinet ministers in the upper chamber receiving new appointments, which is no clear evidence that councillors' voters were bought. Further, in Nova Scotia an offer was made to councillors of remuneration if they resigned and the council declined and in Quebec a lifetime pension was given to all 24 retiring councillors, equal to their salary;
- “The abolition of the legislative council, which might have been regarded by the French as additional security for their rights, was even supported by some of the French members.. And so it was that the Legislative Council of Manitoba voted itself out of existence after only six years of provincial experience” (*ibid.*, 68, quoting MacFarlane 1940, 50), which leaves the impression that French councillors agreed to abolition and it went quickly and easily, when, in fact, the opposite is the case on both points.
- Quebec had a long campaign to abolish its upper chamber that occurred every time the opposition came to power, including during the government of Maurice Duplessis (*ibid.*, 78, drawing on the work of Bonenfant 1968, 264), and yet there were only two

attempts to abolish the upper chamber prior to 1965, and both were from the Liberals and tied to a single bitterly partisan event. The Union National government of Maurice Duplessis did not try to abolish the upper chamber;

- Quebec's upper chamber was the least representative (Kitchin 1973, 76). Quebec's upper chamber had a specific representational role and had the largest upper chamber so on the face of it this fails even in the context of the theory of bicameralism Kitchin identifies as ideal in his paper. All provinces except Manitoba had upper chambers at the time of abolition where party politics had been a determinant in appointment or election.
- After going into detail on how the upper and lower chamber resisted either side's initiatives for change and noting that the compromise was to merge the two bodies, Kitchin concludes that Prince Edward Island became the third provincial legislative council to have been abolished (*ibid.*, 71). While it may be true that the council was eliminated, the councillors were preserved and just began to meet in the room next door in a single chamber with the assemblymen.<sup>42</sup>

In Kitchin's defence, his goal was not to undertake a comparative analysis, but rather to offer some lessons that Canadians and Canada's public officials might draw with respect to the merits of upper chambers and how they appear to have been abolished at the provincial level. He is also, like much of the scholarship on upper chambers, guided by the normative theory of bicameralism, which creates its own restrictions on probing institutional change.

In addition to the paucity of book-length studies on councils, there are only three articles specifically on a legislative council in Canada. Each is published contemporaneously to the chamber-in-question's abolition. The first is a paper which examines the Judicial Committee of the Privy Council decision of 1927 concerning whether or not the government of Nova Scotia had the authority to summon additional councillors

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<sup>42</sup> This conclusion as to when the chamber was abolished is the province's official date as well. But given that in the later part of the British Empire smaller colonies had an institutional configuration where the upper and lower chambers sat together to save money, this conclusion is misleading, especially if the purpose of the literature review is to, in part, allow a comparison of mechanisms and dates of abolition.

to the chamber in support of abolition. In this article Mackenzie (1929) includes a brief review of the history of the chamber, wherein he claims that the Nova Scotia government approached the provinces of New Brunswick and Prince Edward Island in 1879 and convinced them to get rid of their upper chambers. But the Liberal Party in New Brunswick in 1878 had won the election with a platform that included abolition of the upper chamber. At most, the inter-provincial dialogue reinforced the three provinces' interest in the file. But even if it did, no province's initiative for abolition that year was successful and it is misleading to suggest as he does that it started a campaign for abolition that would leave Nova Scotia the last to make the change. Prince Edward Island was able to switch to election that year, but was forced to establish a property qualification for the council to preserve its function as a body representing the propertied class, a change that would take them until 1963 to finally eliminate.

The other two articles are on the Quebec legislative council. In the first, Bonenfant (1968) argues that the Quebec delegates to the Confederation conferences wanted an upper chamber because of its prestige, in addition to its capacity to represent the English minority.<sup>43</sup> While the issue of prestige is reflective of Bonenfant's wider scholarship which sees the institutional arrangements of Confederation through the lens of Quebec's modern desire for autonomy, this is not an accurate reflection of why the upper chamber was adopted for Quebec. It was adopted with the 24 electoral divisions that existed at the time of Confederation as a mechanism to protect the English minority in Quebec on local matters that might impact on their social identity. That being said, French Canada's leading Father of Confederation, George-Étienne Cartier, did frame the agreement on this institutional arrangement for the Canadiens as being one of preserving Quebec's historic institutions and their gravitas, something that was strategic and quickly became entwined with ethno-religious nationalism in the province.

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<sup>43</sup> Bonenfant also published an article in *L'Action* entitled *Peut-on abolir le Conseil législatif contre sa volonté?* shortly after the Lesage government had the legislative assembly strike a committee to look into the constitutional arrangements for the province (14 mars 1963).

As a follow-up to his book, after the abolition of the legislative council in Quebec, Orban (1969) acknowledges that the intended role for the chamber was to protect the minority in Quebec. He suggests that the dual role of representing economic interests and representing minority interests often made the English members side with their French counterparts, thus limiting their capacity to represent the English minority. This is particularly interesting because it suggests that legislators must reconcile competing societal interests, something posited in this dissertation's hypothesis. He goes on to repeat the assertion he had made in his book in support of abolition, concluding that abolition became inevitable in the mid-20th century because it had become deferential to the elected lower house and it ceased having utility, simply rubber stamping the legislation of the lower chamber.

## **V. Summary**

The study of institutions fell out of favour in political science during the 1960s, as behaviouralism came to dominate the discipline. While it has recently seen a renewed interest in political science, something that first occurred in economics and management, study of institutional change has not yet become the focus of this new field in any discipline in a significant way.

There are no systematic studies of the evolution of nominee councils in Canada from origin to reform to abolition. These are bodies that underwent dramatic reforms at times and resisted reform at others. They began as unicameral institutions of governance, dubbed the governor's council, containing judicial, legislative and executive functions. When an elected chamber was created for the colonial government, they became upper chambers in a bicameral legislature. Their executive function was later separated, renaming the upper chambers legislative councils, a label they continued with until abolition. While the existing literature in law, history and political science reports these changes and the constitutional mechanisms that caused them, it is absent an analysis of why such changes occurred, when they did, with the exception of responsible government,

which it attributes to democratic aspirations combined with loyalty to the crown at the local level followed by a reluctant acceptance by the British government, which could not and did not want to rule the empire directly as it moved from mercantilism to free trade and from strict legal interpretation to political, both colonial and domestic, pragmatism.

This lack of a systematic study of the evolution of nominee councils since the rejection of ‘old institutionalism’ as an appropriate scientific approach suggests the merits of revisiting this period of institutional evolution. The numerous changes proposed, failed and adopted in each province, offer multiple points of access by which to examine institutional change within each of these temporal and provincial case studies.

Conspicuously absent from the political science literature in a country where abolition and reform of the upper chamber in a legislature has been a political issue for a number of years, arguably since Confederation (though only seriously since the late 1960s), is a study of the abolition of legislative councils, though there is some consideration of these events in the studies of governments and politics in each of Canada’s provinces.

In addition to hopefully providing insights into what drives and restrains institutional change, this dissertation will fill several voids in the historical record.

## **Chapter 3: The Legal and Theoretical Framework for the Constitution of Canada**

As has been noted in the previous two chapters, political scientists who have written about post-Confederation Senate reform in Canada invariably identify the ‘Constitution’ as the principle impediment to change. On the other hand, most scholars who research and write on constitutional law argue that the strength of the British and later Canadian constitutional model is that it can accommodate change, as unwritten ‘conventions’ “permit the adaptation of constitutional rules to changes in the general political principles and values of the day, without the need for formal amendment of existing positive law” (Heard 1991, 5). However, Justice Evatt (1967, vii) warns that “constant research into, and analysis of, all the present-day implications and tendencies of such method or system are essential; otherwise it may change, or be changed, without popular approval given with full knowledge into something very different”. The Westminster model is thus simultaneously and contradictorily intransigent, adaptable and susceptible to unilateral and unintentional alteration.

The reason for the apparent contradiction in seeing a constitution as an immortal set of rules that resist change and yet are permanently changing, I would argue, lies in the fact that, while rarely looked at as such, constitutions are in fact institutions, in the broadest sense. Thus, they are, to use Sait’s analogy, coral islands that constantly change and evolve while appearing permanent and intransigent (1938, vi); evidencing two of Howlett and Rayner’s institutional characteristics of being simultaneously path dependent impediments to policy change and the process sequencing mechanism by which change occurs (2006).

While this dissertation’s hypothesis suggests that, since the constitution and the political institutions through which change must be achieved are nothing more than variable rules of the game and the field upon which the game must be played, it is rather partisan and social forces operating through these mechanisms that drive and constrain change, and thus should be the focus of our examination. Nevertheless, it would be a shortcoming of any thorough analysis of the historic evolution of Canadian upper chambers if we did not explore the British and Canadian constitutions and how they may have over time

determined and constrained the institutions within which these forces are believed to work. It would also be disrespectful to the large number of distinguished Canadian scholars who continue to cite the *Constitution* as the impediment to Senate reform if we did not consider the relative merits of this claim.

The earliest constitutions in Canada were in fact mandates and instructions to governors to establish institutions. Thus to change these institutions is to change that constitution. Social contract theory suggests that constitutions are contractual agreements among, variously, a monarch and her subjects, the citizens within a country and between societal groups, whether they be formal political entities like provinces or less geographically bounded ethnic, religious and linguistic groups. If constitutional rules are a form of institution, they can act as a proxy for the more formal political institutions they are designed to mediate and offer another window for our examination on the constraints and sources of change. And unlike the relatively new field of inquiry on institutional change that is the focus of this dissertation, the subject of constitutional change has long been of great interest and scholarly debate and investigation in Canada. A clearer understanding of the dynamics of constitutional change may inform the inquiry that is central to our examination, namely what impediments and forces control institutional change.

We begin this chapter by considering the legal philosophical concepts which have governed the political institutions of Canada and its provinces from the colonial period to the present. In part one we will look at the idea of sovereignty and the nature of the social contract as this informs both the legitimacy of the constitution and the mechanism for its alteration. In part two, we turn our attention to the formal structure of the constitutions that were created by the British for Canada's provinces and dominions. In the third and final section of this chapter we will examine the post-Confederation written constitution with specific attention to the issue of the amending formula because this is the mechanism for achieving institutional change in the future. The general purpose of this chapter is to ensure that constitutionalism as a constraint to change is assigned no more and no less attention than its deserved place, while in the process glean any insights that the *Constitution* may

offer on the broader research question of how societal cleavages impact on institutional change.

## I. Sovereignty

A philosophical debate that has informed the British constitution and guided its institutions of governance has been the concept of sovereignty. Changing ideas of sovereignty have informed all constitutional changes, first in England, and then by transposition to the colony and later independent country of Canada, including the very question of the legality of Canadian independence. It is therefore no coincidence that the modern political movement for independence in the predominantly Francophone province of Quebec refers to itself as ‘souverainiste’.

From the outset, the king of England was the physical embodiment of sovereignty and thus the fount of all public authority, a concept that is behind the appellation ‘Sovereign’.<sup>44</sup> This claim emerged in a time when sovereignty was seen as ownership and was vested singularly in the monarch who it was claimed God had made ruler over a particular territory, a construct actively supported by the Roman Catholic Church and to this day reflected in the motto on the queen’s coat of arms in right of England – “Dieu et mon droit” – and in the reference to territorial boundaries via quasi-religious possessive synonyms such as kingdom, dominion and province.<sup>45</sup>

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<sup>44</sup> England has had both kings and queens as ‘Sovereigns’. If there is no hereditary first generational male heir, as occurred with the death of Henry VIII’s only male son Edward VI, a hereditary queen is allowed to assume the throne, which in the first instance brought Mary I and then Elizabeth I to power. This ability for women to take the throne was not standard in Europe. When Victoria came to the British throne, she had to relinquish the Kingdom of Hanover since, under Salic law, no woman could become ruler of that state, which was an electoral seat for the office of Holy Roman Emperor. Beginning with the *Act of Succession 1534* under Henry VIII, and more recently in the *Succession to the Crown Act 1707* under Queen Anne, the heir to the British throne also had to be protestant. The various rules adopted in countries for women and protestants, so as to exclude them from the ultimate seats of governance is an interesting parallel to this examination of institutional change since it points to, even in the pre-democratic era, social cleavages beginning to restrict institutional change, if only to exclude ‘out groups’ from power.

<sup>45</sup> Snow has the most interesting examination of these and other terms, beginning with their etymology and their use as synonyms, leading to an examination of their nuanced differences in British common law with respect to colonial countries and self-governing autonomy (1902).

In the case of Canada, while there was an indigenous population already present at the time of ‘discovery’, European explorers claimed the land in their respective benefactor kings’ names upon their arrival. For example, the letters patent issued on March 5, 1496 to John Cabot empowered him and his sons to acquire the “dominion, title and jurisdiction of the... islands and mainlands so discovered” for Henry VII of England, which he did when he landed on the North American continent, probably in Newfoundland, in 1497 (Biggar 1911, 7-8). Jacques Cartier did the same for the King of France when he landed in Gaspé Harbour on July 24, 1534 (Biggar 1924, 64-9). Simon François Daumont, sieur de Lusson, took possession “in his Majesty’s name, of the territories lying between the East and the West, from Montreal as far as the South sea, covering the utmost extent and range possible” (Thwaites 1959, 104-15).<sup>46</sup> Through these claims of exploration, and subsequent treaties and conquests, royal dominion and sovereignty over all of Canada was extended, and over what is now the United States of America was lost.

But the idea of sovereignty as ownership and the monarch as singular owner is not that simple. From the earliest days in England, more so than in other European states, the British king was never absolute ruler and the king’s authority has always been challenged by other nobles and the church (Maitland 2001). By the ‘age of enlightenment’, the concept of royal sovereignty was being rejected in favour of more nuanced claims that the king’s right to govern had emerged from the incapacity of the people to govern themselves (Hobbes 1998) or, alternatively, was the result of the people’s decision to delegate authority to the king (Locke 1798). Thus the idea of popular sovereignty arose to replace the idea of an individual ‘sovereign’, an idea that fuelled the French and American revolutions, where sovereign people were seen to form a social contract that variously constrained and empowered the king and other wielders of state power (Rousseau 1988). This should be the theoretical underpinning for a constitution – and the limits it places on institutions of

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<sup>46</sup> Slattery has an interesting examination of whether claiming territory in the Crown’s name, as the French explorers did, established dominion over a territory (1986). He argues that continuous possession is required for sovereignty, though this legal distinction in no way impacted on the French monarch’s decision to dispatch troops to defend or French colonists to settle lands claimed in their name, and the same was equally true for the English.

governance, including the crown. Yet within the legal realm, the ‘doctrine of sovereignty’ continued to dominate in law, where it was asserted that sovereignty had to be singularly vested in some person or body that was the source of law yet separate from law, with unlimited power to make law to the exclusion of all others, first asserted by Austin in 1832 (1995).<sup>47</sup>

This doctrine of sovereignty is why all power continued to rest in the hands of the monarch as the sovereign even as decision making devolved to political actors. To this day, all laws passed by the legislative branch in England, and with some variation in Canada, are still “enacted by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same”. All orders-in-council issued by the cabinet begin: “Her Majesty is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:”.

In spite of this construction, over time there has been a shift in the *loci* of power away from the British monarch as person. This has been, in part, a response to the grafting of democratic theory onto institutions which emerged over a millennium earlier and, in part, the result of open conflict between the British parliament and the crown over political supremacy. The English civil war, the glorious revolution and the *Bill of Rights 1688*, the *Act of Settlement 1700* and the *Succession to the Crown Act 1707* firmly established parliamentary supremacy over the crown (Hicks 2010a). It was A.V. Dicey who translated this political supremacy into a revised conceptualization of where sovereignty actually resided (1959). Rather than leaving it in the sole hands of the king or placing it in the collective hands of the people, he built on the Austinian doctrine and asserted that sovereignty resided in the British parliament which both represents the people and contains the monarch as one of its constituent elements. Dicey was a forceful scholar and his domination of British and colonial law school texts firmly established ‘parliamentary sovereignty’ within constitutional law, something that had implications for the constitutions

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<sup>47</sup> see also Dewey (1894).

of the colonies and, later, for their independence (Oliver 2005).<sup>48</sup> After all, if sovereignty rested with the British parliament for not just the United Kingdom but the entire empire, how could any subordinate legislature within the British Commonwealth of nations be given full autonomy to alter their constitutions as these were nothing more than statutes of that supreme parliament? After all, if the parliament in Westminster granted authority to make changes locally they could equally rescind such a gift.

From a colonial perspective, with the shift in sovereignty occurring in the United Kingdom, colonial governors became agents for the British government more so than for the British crown, taking instructions from the British cabinet and the responsible minister, such as her majesty's secretaries of state for the colonies, who would be accountable to the British parliament for these policies and actions. Then, with demands for independence from Britain, this evolution reversed itself in the early 20th century and the role of the British government in directing these governors all but disappeared. They returned to being representatives of the person of the monarch and became vice-regents, or de facto heads of states, operating in former colonies like Canada, and much later in its provinces, as the queen did in England, with the British government simply conveying messages between them and the queen as a matter of convenience (Hughes 1929).<sup>49</sup> It was at the Imperial Conference of 1926, with the 'Balfour declaration', that the independence of the various dominions was recognized and, at that conference, a committee was struck to explore further the complex legal issues surrounding the surrender of sovereignty.<sup>50</sup> This ultimately

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<sup>48</sup> It has been an interest of Canadian political science for sometime whether the loci of power has shifted even further within the same institutional arrangements, specifically away from parliament and the cabinet and into the hands of 'old boy' networks of senior mandarins (e.g., Presthus 1973), mid-level bureaucrats (e.g., Pross 1992), central agencies (e.g., Savoie 1999) or even judges (e.g., Morton et Knopff 2000) and government lawyers (e.g., Kelly 1999).

<sup>49</sup> It was the Judicial Committee of the Privy Council in *Liquidators of Maritime Bank v. Receiver General* (1892) that transformed lieutenant governors from representatives of the federal government in Ottawa to representatives of the monarch with all the prerogatives of the Crown.

<sup>50</sup> Long before this point, governors had lost the practical authority to act on executive matters without local ministerial approval for the exact same reason that the British monarch had lost her independence from her British ministers. Once legislatures began levying taxes and voting supply, even if a governor took a decision that was legally his prerogative, such as dismissing ministers and filling the cabinet with his own nominees, he would be powerless to get supply from the legislature for the day-to-day operations of that government (Keith 1929, 33). Representation, which was demanded as a right in return for taxation, invariably led to

led to the British parliament extinguishing its legal control over the dominion legislatures via the *Statute of Westminster 1931*.

The passage of the *Canada Act, 1982* by the British parliament enacted the *Constitution Act, 1982* which in turn created amending formulae for this act and for the previous *British North America Acts* which were renamed *Constitution Acts*. What made this ‘patriation’ of the Constitution possible is the emergence of what I would suggest is ‘constitutional sovereignty’. In many countries, sovereignty has come to rest not in the legislature or in the monarch, but in the constitution. In response to the Austinian doctrine of sovereignty, which argued that some person or body had to be the source of law yet separate from law, Dicean assertions were for a parliamentary sovereignty located at Westminster. But the same logic would identify the source of law in an independent country like Canada as, particularly given its federal structure and constitutionalized *Charter of Rights and Freedoms*, residing in the *Constitution*. From this perspective, the legislative documents for Canada that Westminster enacted at one time are no longer British statutes, but were patriated to Canada in law as an autonomous *Constitution*. This perspective reconciles with popular sovereignty via the Rousseauian idea of a constitution as a social contract, and still leaves the Queen of Canada as a symbol of ‘constitutional’ sovereignty and the legislatures and federal parliament as sovereign within their areas of constitutional jurisdiction.<sup>51</sup>

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political control transferring to the hands of the people who could obtain supply and whose representational role gave them the legitimacy to wield the power of the state.

<sup>51</sup> Constitutional change is not always recognized for what it is at the time it is occurring. The King of Canada, while the same person as the King of England, became a distinct monarch in 1931 with the *Statute of Westminster*. Yet it was only with Elizabeth II of England that the title Queen of Canada was adopted, which is only a partial improvement since this is the first Elizabeth who has sat on the throne of Canada (she should, by all rights, be Elizabeth I of Canada). Similarly, the coat of arms created in 1921 as the *deputed* Arms of the King of the United Kingdom for particular purposes in Canada, what is commonly called to as the Canadian Coat of Arms, was elevated to be the Royal Arms of the King of Canada for general purposes with the *Statute of Westminster* (see Hicks 2010c). While the Great Seal of Canada issued for George VI in 1940 appropriately had the Canadian Coat of Arms instead of the British Arms at the feet of the monarch, there are many federal government buildings built after 1931 that continued to feature the British Coat of Arms in places of honour in a mistaken belief that this represented the Crown. In fact, several provincial supreme courts continue to use the British Coat of Arms on their documents to this day, apparently oblivious to the fact that they are representing themselves as dispensing the justice on behalf of a foreign head of state.

## **Nature of the Social Contract**

Where sovereignty provides the philosophical legitimacy and legal authority for law, the political systems it codifies are institutional arrangements that are designed to reflect the social contract. Understanding who were and are the parties to that contract then becomes a key conceptual point of departure when considering institutional change. They become foundational principles for the institutions that were created, which in turn can influence the way “the first questions of Canadian constitutionalism are studied and debated” (Vipond 1985, 267).

While sovereignty provides the authority for law and thus is the only authority that can authorize change, the parties to the social contract can assert a moral obligation on this sovereign power in order to restrain change. In Canada, this debate over who were the original parties to the contract, or at least the contract that established the current set of political arrangements in 1867, has been a point of much examination and debate.

One of the claims that has been advanced to explain the *Constitution Act, 1867* is the ‘compact theory’ of Confederation, which suggests that the country which emerged in 1867 was a ‘compact’ or contract between four ‘provinces’: Ontario, Quebec, New Brunswick and Nova Scotia. To these foundational provinces, additional provinces joined the compact, including several that were carved out of territorial possessions already in British hands as Canada spread itself east and west until it came to encompass all former British colonies and territories in North America that had not joined in the American Revolution or been claimed by the emergent country of the United States of America.

The idea of a compact of provinces was first articulated in opposition to the expansionist role Canada’s first prime minister, John A. Macdonald, was leading the federal government into, and was intended to support a broader interpretation of provincial powers and a provincial veto over any changes to the *Constitution* (Cook 1969). The compact theory suggests that two large provinces, supported by two smaller provinces, only agreed to union based on the necessity of common defence and other rational arguments of self-interest and in no way desired to surrender their autonomy to a new political construct.

These arguments were laid out explicitly for the first time by Quebec Jurist T.J.J. Loranger in his *Lettres sur l'interprétation de la constitution fédérale* (1884), though the arguments were quickly adopted by all the provinces in their struggle for autonomy (Behiels 2007). Loranger was most concerned with threats to Quebec's autonomy, but his claim was universal and unequivocal, that: "The confederation of the British Provinces was the result of a compact entered into by the Provinces and the imperial parliament which, in enacting the British North America Act, simply ratified it" (McRoberts 1997, 16). Following this logic, the federal government could not enhance its powers without the Quebec government's consent, and presumably the consent of each of the other provinces.

Sir John A. Macdonald was consistent in rejecting not only the compact theory, but any proposal put before parliament that might be interpreted as an endorsement or validation of this theory (Dawson 1933). Macdonald was intent on building a country, and while the intrusiveness of the federal state would not be genuinely felt until the era of the welfare state, an increasing number of irritants were beginning to emerge as the federal government launched its 'national policy' following Confederation.

Building on the compact theory was what Cook (1969) calls the 'national compact' and McRoberts (1997) refers to as the 'dual compact' theory. The idea of a dual compact arose, in part, out of concern for the treatment of Francophones outside of the province of Quebec. The compact theory did nothing to protect their interests and even appeared to validate their mistreatment since provincial autonomy was assured in a compact of equal partners (McRoberts 1997, 19). In calling for the defence of Francophones across Canada, Henri Bourassa claimed that the *BNA Act* was a 'double' contract: "One between the French and English of the old province of Canada, while the aim of the other was to bring together the scattered colonies of British North America" (Cook 1969, 57). This argument of a partnership between the French and English would come to be adopted by the federal government as its preferred characterization of the nature of the union, under the Liberal administrations of prime ministers Lester Pierson and Pierre Trudeau, though the federal government has consistently denied the existence of a parallel compact between the

provinces or that this bilingual compact endowed the Quebec legislature with specific jurisdiction beyond that delineated in the *BNA Act*.

A century before Confederation, the idea of a compact between states had informed the actions and debates of both independence from Britain and the subsequent formation of the United States of America (McLaughlin 1900). Later, the idea of a compact of states was used in support of the southern states breaking away, forming a Confederacy in 1861 and starting a ‘War between the States’ (Hughes 1935).<sup>52</sup> While many Canadian scholars have argued that the Civil War likely had soured the Fathers of Confederation on the American model of union (see, for e.g. Hodgins 1978, 43; Creighton 1970, 10; MacNaught 1969, 134; Waite 1962, 33; Wheare 1963, 4-5), Vipond illustrates how the same intellectual arguments were used by the Fathers of Confederation in conceptualizing the Canadian experiment as had been already identified by the framers of the American constitution, specifically by James Madison and James Wilson (1989). The Confederation deal was defended “in terms that were strongly reminiscent of the Federalists’ classic exposition of constitutional federalism” (*ibid.*, 5).

The tension between the act of union and the retention of sovereignty in the U.S. federal system, combined with the dual characterization of compact of states and social compact of citizens, were summed up by Pelatiah Webster in a pamphlet printed in 1783 in support of the American union:

“A number of sovereign States uniting into one Commonwealth, and appointing a supreme power to manage the affairs of the union, do necessarily and unavoidably part with and transfer over to such supreme power, so much of their sovereignty, as is necessary to render the ends of the union effectual, otherwise their confederation will be an union without bands, like a cask without hoops, that may and probably will fall to pieces as soon as it is put to any exercise which requires strength.

“In a like manner, every member of civil society parts with many of his natural rights, that he may enjoy the rest in greater security under the protection of society.” (McLaughlin 1900, 472)

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<sup>52</sup> Hughes argues that the label ‘civil war’ obscures the nature of this conflict which was over the terms of the original compact.

Vapond argues that the effect of the U.S. Civil War was to stifle discourse, as Canadian politicians were reluctant to identify the federal principles as being American in origin even though many of them, particularly the ‘Reformers’ of Ontario and the ‘Bleus’ of Quebec, were avid fans of the U.S. model (1989). The conclusion of Canadian historians, on the other hand, is that the model adopted by Canada was not an American federation but rather the British empire model “in which Ottawa replaced London and the provinces assumed the role of colonies” (Cook 1969, 8; see also Creighton 1965, 176-77; Morton 1980, 211; Saywell 1986, 4; Mallory 1965, 3-5; Bothwell 1986, 81).

The lack of clear discourse at Confederation and the subsequent divergence in opinion on what the nature of the social contract was for Canada might commend a healthy ongoing research agenda for various departments within the Canadian academy. But criticism from Norman Rogers in a paper to the Canadian Political Science Association in 1931 so effectively undermined the compact theory among English-speaking political scientists that its “credibility vanished overnight” (Romney 1999, 23). There has been little interest in the question since, though in recent years, there has been a revival in interest over the early moral foundations and how they may have been influencing identity politics in Canada (Vipond 1991; LeSelva 2002; Bouchard 2000).

Interest in the social contract with respect to its constitutional implications has gone unstudied in large measure due to the fact that the supreme court of Canada has already ruled that a compact reached at Confederation cannot *formally* constrain future constitutional amendment (*Re: Resolution to amend the Constitution* 1981), and that even if many Canadian politicians subscribe to a particular notion of what the compact might be today, such as a partnership between the English and French, this is not sufficient to form a constitutional convention (*Re: Objection by Quebec to a resolution to amend the Constitution* 1982).

Of course, what is being suggested in this chapter is not that the social compact provides a legal constraint on constitutional change. Quite the opposite, it is argued that only the concept of sovereignty can inform constitutional change, but that the

understandings of social groups about the nature of the social contract that is a constitution may fuel opposition to change and can create a moral constraint on actors that is a counter pull to the formal constitutional amendment processes permitted by sovereignty.

The dual compact theory continues to be embraced by the Government of Quebec in one form or another and can be found in the work of the Tremblay Commission of the 1950s and the arguments made against patriation in the 1970s and 1980s (McRoberts 1997). A partnership between the English and French has been espoused by Quebec premiers Jean Lesage, Daniel Johnson Sr., Robert Bourassa, René Lesvesque, Jacques Parizeau, Lucien Bouchard and Jean Charest, and the leader of the ‘no’ forces in the first Quebec referendum on independence Claude Ryan, and the separatists in Quebec have invoked its non-realization as justification for secession (Paquin 1999).

Elsewhere I have provided evidence that the symbols of sovereignty and authority issued to Canada following Confederation suggest that there was no acknowledgement of the existence of a dual compact *at the time of* Confederation or in the first half century following, and that a compact of provinces was the dominant perspective of the Fathers of Confederation (Hicks 2010c), though I have also shown how from an institutional perspective, the house of commons and the senate of today show an implicit accommodation of all three constructions of social union: a compact of people, a compact of provinces and a compact of the French and English (Hicks 2007). From an institutional perspective, which will become increasingly apparent in the following chapters, the structures of government that form the building blocks upon which Canada’s current federal institutions rest, pre-date 1867, and support the idea of a French-English compact. For our purposes here it is not necessary to resolve the debate over the nature of the social contract. That a debate exists is sufficient, as it provides evidence of a coordinated attempt by social groups to restrain institutional change and of how societal cleavages are reflected within the *Constitution*.

## Summary

The authority for constitutional change rests with the queen as ‘sovereign’ and with her personal representatives, advisors and legislatures. For much of Canada’s history, as will be discussed in more detail below, this has either meant the British crown or the British parliament at Westminster as the legal location of sovereignty for all of the British empire. In terms of the social contract that is the constitution, there is disagreement over who were the original parties to the compact. This has been the subject of much debate even in the colonies that existed before 1867 and, as has been noted here, has repeatedly emerged in discourse over constitutional and institutional change since confederation. It pits those who believe in the popular sovereignty of the people against those who get their identity from particular social groups that emerge on either side of a cleavage.

The current Canada is not unitary, given that it was decided to adopt a federal system in 1867, but those who identify with a popular sovereignty vested in the Canadian people freely entering into the social contract that is a constitution, invariably argue in favour of some form of majoritarian decision making in support of constitutional and institutional change. The compact theory, on the other hand, particularly that of a dual compact which involves both provincial partnership and a partnership between the French and English, has always been advanced in opposition to constitutional and institutional change. Put in the language of this dissertation, sovereignty can be seen as the political construction that allows for and drives constitutional change, whereas parties to a constitutional contract are often seen to be reflective of the society’s social cleavages, especially in a federation, and will be opponents of constitutional change in so far as it deviates from the original contract agreed to by the partners.<sup>53</sup> While one can imagine changes to the compact they would favour, being minority parties to the contract, the status quo becomes the preferred position.

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<sup>53</sup> Federal systems are frequently adopted to accommodate minority social – cultural, linguistic or religious – groups that, while a minority in the country, form a majority in a particular geographic area within the state.

## II. Constitutions

Turning now from the philosophical underpinnings of a constitution, to the constitutions themselves, it is important that we put the law into the perspective it deserves. All constitutions can be changed. All political systems can be changed.

Revolution is the extreme mechanism whereby citizens force change through collective agitation, violence and a general departure from the rule of law. Most states have allowed for more peaceful change through structured evolution. What we are interested in is change to institutions through the formal processes of state sanctioned power. This means we are talking about constitutional change.

The word ‘constitution’ is used here in two different senses. Used abstractly, it encapsulates the “system of laws, customs and conventions which define the composition and powers of organs of the state, and regulate the relations of the various state organs to one another and to the private citizen” (Jackson et Leopold 2001, 4). But in most countries, with the notable exceptions of the United Kingdom and Israel, there are also specific documents referred to as the ‘constitution’ and it is in these documents that the most important laws of the constitution are identified and then protected by an amending mechanism that is more challenging than the mechanism used to adopt and amend normal legislation.<sup>54</sup> As no one document can define all the rules for the operation of the state, these ‘written constitutions’ are invariably supplemented by customs, conventions, laws passed in the normal way, and judicial decisions interpreting the various clauses within the document.

The legal literature often differentiates between the degrees of freedom that constitutional actors have in making changes to institutions, a practice that has undoubtedly influenced political science discourse concerning the challenge surrounding institutional change in Canada. Constitutions are variously described as ‘moving or stationary’, ‘fluid

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<sup>54</sup> For the operation of Israel’s parliament there are ‘basic laws’ but no constitution has yet been adopted (Likhovski 1971).

or solid' and 'flexible or rigid' (Bryce 1901, 131-2). Flexible constitutions are defined as when every law of every description can legally be changed in the same manner by one and the same body, whereas rigid constitutions are those where certain laws, generally known as constitutional, cannot be changed in the same manner as ordinary laws (Dicey 1959, 126-50). This legal definition is not particularly useful as we noted above virtually every country in the modern era now has a written constitution, so the only thing that might be of interest with respect to institutional change is the degree of rigidity and thus the thresholds created for institutional change through constitutional amendment formulae.

The move towards written constitutions was first necessitated with the emergence of federal states. A 'state', as it relates to constitutions, is an independent political society occupying a defined territory, whose members are united at the very minimum to resist external force and preserve internal order (Jackson et Leopold 2001, 4). Beginning with the United States, where the original colonies decided that it would be preferable not to surrender all public authority to a single level of government, there have emerged an increasing number of federations in the world, including Canada. These are countries which combine shared rule through common institutions and regional rule via alternate institutions at the regional or local level. In a federation, neither the federal nor the constituent units of government are constitutionally subordinate to the other. Each has 'sovereign' powers derived from the constitution, each is empowered to deal directly with its citizens in the exercise of its legislative, executive and taxing powers and each is directly elected by its citizens (Watts 1996, 7). This necessitates a written constitution that can balance union with decentralization. And, as has been argued above, this constitution becomes the source of their sovereignty.

More recently, written constitutions have become the norm because, as famed French historian François Furet noted in a speech in Britain at the bicentennial of the French Revolution, "in a real democracy liberties and minorities have legal protection in the form of a written constitution that even Parliament cannot change to suit its whim or policy" (cited in Dworkin 1990). In the case of rights, which are group entitlements

considered so fundamental to human dignity that they must receive special protection under the law, it is only through a written constitution that the government can be forced to take an active role; and in the case of freedoms, which involve the liberty to do or believe certain things, it is similarly through a written constitution that government can most effectively be restrained. As with the model of federalism, it is the constitution of the United States with an entrenched bill of rights that served as a template for other states to adopt in the modern era.

Like most political rules, there are almost as many variations in amending formulae as there are states, as system architects apply normative and theoretical models popular at the time to their own political and social context and come up with what are thought to be workable arrangements for that state. For example, in Australia, referenda have been adopted as the preferential mechanism to change the constitution and this requires ratification by both a majority of electors nationwide and in a majority of states; in the United States a two-thirds vote in each federal legislative chamber and ratification by three-fourths of the individual states is required; Belgium requires a federal election be called between the introduction of an amendment and its adoption which requires a two-thirds majority in each legislative chamber; France uses either a referendum or a special joint meeting of its legislature wherein a three-fifths majority is required; and Canada currently has different thresholds for different sections of its multiple constitutional documents as will be discussed in detail in part three of this chapter.

## **Colonial Constitutions**

Where the U.K. has been resistant to written constitutions, its colonial possessions have always had de facto written constitutions. These are centred on orders-in-council and letters patent, which are issued under royal prerogative, or on an act of the parliament at Westminster. These seminal documents provide for governance of a colony and usually specify the composition and powers of the legislative and executive councils and assemblies and the superior courts.

Under the royal prerogative, in the first instance, letters patent will create the office of governor and define his duties and powers, after which governors are appointed by royal commission and serve at pleasure (i.e. until another governor is appointed in his stead) though regular terms of appointment may emerge in practice. Royal instructions are issued to the governor from time to time by the secretary of state for the colonies, who is a member of the British privy council (i.e. cabinet), and these establish for the governor how he is to exercise his duties and powers. These are all statutory instruments and form part of the constitution of a colony.

In British law, there was a distinction between a colony that was ‘settled’ and a colony that was ‘conquered or ceded’. The constitutions in settled colonies are based on the legislated authority granted the crown under *British Settlements Acts, 1843* and 1887, and in ceded colonies on nothing more than royal prerogative constrained only by the moral obligation set forth in a treaty of peace or terms of capitulation. As such, in settled colonies, settlers took with them all the rights of British subjects. Specifically settlers took the common law of England and the statute law as existed at the time of settlement (Jackson et Leopold 2001).<sup>55</sup> It could be argued that they also took the right to be granted representative government in the shape of a bicameral legislature with a nominated upper house and an elected lower house, on the model of the British parliament (which is argued by Wight 1947, 5). Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland were settled colonies and, as will be examined in detail in chapter five, the local variations in governance and law in the initial constitutions for these ‘islands’ and ‘provinces’ suggest that while a predictable trajectory emerged, it was in no way assured and was undeniably staggered by colony in terms of when it emerged.<sup>56</sup>

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<sup>55</sup> This, no doubt, encouraged settlers to follow the practices they learned in England but these institutions were in no way assured even if their trajectory later seems predictable with hindsight. The importance of common law traditions was so ingrained into ex-patriot citizens that in Henry Hudson’s fatal trip to Canada, faced with certain death from cold and starvation in a locale where there was no judicial enforcement or deterrence value in the law, in a voyage long believed to be rife with lawlessness, overwhelming loyalty to uphold the king’s law prevailed (Mancall 2009).

<sup>56</sup> The terms ‘island’ and ‘province’ are colonial terms in the British common law of the 15-19<sup>th</sup> centuries. While ‘dominion’ was originally a synonym, it emerged as the term to designate a largely settler state that

Quebec was a ceded colony. The inhabitants of conquered or ceded colonies only had such rights as the British crown chose to grant, though the existing legal system of the colony prior to its absorption into the British empire was continued until it was altered by the British Crown. However, once a ceded colony was granted a representative legislature, it ceased being within the crown's authority to undo such grants unless there were overriding issues of public necessity.<sup>57</sup> Keith argues that it was desirable to grant similar institutions of governance to conquered and ceded colonies in order to attract additional settlers, an argument that will be explored more fully in the following chapters (1928, 4). Suffice it to say for our purposes here that in all colonies, whether ceded or settled, the trajectory of institutions would lead to representative legislative assemblies (usually bicameral) and then responsible parliamentary government, but this was in no way an obligation on the Crown or a right of the residents of the colony.

The distinction between ceded and settled implies a different social contract. In a ceded colony the British crown had only such obligations as were identified in the treaty which ceded the territory and these obligations were to a social group. Settled colonies were predicated on the settlers being British subjects and thus the obligation the crown had to its subjects.

With the emergence of representative government, there was leeway to amend the constitution granted by the crown via the local legislature because a representative legislature has constituent powers (Wight 1947, 6). Once the British parliament enacted a constitution through legislation, the crown lost its capacity to change that legislature. The parliament at Westminster's supremacy over the colonies was a paramount right, so regardless of the source for the colonial constitution, whether it be crown prerogative or British ordinary legislation, imperial parliamentary authority could be exercised to override

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was on a trajectory for independence in the early 20<sup>th</sup> century, though this term has since been rejected by all 'dominions' like Canada due to its predating the independence granted by the Balfour Declaration and the Statute of Westminster.

<sup>57</sup> This principle was identified by the Court of Kings Bench in *Campbell v. Hall* (1774).

and control the powers possessed by any local government (Todd 1880, 172-3). This it did in Canada following the uprisings in the provinces of Upper and Lower Canada in 1838.

The province of Nova Scotia, and the new province of New Brunswick which was created from it after the American War of Independence, are examples of settler colonies that had constitutions which saw their institutions of governance created by the crown through letters patent and instructions issued to the governors and then more directly managed by the crown on the advice of the local representative government. Quebec as a ceded colony received its first authority for representative government not from the crown but from an act of the British parliament via the *Quebec Act 1774*.<sup>58</sup> As this colonial constitution was an act of the British parliament, it is only through subsequent acts of the British parliament that new constitutional arrangements could be made for this territory, including the establishment of separate provinces of Upper Canada and Lower Canada (*The Constitutional Act 1791*), the re-union of the two provinces into a single ‘province’ under the name Canada (*The Union Act, 1840*) and then the union of four provinces into a federal ‘dominion’ also called Canada in 1867 (*British North America Act, 1867*), and that all subsequent changes to the constitution of that federation were made until 1982 with the passage of the Canada Act. As provinces were added to Canada, either by ‘joining’ Confederation or created new out of territory ceded to Canada, provincial constitutions were equally enacted or incorporated into the constitutional framework of the country.

The *Union Act, 1840*, created a new concept in colonial law and this is one of repugnancy. This concept was extended to all colonies in 1865 with the passage of the *Colonial Laws Validity Act*. As a result, legislation enacted by a local legislature that concerned ‘imperial’ matters had to be sent to England for ratification or disallowance. However, the inverse of this was the principle that all local matters should be the

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<sup>58</sup> This is one of the ‘intolerable acts’ identified in the U.S. Declaration of Independence, because it assigned land in the west that the American colonists had designs on to this province, and extended protection for the French language, catholic religion and civil law to the province, altering the oath of office in the process so that French Canadians could hold government and legislative positions. This act also denied to Quebec the representative system promised in 1763, leaving governance in the hands of the governor and a nominee council.

responsibility of the colonial legislature. With regards to their respective constitutions, the Act specified that:

“Every representative legislature shall in respect to the colony under its jurisdiction have and be deemed to have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature, provided that such laws shall have been passed in such manner and form as may from time to time be required by any act of parliament, letters patent, orders-in-council, or colonial law for the time being in force in said colony” (*Colonial Laws Validity Act, 1865*, s.5).

This marks a shift in policy within the British government and its colonial office, that irrespective of the position of the British parliament, colonial legislatures should be responsible for managing their own affairs and that constitutional documents created from that time forward should have their legislative powers more clearly defined (Swinfen 1970, 182-3).

The *British North America Act, 1867*, which in 1982 was renamed the *Constitution Act, 1867*, provided for the merging of the colonies of Ontario, Quebec, New Brunswick and Nova Scotia, with provision for the future admission of other North American colonies, and established a constitutional basis for both the federal and provincial governments and legislatures within its territorial jurisdiction. There was no formal provision for amendment through local autonomous decision making. This would not be provided for until 1982. One of the reasons for this was the acceptance by legal scholars in England and in Canada of Dicey’s theory of parliamentary sovereignty (Oliver 2005). As Acts of the British parliament were supreme over all the dominions, amendment of constitutions created by the British parliament could only be made by that legislature. There were a number of amendments made, and these were done by the British legislature at the simple behest of the Canadian federal parliament, so there is no reason to assume that, in the early years of Canada, constitutional amendment was thought to be constrained by anything more than a sense of obligation to the social compact reached by the Fathers of Confederation.

## Conventions

Conventions form the greatest part of the Canadian constitution. The *Constitution Act, 1867* gave Canada “a Constitution similar in Principle to that of the United Kingdom”. This effectively transferred to Canada the Westminster-model of responsible parliamentary government and constitutional monarchy that existed in the U.K. on July 1, 1867.<sup>59</sup> In spite of the model’s heavy reliance on unwritten conventions, they go largely unstudied in the United Kingdom and in its derivative former colonies like Canada and Australia.<sup>60</sup>

It was John Stuart Mill (1865, 35) who first argued that there were “unwritten maxims of the constitution” and imbued them with then emerging democratic values. These were given the label ‘conventions’ by Dicey, who went further and used this concept to create a constitutional obligation for the crown “to secure the ultimate supremacy of the electorate as the true political sovereign of the state” (Dicey 1959, 422).<sup>61</sup> Conventions are “a binding rule, a rule of behaviour accepted as obligatory by those concerned in the working of the constitution” (Wheare 1951, 179). The existence of a convention can be ascertained by asking three questions: Are there precedents; is there a reason for these precedents; and is there agreement to be bound by these precedents which would then

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<sup>59</sup> Andrew Heard has the only recent book in Canada which is devoted to systematically chronicling the ‘Canadian’ version of British constitutional conventions, including the ones guiding the governor general, legislatures and the very non-British idea of federalism (1991). This paucity in books on conventions is disappointing in terms of continuing Canadian scholarship since it was a Canadian, Eugene Forsey, who resurrected the theory of a democratic basis for the reserve powers with what is still the definitive text still used throughout the Commonwealth on the crown’s decision making over ‘dissolution’ (1943). The only recent full length text on constitutional conventions in England is Marshall (1986); and Cooray has the only recent book on the Australian variations (1979). This is an equally surprising situation for Australia, as it was an Australian, H.V. Evatt, a contemporary of Forsey, who did the first examination of the reserve powers of governors (1967).

<sup>60</sup> Obviously conventions are discussed in all legal texts on the Canadian *Constitution*, such as the popular texts used in law schools by Hogg (1977) and Brun and Tremblay (1982), and in specific studies on the Canadian system of governance including MacKinnon’s (1976) work on the crown, Mallory’s (1978) and Messamore’s (2006) work on governors general, Saywell’s (1986) work on lieutenant governors, Gérin-Lajoie’s (1950) work on constitutional amendment, and Forsey’s (e.g. 1974) prolific work on responsible parliamentary government.

<sup>61</sup> Of course, the grafting of democratic principles onto an institutional structure conceived of in a time of feudalism means that the reasons for the precedent will be artificial (Hicks 2009c). What is more, the ‘democratic’ obligation that is understood to govern the constitution is dependent on temporal, cultural and historic circumstance, as illustrated by a comparative examination of the royal prerogative in Britain and Canada (Hicks 2010a).

constitute a rule? (Jennings 1960, Ch.3). Jennings suggested that it might be sufficient to show that a rule has received general acceptance by persons in authority, though Hogg more specifically identifies the need for acceptance by the “officials to whom it applies” (1977, 9), an approach employed by the Supreme Court of Canada (*Re: Resolution to amend the Constitution 1981*, 888; and *Re: Objection by Quebec to a resolution to amend the Constitution 1982*, 802-818).

It is the Canadian supreme court’s constituent position that enforcement of such conventions is political and not a question of law for the court, and that even a finding of unconstitutionality for a particular course of action cannot prevent that course of action (*Re: Resolution to amend the Constitution 1981*).<sup>62</sup> Conventions are left by the courts to be enforced by legislatures, governors (lieutenant and general) and, ultimately, the people through elections.

When Dicey defined a ‘constitutional morality’ that bound the Crown (Dicey 1959, 422), he was doing more than just identifying customs and maxims that had evolved over time. He and his predecessors and successors have systematically tried to bridge the gap between democratic theory and legal codification in order to bind the institutions of governance to democratic principles. “Conventions therefore change in accordance with the underlying ideas of government” (Holdsworth 1932, 161). As the Supreme Court of Canada has noted, the “main purpose of constitutional conventions is to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period” (*Re: Resolution to amend the Constitution 1981*, 880). In other words, conventions offer a mechanism to change the constitution and to change the institutions of governance without the arduous task of amending written constitutions, enacting new constitutions or even undertaking statutory changes. They are institutional alterations that have been agreed to by the constitutional actors, something that

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<sup>62</sup> The supreme court of Canada (pursuant to s.53 of the *Supreme Court Act*) and provincial supreme courts (pursuant to their respective legislation) allow for governments to refer important questions of law or fact concerning the interpretation of the Constitution or the constitutionality of federal and provincial legislation, so the supreme court of Canada has commented on constitutional convention which while instructive is not binding or enforceable.

would theoretically lend itself to partisan pressures for change, but would equally be something that social groups would have the capacity to resist. Constitutional law is, after all, a normative endeavour equally sensitive to group dynamics and to politics.

## **Judicial Review**

The British legal system is hierarchical, and until the *Balfour Declaration* of 1926 and the *Statute of Westminster, 1931*, appeals could be made to the Judicial Committee of the Privy Council in London. Created by the *Judicial Committee Act, 1933*, the JCPC is a committee of the British privy council established to hear appeals of court rulings that are submitted to the monarch. As colonists had the right to appeal to the monarch any decision rendered with respect to the king's justice, it became the highest court of appeal for the colonies.<sup>63</sup>

The supreme court of Canada was created in 1875, under the authority of the *Constitution Act, 1867*, which allowed for the federal parliament to create a "general court of appeal for Canada" (s.101). While its creation should have ended appeals to the JCPC, leave was still granted by the JCPC and was only ended in 1933 for criminal cases and 1949 for civil cases.<sup>64</sup>

Judicial review of the constitution has always existed in Canada since, as a former colony and a federation, it has always had a constitution which was beyond the reach of the Canadian parliament (Abella 1993, 177). While bounded by precedent and thus conservative in nature, decisions of all courts are matters of interpretation arising from disputes between people, between the state and its people or between groups of people, so they will always be surrounded in controversy. This has been especially true for Canada.<sup>65</sup> Decisions in the first half of Canada's history (made by the JCPC) resulted in criticisms

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<sup>63</sup> For a history of the origins and emergence of the Judicial Committee of the Privy Council as the supreme appellate tribunal for the British Empire see Howell (1979).

<sup>64</sup> This was grandfathered, so cases which had begun prior to 1949 were allowed to continue so the last case heard by the JCPC was in 1959.

<sup>65</sup> Bushnell points out that court bashing is a Canadian tradition, and within three years of the creation of the Supreme Court it was under attack (1992).

from the ideological ‘left’, since these decisions had the outcome of restraining the federal government’s ability to create social programs, and yet since 1982, the criticisms have come from the ‘right’, which has objected to social outcomes that seem to restrain parliament’s capacity to limit the activities of minority groups (Smith 2002).<sup>66</sup> Litigation is therefore another mechanism to obtain constitutional change and is available to every citizen, subject to their capacity to frame their cause in a justiciable action and sustain the costs of using the legal system. As corporations are in law deemed to be persons, this has meant that organized social groups can avail themselves of the courts to obtain constitutional change, as can members of an identified social group who wish to act in their individual capacity to obtain changes that benefit themselves and others with whom they identify.

## Summary

In the modern era, most countries have written constitutions and these have different procedures designed to protect these documents from ill-conceived and intemperate changes. As has been noted, Canadian scholars see amending the written constitution as the insurmountable barrier to institutional change. While it is true that written constitutions on paper make change more challenging than unwritten constitutions and it is true that Canada has always had written constitutions, these constitutions, along with the institutions they structured and regulated, have been changed repeatedly over time in Canada.

While it has been common for legal scholars to talk about the degree of flexibility or rigidity when it comes to constitutions, this is clearly not the only, and perhaps not the most

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<sup>66</sup> These decisions were no different than those being made in the previous century, except when it comes to their dealings with the people, institutions and officials of government the new decisions involved a constitutional obligation to live up to the earlier implied obligation to the citizen under British common law (Dickson 1994). Today, those on the “right” argue in their most generous state that Parliament should have concurrent jurisdiction to interpret the constitution (Manfredi 2001). Elsewhere I have argued (Hicks 2003), in concurrence with Justice Rosalie Abella, that this makes no sense for Canada since it has always had a written constitution, Canadian parliamentary supremacy was never implied. And Roach argued that to let Parliament have equal authority to interpret the Canadian constitution “challenges conventional understandings of the rule of law which suggests that the legislature should respect the Court’s interpretation of the Constitution” (2001, 493).

significant, consideration with respect to amendment. In the United States, written constitutions at the state level have proven incredibly flexible to change, so flexible that constitutional amendment has become the preferred mechanism for political groups to pursue their financial and social policies, on everything from banning gay marriage to reducing tax rates and forcing balanced budgets, policies that these groups were unable to obtain through the much more modest approval mechanisms required for legislation and government policy. As Jackson and Leopold note with respect to the English constitution, societal norms in the United Kingdom make it “more difficult to pass a British statute amending the law relating to the sale of intoxicating liquors or the opening of shops on Sunday than to pass a French statute reducing the period of office of the President of the Republic from seven to five years” (2001, 6-7). Constitutional change would appear to be constrained by social forces and cultural attitudes rather than political will, something that would seem to support the thesis being advanced here with respect to institutional change.

### **III. Constitution Act, 1867**

We turn now to the *Constitution Act, 1867*, or more particularly to the search for and enactment of rules to govern amending this Act domestically in Canada. This is deserving of specific examination for two reasons. First, the rules that govern the amendment are the specific constraints that Canadian scholars have argued are too onerous to permit alteration of the Canadian Senate. It has been argued above that from a theoretical perspective such rules are nothing more than normal constraints that govern political action in the name of the state so as to ensure a certain level of consensus, albeit a higher level of political will than that which governs the enacting of ordinary legislation. While the examination so far has seemed to support this claim *a priori*, it is worth considering the specifics of the threshold to address whether or not the amending formula does contain particular social as opposed to partisan barriers that would *prima facie* challenge the argument in this thesis. Second, the search for an amending formula is an exercise in constitutional amendment and since it is argued here a constitution is an

institution in the broadest sense, then that journey should offer some empirical evidence with respect to the constraints and sources of change for institutions of governance.

Before turning to those two questions, it needs to be stressed again, as this research covers equally the colonial and the modern era, that for the majority of Canada's history a simple order issued by the British cabinet or legislation enacted by the British parliament was sufficient to alter any constitution in Canada. There were no obstacles to change beyond the hurdle of convincing the British imperial government, and through it the majority of members of both chambers in the British parliament, that change was necessary, something that will be explored more fully in the following chapters

### **Finding an Amending Formula**

The search for an amending formula began following World War I. Canada was becoming self-aware, having 'punched above its weight' during the war, and this may have activated a federal-nationalism which, in turn, primed a provincial-nationalism (Hicks 2010c, 112).<sup>67</sup> Additionally, decisions of the JCPC had been favouring the provinces, so constitutional amendment on federal-provincial division of powers, something that the British parliament under the influence of the JCPC would have been less supportive of doing without some indication of provincial support, was an increasing contemplation for the federal government.<sup>68</sup> More immediately, Liberal Prime Minister Mackenzie King had made an issue of breaking the bonds of British control in the 1926 general election for partisan as opposed to nationalistic reasons, having briefly been deprived of his prime ministership by the Governor General, Lord Byng (Hicks 2010a, 2010b, 2009a, 2009c; Forsey 1943).

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<sup>67</sup> Based on my initial foray into the question of using heraldic symbols to examine ideas of sovereignty and identity I suggest that this possibility should be explored further. That WWI moved the desire for a unique symbol in the form of the Canadian coat of arms and even the maple leaf, which was worn by the troops and later became the basis of the Canadian flag, already seems apparent (see Matheson 1986).

<sup>68</sup> That the JCPC was a political body, particularly when it came to imperial interests of the British government, rather than a judicial body acting as purely a court of appeal, and the membership crossover between the government and this body is explored in detail in Howell (1979)

The Liberals under Prime Minister Mackenzie King had won fewer seats in the 1925 general election than the Conservatives under Arthur Meighan. King decided to continue to govern, as was his right so long as he had the support of parliament. But a scandal undermined that confidence and facing a motion of censure, King asked Governor General Lord Byng to dissolve parliament, a request that Byng rightly refused. Mackenzie King tried everything, from asking the cabinet to submit a proposed order-in-council to Lord Byng for signature to asking His Excellency to wait for instructions from Britain. Byng stood his ground and Mackenzie King was forced to submit his resignation and let Arthur Meighan try to form a government. Meighan was unable to put together a government that had the support of parliament, whereupon Lord Byng dissolved parliament. In the ensuing election Mackenzie King hypocritically made the fact that the Governor General was a British representative an issue, and was returned to power.

Motivated by his own election rhetoric, Mackenzie King took his campaign platform to the Imperial Conference of 1926 where he was instrumental in securing the Balfour Declaration and the passage of the *Statute of Westminster*, whereby the British parliament formally extinguished its authority over their dominions and their governors. Arthur Meighan ridiculed this accomplishment by pointing out that the *BNA Act* remained an ordinary statute of the British parliament and that Canada still had to ask Britain to make changes to its constitution, so the rescinding of British parliamentary control over the dominions meant nothing for Canada.

Never one to be out politicked, Mackenzie King responded by convening a federal-provincial conference between November 3rd and 10th, 1927, to consider the question of amending formulae. The formulae he and his Minister of Justice proposed would have required that “ordinary” constitutional amendments be adopted only if the majority of the provinces agreed whereas “vital and fundamental” amendments would require unanimous consent (Dupras 1992, 3). This proposal failed because the Quebec government would not agree to an amendment mechanism which would put at risk any portions of the constitution that protected the province’s religion and language rights (Keith 1929, 41). The

Government of Quebec was not operating in this instance as the leadership of a political party or constitutional administrative unit, but as representative of a societal group that exists on one side of a series of social cleavages in Canada, namely language, culture and religion, and it was resisting change specifically because it could endanger that group's religion or language, preferring to opt for the *status quo*.

Mackenzie King tried in 1935 again to obtain agreement on an amending formula to govern Canada's constitutional Acts during a federal-provincial conference held from December 9th to the 13th. The outcome of that meeting was a committee struck to develop an amending procedure. Their proposed four level amending formulae are very similar to what eventually came to be adopted in the *Constitution Act, 1982* – they differ primarily with respect to what was determined to fall under each formula, particularly what fell within the jurisdiction of the federal parliament to amend on its own.<sup>69</sup> Having failed to get agreement at the time, the federal government had the British parliament amend the *British North America Act, 1867* to give it the power to amend the Constitution with respect to the items it felt were purely within federal jurisdiction (*British North America Act (No. 2), 1949*).

When, in 1950, the federal government tried again to obtain provincial agreement on amending formulae, it did so by increasing the formulae to six classes. And in the meetings of 1961 and then in 1964, the 'Fulton-Favreau Formula' emerged, which continued in the tradition of majoritarian political decision making, in groupings similar to that set forth in 1935, though the classes of subjects over which the federal government had originally demanded unilateral authority for parliament to amend was reduced as a carrot to offer the provinces for their endorsement. This was not forthcoming.

The Liberals had made British control of Canada and its governor an election wedge issue in 1927. This wedge, or cleavage, in Canadian politics, between the Liberals who had

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<sup>69</sup> Namely the office of governor general, the offices of lieutenant governor, the constitution of the privy council, the constitution, composition and powers of the senate (except for the representation of the provinces in the senate), house of commons (except for representation in the house of commons) and the treasury.

touted independence for Canada and the Conservatives, who in Tory tradition had supported the governor and his ties to Britain, became the impetus for institutional change, including what would be a 55-year campaign by successive Liberal administrations until they obtained agreement on amending formulae for all aspects of the Constitution Acts.

In every attempt to find a formula, Quebec found itself at odds with the federal government, and the reason for not proceeding can be attributed to the Quebec government opposing the proposals advanced by the federal government in all 14 attempts (Hurley 1966). The only time that the federal government and Quebec came close to agreement, with the other provinces in tow, was in 1971 with the *Victoria Charter*. This would have required, for the purposes of a 'general' amending formula, the agreement of Ontario, Quebec and the majority of the provinces in Atlantic Canada and in Western Canada. While the Quebec government was motivated to support this formula by its desire for a veto over constitutional amendment, this was sold to the other provinces not as a notion of respect for the Francophone population in Quebec but rather a reflection of the original entente agreed to in 1867. The Victoria formula reflected the principle of the federation used for the Canadian Senate, where Canada was defined as four equal regions (Hicks 2007). So the one amending formula that the Quebec government almost agreed to would have altered the Constitution to advance protection of its side of a social cleavage, but would also have been, in some ways, a preservation of the status quo principle of partnership already identified as being within the social contract.

Quebec Premier Robert Bourassa subsequently backed away from the agreement out of concern it would not be supported by the Francophone population, or at least by students and the political elites, of Quebec. Prime Minister Pierre Trudeau additionally suggests that Bourassa was reticent about agreeing to any constitutional change, and that the Quebec Premier moved to stall consensus even before proposing that he had to return to Quebec and seek approval from his Cabinet and gauge public opinion (Trudeau 1993, 232-3). This would equally support the hypothesis that the minority group on the side of a social cleavage will tend to support the status quo.

By 1975, the other provinces had distanced themselves from this formula in response to a perception that this would give a ‘veto’ to Quebec. And while the federal government has been largely consistent in support of such a formula ever since, the political will has not been sufficient to obtain the formula that Quebec, as a province with a majority of Francophones, might find beneficial.<sup>70</sup> There was no objection to Ontario having a veto, at this time or since, as Ontario’s veto was an acknowledgement of its large population and thus conforms to majoritarian political decision making.

While the federal government believed that it was free to request the British parliament to amend the *Constitution* with respect to the senate as recently as 1978, it put this question to the test in a reference to the supreme court after it failed to obtain provincial support for its proposed replacement of the upper house with a House of the Federation. The supreme court of Canada (*Re: Authority of Parliament in relation to the Upper House 1980*) stated that the senate, as a body established for the purposes of provincial representation should not be altered without some degree of provincial concurrence.<sup>71</sup> This, and a subsequent supreme court ruling on the level of provincial consensus necessary to patriate the constitution (*Re: Resolution to amend the Constitution 1981*), enshrine a bill of rights and adopt an amending formula – constitutional amendments that Pierre Trudeau had as justice minister in 1967 informed the provinces at a federal-provincial conference was the full extent of constitutional change he was willing to make in the first round – laid the groundwork for the first ministers to negotiate an amending formula in 1982, which was agreed to by every province but Quebec. Adopted pursuant to the rules of sovereignty, even as modified by convention, it remains the unquestionable constitutional law of the land (*Re: Objection by Quebec to a resolution to amend the Constitution, 1982*). All change from this point on must meet the majoritarian thresholds set out in the *Constitution Act, 1982*.

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<sup>70</sup> As Pierre Trudeau later put it, “Bourassa's subsequent career has been spent trying to regain what he was once so unwise as to refuse” (Trudeau 1993, 229).

<sup>71</sup> This proposal would have given provincial governments the authority to appoint members to the Senate, which was intended to strengthen its provincial dimension, making the court’s ruling not about political influence but about constitutional amendment.

## Constitution Act, 1982

The amending formula entrenched in the Constitution through the *Constitution Act, 1982* has placed “(b) the powers of the Senate and the method of selecting Senators” and “(c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators” under the ‘general’ amending formula (s.42(1)). The general amending formula requires the passage of resolutions in support of a change by the legislatures of two-thirds (or seven of the ten) provinces representing at least 50 percent of the Canadian population.<sup>72</sup> These resolutions need to be adopted within a three year ratification period.

This is not the only amending formula established by the *Constitution Act, 1982*. But it is significant that Senate reform was specifically placed under the less onerous general amending formula, albeit more onerous than the federal parliament acting alone. Clearly, the framers of the 1982 *Constitution* saw the Senate as deserving of change but were also cognizant of the importance of this institution to parliament’s internal balance and to its *intended* purpose in the federation.<sup>73</sup>

In addition to the general formula, which specifically provides for constitutional amendment so as to achieve what Eugene Forsey once wrote should be the objective of any worthwhile Senate reform package, “acceptably the method of choosing Senators, their powers, their numbers, and their relations with the House of Commons and the Government” (1984, 51), the *Constitution Act, 1982* has three other formulae for amendment of the Constitution Acts. That the general formula should govern most amendments unless enumerated elsewhere cannot be overstated. A basic principle of

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<sup>72</sup> The door was opened to this amending formula by the Quebec’s Parti Québécois (i.e. independence or separatist) Premier, René Lesvesque, breaking with his predecessors and agreeing with other provinces to this majoritarian formula instead of the traditional claim of a right to a Quebec veto that had been accepted by the federal government to be reflected in the Victoria formula. Given the political dynamic of these negotiations, “not much should be read into this abandonment other than the fact that the subsequent *Constitution Act, 1982* did not adopt an amending formula based on a four-region formula” (Hicks 2007, 24).

<sup>73</sup> Uhr has noted that the two chambers of a bicameral system more often than naught are designed to be in balance, a principle in conformity with the theory of bicameralism expanded upon at length in the writings the *Federalist Papers* and J.S. Mills (2006).

constitutional law is that once you define you limit and the limitations expressed for the other clauses should be seen as limiting those clauses to those specific classes of amendment. The same is not true for the general formula where its enumerated subjects are illustrative. Of course, large packages of amendments that cover multiple classes need to be ratified by the most onerous formula that is required for any one item in the package.

Social groups will invariably argue that amendments which impact on their community should be governed by more stringent formula. This has been the unanimous position of the Quebec National Assembly on the federal government's recent bills to alter the Senate, including the reduction in length of tenure, and given its unanimity is evidence of a social group trying to restrain institutional change in the face of a partisan group driving change.

The four other constitutional amendment formulae adopted in 1982 are as follows:

1. Resolutions of all 10 provinces and the house of commons and the senate are required to alter the office of the queen, governor general and lieutenant governor, the right of a province to at least the same number of MPs as it has Senators, the use of French and English languages, the composition of the supreme court and to alter the amending formulae (s.41);<sup>74</sup>
2. Resolutions of the provinces concerned and the two chambers of the federal parliament are necessary where a matter only concerns one or more province, including alteration to provincial boundaries or the use of French and English in a province (s.43); and
3. Resolutions of the two chambers of parliament is sufficient for matters that relate only to the executive government of Canada, the senate or the house of commons (s.44).
4. As was the case prior to 1982, the provincial legislatures have retained the authority to alter provincial constitutions on their own (s.45)

In addition to these formal amending formulae, there are provisions for provinces to opt out of an amendment that “derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province” (s.38.2) and to opt out with reasonable compensation if the amendment concerns “provincial legislative

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<sup>74</sup> This formula, requiring unanimity of the provinces, would be the necessary mechanism to abolish the Senate.

powers relating to education or other cultural matters” (s.40). And, as noted in part II of this chapter, in addition to the formal amending procedures, the constitution can be amended through judicial interpretation and constitutional convention.<sup>75</sup>

Constitutional matters that are not exclusively in areas of federal jurisdiction are dealt with equally by the senate and the house of commons, but assuming the provinces have given their consent to the change they may be implemented without the approval of the senate if, after 180 days of it being passed in the house of commons, the commons passes a new resolution along the same lines (s.47). The decision to grant only a temporary or ‘suspensive’ veto over amendments having provincial support is due to the Senate’s role protecting provincial interest being unnecessary for constitutional amendments already agreed to by the provinces (Smith 2003b, 103). However, it is also to permit changes to the Senate without its consent as it was felt that this chamber should not have a veto over its own reform (see, among others Wells 1 May 1990).

While comprehensive senate reform would require the use of the general 7/50 amending formula, abolition of the senate would require unanimity and modest changes that do not alter the federal nature of the senate or its role as a chamber of sober second thought could be done by parliament acting alone.<sup>76</sup> These amending formulae codify the principles set by the supreme court (*Re: Authority of parliament in relation to the Upper House* 1980).

Outside of the amending formulae, one issue needs to be addressed concerning social cleavages and whether or not the 1982 constitutional changes may have been in response to pressure from social groups rather than an initiative of a political party and that

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<sup>75</sup> For example, the *Constitution Act, 1867* allows for legislation to be held in reserve for approval by the Queen (s.55 & 57) or to be disallowed by the queen after assent is given by the governor general (s.56) and these powers were extended to the lieutenant governors of the provinces in a similar fashion (s.90)., yet there is general consensus that a constitutional convention has emerged rendering these clauses obsolete (e.g. Heard 1991, 36; Hogg 1977, 120). (Though see also MacKinnon 1976, 108; Hicks 2010b).

<sup>76</sup> Examples of modest changes would be the replacement of the property and net worth criteria for appointment, which requires Senators to have a net worth and own property in the amount of \$4,000 in the province (or in the case of Quebec in a district), with a simple residency requirement, or the reduction of the term of a Senator’s appointment from age 75 so long as the new terms were of sufficient length to preserve institutional expertise necessary for the revision of legislation.

is the adoption of a *Charter of Rights and Freedoms*. This is a document that includes the protection of group rights.

As Furet noted, constitutionally protecting basic human rights and freedoms reflects a global recognition that such protection is central to being considered a democracy (cited in Dworkin 1990). The British parliament had adopted the *Bill of Rights 1689*, and this with common law precedent established basic rights in and for Canada. In 1960, Progressive Conservative Prime Minister John Diefenbaker had tried to protect human rights in federal jurisdiction legislatively and, while he passed a Canadian *Bill of Rights*, it was ineffectual due to the courts marginalizing this legislation. This was a personal crusade of Diefenbaker's, who had created a draft bill in 1936 as a young lawyer, four years before being elected to parliament, whereupon he had, as a private member, tried to introduce this legislation.

“Pierre Trudeau took Mr. Diefenbaker's *Bill of Rights* one step further by adding critical provisions of his own on language rights and then waging a decades-long battle to persuade the provincial governments of the necessity of a Charter binding on all levels of government” (Axworthy 2005). This was a change that Liberal Pierre Trudeau identified as central to his party's policy in 1967, and had been a cause that he had identified long before entering politics in his discussions with McGill University law professor Frank Scott. While social groups appeared before the Canadian parliamentary committee studying the Charter in 1981, Prime Minister Trudeau's justice minister, Jean Chrétien, made clear to that committee the government would not support the inclusion of rights for ‘new’ groups, such as homosexuals, but would only recognize rights already accepted as part of the Canadian fabric by society and the courts (see Hicks 2003).<sup>77</sup> So while the Charter had social consequences, the initiative was in the first instance a normative democratic value and its advancement was decidedly partisan.

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<sup>77</sup> Though Chrétien left the door open to the court, on its own outside of the political arena, extending rights to groups such as gays and lesbians.

## Post-1982 Attempts at Amendment

The first consideration of significant constitutional amendment after the adoption of the amending formulae in the Constitution Act, 1982 was in response to Aboriginal protests over the package, including their leadership's active lobbying in London with both the British parliament and the queen. A series of constitutional meetings with Aboriginal leaders were agreed to and, in 1983, an acknowledgement was placed in the Constitution Act, 1982 (s.35.1) of the principle that federal and provincial governments should consult with representatives of the Aboriginal peoples of Canada prior to passing amendments that affect them. Three meetings were held between the first ministers and Aboriginal leaders to try to find constitutional resolution of their grievances. These meetings did not result in constitutional change. This is evidence of a social cleavage creating resistance to the change of the 1982 *Constitution*, and then being unable to drive change between 1983 and 1987 when first ministers had accepted Aboriginal issues to be a priority for discussion.

The next attempt at significant constitutional change was the initiative of the government of Conservative Prime Minister Brian Mulroney, working in coordination with the government of Quebec Premier Robert Bourassa, who called first ministers meetings to change the Constitution in what he labeled the 'Quebec round'. The resultant agreement reached in 1987, known as the *Meech Lake Constitutional Accord*, did not simply address the five demands unveiled by the Quebec government, but included a large number of other issues advanced by the other nine provincial governments.<sup>78</sup> So from the start, the political elites had rejected the idea of making a constitution change that was only directed at one side of a social cleavage. It also could be argued that Brian Mulroney's initiative had little to do with responding to the demands of a minority group in Canada and more to do with partisan ambition, including a desire to one-up the *Constitution Act, 1982* and the political legacy of Liberal Prime Minister Trudeau (see Newman 2005).

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<sup>78</sup> It was named the *Meech Lake Accord* because it was negotiated by the first ministers at the government retreat in Quebec overlooking Meech Lake.

Over the course of the ratification period, the House of Assembly of Newfoundland, which had ratified the *Accord* when a majority in the legislature was Progressive Conservative Party, rescinded its ratification when the majority became Liberal. Newfoundland Premier Clyde Wells, who was a supporter of Trudeau's constitutional position, was vilified by the federal government in public and private for rescinding the province's required resolution. Wells, and an increasing number of Canadians on the English side of the linguistic cleavage, opposed recognition of Quebec as a 'distinct society', though Wells was also concerned about the impact of the *Accord* on Senate reform as it moved this class of items under the formula requiring unanimity and away from the 7/50 general formula. This is evidence that the *Accord* was seen as a partisan Progressive Conservative document that might favour one group created by a social cleavage in Canada.

The other province that failed to ratify the *Accord* within three years was Manitoba.<sup>79</sup> In this province opposition came from one lone member of the legislature, an Aboriginal named Elijah Harper. His capacity to stop the *Accord* was due to the legislative requirement for unanimous consent given the short notice, though it is noteworthy that over the several days when he refused to give consent, he became a rallying point for Aboriginals across Canada. Given the decision of the political leadership in the province not to press the matter in the face of growing support for Elijah Harper, this resistance to the *Accord* was clearly seen as being mounted by a minority group on one side of a social cleavage in Canadian society.

The label executive federalism has been applied to this exercise in constitutional amendment, and much emphasis has been placed on how the *Meech Lake Accord* was negotiated in secret among Canada's prime minister and premiers (e.g. Watts 1989; Cairns

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<sup>79</sup> This was an artificial political and not constitutional deadline. Only the 7/50 formula requires a three year ratification period. The *Accord* was being ratified under unanimity since some items in the package fell under the class of subjects identified in s. 41 of the *Constitution Act, 1982* so, in theory, this accord could be still adopted if ratified by Manitoba and Newfoundland, though since the political actors at the time accepted the three year timeline, opponents of the *Accord* could challenge its validity on the basis of there having arisen a constitutional convention during those three years.

1988; Gibbins 1989). Executive federalism has always been the mechanism for amending the constitution (Hurley 1966). Further, the subsequent attempt to amend the Constitution known as the *Charlottetown Accord*, which had an even greater package of constitutional reforms designed to capture even more political support (i.e. a greater winset), involved both public consultation and a Canada-wide referendum. Yet the result was also failure. If executive federalism has been the primary problem, then the second attempt by the Mulroney Government at constitutional amendment should have remedied this defect.<sup>80</sup>

The reason why *Charlottetown* failed is that these reforms were opposed by a number of minority groups, especially women, multicultural groups, gays and Aboriginals (Cairns 1992). This was also true for opposition among the public during ratification of the *Meech Lake Accord*, even if the public was not part of the ratification process under executive federalism (Cairns 1988). These are all groups identifiable by the various social cleavages recognized in law to exist in Canadian society. While the *Charter of Rights and Freedoms* may have been the product of normative values and driven by the partisan initiative of the federal Liberal Prime Minister, these groups perceived the *Constitution Act, 1982* as having included them in the social contract. Their understanding of the new compact motivated them to try to stop institutional change even in the face of overwhelming consensus among the representatives of the political parties and governments that were driving this change.

The final constitutional development occurred in 1996. Following the 1995 referendum in Quebec on independence, which failed by the narrow margin of 50.58% to 49.42%, parliament adopted *An Act respecting Constitutional Amendments*, which prevents a minister of the crown from introducing any constitutional amendments under the 7/50 formula unless the proposed amendment has been approved by the majority of provinces (representing the majority of the population) in each of the (now) five regions of Canada.

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<sup>80</sup> This was so named because of one of the locations where the premiers and prime minister met, and while not the original location of negotiation, its symbolic reference to the meeting place where the Fathers of Confederation agreed to the general outline of the *British North America Act, 1867* was intended to give the accord additional gravitas.

This gives British Columbia, Ontario and Quebec vetoes over constitutional changes in this class, essentially adopting through legislative means the Victoria formula updated to reflect recent demographic shifts.<sup>81</sup> Critics point out that this is an act of parliament so can be rescinded by the normal legislative process. As no changes to the Constitution have been tried under this formula, its impact is unclear, but the fact it has been adopted reflects a recognition by the federal government and parliament that the social cleavage that separates Quebec from the other provinces prevents constitutional change in practice, even if the formal rules of the *Constitution* specifically permit changes like senate reform to occur without the agreement of Quebec. Additionally, nothing in this Act prevents a person who is not a minister of the crown (i.e. a parliamentary secretary or private member) in either the senate or the house of commons from introducing such a resolution and yet critics of this bill have failed to note this omission, reflecting the widely held belief that constitutional amendment is the purview of a government, which is of course the leadership of the parliamentary majority party, something created by partisan division in society.

There have been successful amendments of the *Constitution* during the period. In 1993, cultural institutions in New Brunswick were given equal standing and the ‘fixed link’ bridge replaced the constitutionally guaranteed ferry service to PEI; in 1997 Quebec was allowed to replace denominational schools with linguistic ones and Newfoundland was allowed to create a secular school system; Newfoundland abolished denominational schools in 1998; in 1999 Nunavut was separated from the Northwest territories and given its own representation in parliament; and in 2001 Newfoundland’s name was changed to include Labrador. While these were all changes done under less onerous amending formulae, the agreement to hold constitutional conferences with Aboriginal leaders was itself a constitutional amendment under the 7/50 formula, and this amendment additionally clarified the wording with respect to the legal status of treaties and land claims. Constitutional amendment is possible in Canada under the formulae adopted in 1982.

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<sup>81</sup> Given uneven population distribution in Atlantic Canada and the Prairies, this makes the legislatures of Nova Scotia and Alberta central to passage in these two regions.

## Summary

Canada was unable to adopt an indigenous constitutional amending formula from 1927 to 1982 for one specific reason: the amending formula that would have addressed one of the largest social cleavages in Canada – an amending formula that was in keeping with one of social contract theories that much of the political elite in Quebec believes already informs the Canadian constitution and is reflected in the Canadian Senate – was unpalatable to the majority of political actors. The majoritarian formula that was proposed as an alternative and adopted in 1982 has been opposed by numerous Quebec governments of different political stripes, which also opposed the Victoria formula, preferring instead to opt for the *status quo*. After adopting amending formulae in 1982, the subsequent attempts to achieve comprehensive constitutional change resulted in failure. The political will appeared to be there to make wide sweeping constitutional change on two occasions under the applicable formula but social groups rose up to thwart that will in both instances. In both instances the change was driven by partisan interests. This would seem to offer in the most general terms support for the thesis that partisan cleavages drive institutional change and social cleavages restrain such change, in so far as the constitution may be seen as an institution in the broadest sense or may act as a proxy for the institutions it mediates.

## IV. Conclusion

This chapter has looked at the constitution from a philosophical perspective and shown that the ideas of ‘sovereignty’ and of ‘social contract’ provide the conceptual basis for a constitution being variously changed and restrained. Most conceptions of sovereignty point to mechanisms that permit change through majoritarian political action and thus make change likely to be the product of partisan cleavages. This was true during Canada’s early years when the British and Canadian legal communities claimed that there existed British ‘parliamentary sovereignty’ and it continues to be the case post-1982 when ‘constitutional sovereignty’ dictates that amending formulae can be used to alter the Constitution. Social contract theory permits the conceptualization of a constitution as a compact between

groups, a belief that would in turn encourage social groups that feel they are party to the contract to resist such changes in favour of the *status quo*. Conceived of this way, institutional change driven by partisan groups, even groups with the requisite majority to meet the rules governing change, will not only be resisted by social groups that are in a minority but the very attempt to make such a change may exacerbate the societal divisions, particularly when the change is perceived to advantage one specific side of a social cleavage.

This caused us to alter the third proposition in our hypothesis as follows:

- 3) *[Revised]: When the social cleavage and the partisan cleavage aligned:*
- a. *If proposals for change came from the 'out' group, the elites that represented that group would have insufficient influence to bring about the change.*
  - b. *If proposals for change came from the 'in' group, the elites that represented the 'out' group would resist change and opt instead for the status quo.*

British and Canadian constitutional law suggests that the social contract in 'ceded and conquered' colonies involved social groups, whereas in 'settled' colonies it was with and between the colonists, something that would explain why there has been such a divisive debate over what compact led to union in 1867: a compact between people, between provinces or between the French and English. Irrespective of the social contract, the constitutions that have governed Canada all had a written portion, whether enacted by royal prerogative or by the British parliament and these constitutions each established formal institutions of governance, could be interpreted by the courts and, above all, could be modified through amendment and, in some aspects, by convention.

The empirical evidence from modern Canada's debate over adopting a constitutional amending formula would support the contention that social cleavages restrain change, even in the face of political consensus in favour of change. Once an amending formula was proposed for partisan reasons in 1927, until it was adopted along with a

*Charter* in 1982 (which was equally a change that grew out of a partisan cleavage), the Government of Quebec had been able to prevent the adoption of an amending formula even though the rules governing constitutional amendment were not particularly onerous.

In the era of a formal constitutional amending formula the Constitution has been amended a number of times. Yet none of the amendments that were proposed by social groups have resulted in change, whether it be Aboriginal groups between 1983 and 1987 or Quebec on behalf of its Francophone population beginning with the so-called ‘Quebec round’. In instances where there appeared to be sufficient political support in favour of constitutional and institutional change, social cleavages in Canada fuelled sufficient opposition to that change to stop it just short of ratification.

Nevertheless, the formal mechanism put in place by the *Constitution Act, 1982* clearly allows for changes to Canada’s institutions of governance by simple majoritarian processes, albeit with higher standards in most instances than is required for ordinary legislation. These rules specifically put all the essential elements for comprehensive Senate reform within a formula that does not give a social group, including the government of Quebec, the authority in law to prevent such change.

Comprehensive Senate reform post-1982 would be possible if a resolution were passed by the legislatures of seven provinces representing at least 50 percent of Canada’s population. This means that Senate reform could be achieved in the future over the protests of the Government of Ontario, which due to that province’s large population might be expected to naturally favour a unicameral legislature based on representation by population, or of the Government of Quebec, which it has been argued here might naturally support the *status quo*. While comprehensive Senate reform would not be possible without one of these provinces’ legislatures, some changes to the Senate could be made by the federal parliament acting alone, such as the elimination of the property and net worth requirements for appointment and an alteration of the term of appointment that still respected the role of the Senate as a chamber of sober second thought. The fact that the Quebec legislature has been unanimous, across party lines, in its opposition of the federal parliament making such

changes – even though the divisions within Quebec reflect both the limited territorial boundaries of Quebec in 1867 and its religious and linguistic divisions rather than the francophone majority, is illustrative of the resistance to constitutional change that arises from a social cleavage and the construction of a constitution as a social contract.

Parliament adopting *An Act respecting Constitutional Amendments in 1996*, must be seen as recognition by parliament that social cleavages restrain change even when nothing in the amending formulae can be seen to protect social group interests. This law is not a constitutional requirement and could be simply repealed by legislation by the same majority required to adopt parliament's requisite resolution to amend the *Constitution*, and it is only binding on members of the federal cabinet.

The *Constitution, per se*, does not prevent Senate reform. In fact, since any member of a legislature or of parliament can start the process of amending the *Constitution* by introducing a resolution for that change, the constitutional rules would seem on paper to allow for a large number of people who are members of political parties or social groups to initiate change to the *Constitution of Canada* and its institutions of governance. The fact that one cannot imagine a constitutional amendment occurring in Canada unless it was advocated by a political party, or if it was opposed by Francophones in Quebec, would suggest that constitutions are an institution in the broadest sense and that they are likely one of the mechanisms through which partisan cleavages operate to drive change to political institutions and social cleavages operate to restrain these changes.

## Chapter 4: Resisting Institutional Change - The Province of Quebec

The first period examined in this dissertation was the period from the settlement of New France in the 17<sup>th</sup> century, through the British conquest whereupon Canada was renamed Quebec, until the early 19<sup>th</sup> century when rebellions in favour of institutional change broke out in Upper and Lower Canada. The results of that examination are reported in this chapter. This offers a ‘best case’ to test our hypothesis.

Our hypothesis is that when social cleavages and partisan cleavages align, institutional change will be opposed by the other side of the cleavage since it will be seen as coming from a social group to advance its interests over the other group(s). When the two cleavages are not aligned, we expect to find the ‘out’ social group opposing change and favouring the *status quo*. For change to occur in a period of cross-cleavages, we expect to find a partisan group driving that change that has membership from both sides of the social cleavage.

There are three sections to this chapter and each reflects a period of time, first under the royalist French regime which runs from 1663 to 1763, which is where we identify the institutions that the colonists would be familiar with prior to the conquest by the British. This gives us the baseline. Following that, each change and attempt to make change to these institutions was process traced.

The second section runs from the end of the Seven Years War in 1763 to 1791.<sup>82</sup> What emerged here were very clear demands for institutional change coming from the new English settlers and merchants, following the conquest, which were successfully resisted by the French elites. In the lead up to 1791, the French merchants and English merchants

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<sup>82</sup> It is referred to as *La Guerre de la Conquête* by Quebec scholars, in India it is referred to as the *Third Carnatic War* while the Prussian-Austrian conflict is referred to as the *Third Silesian War*. English Canadian and European scholars most often refer to it as the Seven Years War, even though it ran for nine years, with a brief cessation of hostilities in North America which provided the opportunity for the expulsion of the Acadians. Winston Churchill referred to this as the First World War due to its global nature and the involvement of all the European powers (Bowen 1998).

briefly united in support of the division of Quebec along its social cleavage into two provinces of Upper Canada and Lower Canada which is what occurred.

The third section runs from 1791 to 1838. During this period the social cleavage was seen to align with the partisan cleavage in each of the two provinces. In both provinces, agitation for change was seen to be driven by one social group and it was opposed by the other group. This led to rebellions in favour of institutional change from the 'out' social group in each province in 1838.

## **I. Original 'Canadian' Institutions of Governance**

Samuel de Champlain founded New France and Quebec City in 1608, but it was only in 1663 that the province of New France became a royal province directly under the French king's control. By this time the population had only reached 2,500 of whom 800 were living in the town of Quebec, and the public debt was around 200,000 livres (Clercq 1691, 4).<sup>83</sup> New France was essentially a collection of trading posts. What little governance that could be seen to exist for the French traders was mercantile in nature. Development was left in the hands of the Company of New France, also known as the Company of One Hundred Associates. They had been given a monopoly by the French king and charged with settling the new land, but settlement was not forthcoming and the company proved to be a failed mercantile venture. The fur trade proved to be less and less lucrative and the Iroquois inflicted greater and greater damage on what little settlement there was.

In response to this failed enterprise, the Company of New France's control over Canada was extinguished in 1663, and New France became a royal colony, or province, of

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<sup>83</sup> The town of Quebec had 28 settlers at its founding in 1608, including Samuel de Champlain (Laverdière 2003, III:173), and only 60 persons in 1620 (*ibid.*, v.VI:8). The sedentary population of New France in 1641 was only 240 (Dollier de Casson 1927, 31).

the king of France.<sup>84</sup> ‘Canada’ emerged as one of its five internal divisions.<sup>85</sup> Even after its establishment as a royal colony, the administration of this territory was handled, in part and from time to time, by a number of mercantile corporations operating under sanction and even delegated vice-regal authority of the French crown, including the *Compagnie de l’Occident*.<sup>86</sup> However, these companies also failed to meet their obligations for settlement or for revenue, and their influence on local governance was limited.

It should be noted that a local governing council had existed during the time of the Company of One Hundred Associates. This had been established by the royal edicts of 1647 and 1648, though the governor was directly delegated authority by the company and not by the crown. In order to curb the autocratic tendencies of governors over time, the company had experimented with these councils, first by adding the ranking religious authority, the Superior of the Order of Jesuits, and then by adding the lieutenant governor of Montreal and representatives from each of the three syndicates, which looked after the company’s business interests in Quebec, Montreal and Trois-Rivières.

Cahall (2005, 22) suggests that these early experiments in governance from the time of the Company of One Hundred Associates guided Louis XIV when he established the first sovereign council in 1663. He bases this conclusion on the smaller size of the council and the fact that there was no ‘intendant’ appointed in 1663, setting this sovereign council apart from the sovereign councils established within the provinces of mother France.<sup>87</sup> This is an erroneous conclusion. The establishment of royal governance for New France in 1663

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<sup>84</sup> Formally the officers and shareholders of the company surrendered their rights to the king on February 24, 1663, but its financial interest in this colony had long before declined and the writing was clearly on the wall (Cahall 2005, 21).

<sup>85</sup> ‘Canada’ was by far the largest division, and included territory that is now divided between Ontario and Quebec. The other administrative division being l’Acadie (Nova Scotia), la Baie d’Hudson (which was unsettled and the British claims through what would become known as the Hudson’s Bay company, would come to dominate), Terre-Neuve (Newfoundland) and la Louisiane (communication).

<sup>86</sup> The *Compagnie de l’Occident* was established by letters patent in 1664 to exploit the resources of the French colonies and, hopefully, compete with the Dutch and English companies that were successfully creating a mercantile economy for their imperial countries. It was spearheaded by the Minister Jean-Baptiste Colbert, who was Minister of Finance in addition to Secretary of State for the Navy and Colonies.

<sup>87</sup> The sovereign councils of the French provinces of Ensisheim, Perpignan and Arras each had governors, intendants and bishops within their membership.

was a rejection of the mercantile experiments. These earlier councils were decidedly corporate, and not governmental, as the administration and settlement of New France had been assigned to the Company of One Hundred Associates and through it to the company's governor. What is more, the experiments in these early councils under mercantile rule had a democratic element through the representatives of the three syndicates. Representation of any interest, be it corporate or settler, was not an element that Louis XIV supported, as he was embarking on a systematic campaign to centralize authority into his hands and those of his key ministers.

In 1672, Governor Louis de Buade, Comte de Frontenac, took it upon himself, without royal instruction, to experiment with a governance model divided by estate. The three estates as had emerged in France were clergy, nobles and representatives of the people. Colonial Secretary<sup>88</sup> Jean-Baptiste Colbert's response to Frontenac's decision to assemble estates was quick and unequivocal; informing him in a *Despatch* dated June 13, 1673:

“L'assemblée et la division que vous avez faite de tous les habitants du pais en trios Ordres ou États pour leur faire prêter le serment de fidélité pourvoit produire un bon effet dans ce moment-là, mais il est bon que vous observés que comme vous devés toujours suivre dans le gouvernement et la conduite de ce pais-là les formes qui se pratiquent ici, et que nos Rois ont estimé du bien de leur service depuis longtemps de ne point assembler les États Généraux de leur Royaume pour peut-être anéantir insensiblement cette forme ancienne; vous ne devés aussi donner que très rarement, et pour mieux dire jamais, cette forme au corps des habitants dudit pais, et il faudra même avec un peu de tems, et lorsque la Colonie sera encore plus forte qu'elle n'est, supprimer insensiblement le syndic qui présente des requêtes au nom de tous les habitants, étant bon que chacun parle pour soi et que personne ne parle pour tous”.<sup>89</sup>

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<sup>88</sup> Colbert's formal titles had been Comptroller-General of Finance and Secretary of State for the Navy. The responsibility for the colonies was the extension of both of these roles. Under both the French and English kings, secretaries of state were usually given responsibility for the colonies, as this was one of the most senior titles in both royal courts. These came to be known in the literature as colonial secretaries, and for ease of understanding they are used in this form here.

<sup>89</sup> Despatch from the Collection Moreau St. Mércy, 1670-6, French Archives, Série F, vol. 178, p.208 (for English translation see Kennedy 1922, 16)

The government of Louis XIV supported neither representation by the people nor the syndicates of the local merchant interest, so there is no reason to believe the king was guided by any of the experiments of the new or old world. What is more, the French monarchy was fearful of any institution of governance that might be prone to use by societal groups, whether these groups be social or political, and the early colonial experiments had been just that.

It also seems possible that an intendant had been appointed in 1663, in the person of Louis Robert de Fortel, and that he had just not left for New France as planned with the bishop and the governor (Vachon 2000). As it was, King Louis had difficulty even finding a governor for this new royal colony, with Augustin de Saffray de Mézy reportedly only taking the post after the king agreed to cover all his financial debts (Eccles 2000).

What Louis XIV put in place for New France was the same institutional model that was used in the provinces of France in Europe. The sovereign council was the common mechanism for governing provinces. Thus 1663 offers the starting point for our consideration of institutional change as the population that had experienced the mercantile model was negligible at this time, and this was the first government established directly by the imperial government. This institution of governance would be the only form of government the settlers, who arrived after 1663, would come to know prior to the conquest by the British.

### **Sovereign Council of New France (1663-1763)**

As noted, the Company of One Hundred Associates had failed to adequately settle the French colony. In addition, questions had been raised about the administration of justice in the colony. As Louis XIV's colonial secretary noted, "there has been in that colony no regular system of justice the authority of which was universally recognized, and through the weakness of character of those who were charged with rendering justice, the judgments which were pronounced were generally unexecuted" (*Édits, ordonnances royaux*, 1854, v.2, 26}. Additionally, the Company of One Hundred's governors' refusal to

ban the trade in, and sale of, liquor to the native population placed them regularly at odds with the Jesuits, which was an influential religious order in France and the dominant Roman Catholic order in New France. The Jesuits had made converting the Aboriginal population of New France to catholicism its holy crusade.

So upset with the company's governor at the time was the ranking Jesuit, François-Xavier de Montmorency-Laval, Bishop of Patreau *in partibus infidelum*<sup>90</sup>, that he travelled to Paris in 1662 to lobby the king for the end of the rule by the Company of One Hundred or, at the very least, the recall of the company's then governor. In response to his entreaties and to the king's ongoing concern over the state of the colony, in 1663, the *Édit de Création du Conseil Souverain* established a 'sovereign council' to be composed of a governor, the 'bishop', five councillors, an attorney-general and a secretary (*Édits, ordonnances royaux*, 1854, v.1, 37). The governor was to be appointed by the king, and the bishop was to be appointed by the pope, but all other vacancies were to be filled by the governor and bishop jointly.

The sovereign council is different than the British-model of a governor's council. Where British practice was to appoint a governor and delegate royal authority to him, to be exercised with the advice and consent of a council, the authority to establish ordinances (or laws) was vested by the French king in the sovereign council. This subtle distinction is important for two reasons. First, it would allow power in New France to shift between the three office holders within the council – the governor, bishop and intendant – depending on circumstance, strength of personality and royal favour. Second, it was predicated not on the right of the people to have representation with respect to the enactment of local laws that affect them, which is the theory behind the British governor's council, but on the need to proclaim royal decisions locally and to protect the interests of the French crown.

Augustin de Saffray de Mézy arrived with the returning Bishop Laval in 1663. Jean Talon, the first 'intendant', arrived in Quebec only two years after the governor, in 1665,

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<sup>90</sup> This was a titular bishopric. *In partibus infidelum* (Latin) means 'in the territory of the infidels' and is used to give a bishop the title without creating a 'see' (or province) of the church, which is an administrative unit.

and was immediately incorporated into the council. The failure to include the intendant in the council at the birth of the new royal colony reflects not a lack of desire to use this office in a similar fashion, as was being used in France, but rather the difficulty that the young king and his colonial secretary were having in finding trusted persons willing to serve in this isolated and untamed wilderness.

While the new sovereign council enacted important legislation for the colony early in its existence, including the banning of the sale of liquor to aboriginals, it quickly found itself divided between the competing camps of church and military governance. Bishop Laval not only had to concur in appointments, but he was more familiar than the governor with the local gentry and thus several councillors were seen by the governor to be biased in favour of the Jesuit order. The governor attempted to eliminate those he saw as subject to undue church influence on the council, but his attempts were thwarted by Bishop Laval. Laval tried to influence the king to recall the governor; something that likely would have happened had Mézy not died in office.

Given the influence of the clergy, it would be appropriate to characterize the colony as a theocracy. While in law there was a separation between ecclesiastic matters and civil matters, the bishop's reach was into all matters, as little could be claimed to be purely civil given the moral dimension perceived by the church to exist in all human endeavour, and this reach was only amplified when it came from the pulpit every Sunday. In a small but suddenly growing colony, the church became the sole instrument of culture and identity, with Bishop Laval beginning an ambitious campaign of building architecturally and artistically impressive parish churches so as to inspire devotion among the French colonial residents and, along with song and painting, inspire awe through which to convert the aboriginal people (Vance 2009).

While different in intent, where the sovereign council was similar to the British-model was in the assignment of judicial, executive and legislative authority to a single council. But the French had no common law necessity of having a legislative body approve ordinances, and King Louis assigned the *Coutume de Paris* (commonly called civil law or

Roman law) to govern this province in the same way it governed France. This law would be modified by subsequent ordinances adopted by governors and intendants, and placed into the code through the minutes of the sovereign council.

As already alluded to, the difference in status of the sovereign council, which on the one hand was given direct responsibility for adopting ordinances and on the other hand was not a common law body for judicial interpretation or representation with respect to legislation, encouraged a power struggle between the bishop and governor, from the outset, and then a tripartite power contestation with the increasingly influential intendant.

In France, the influence of the Roman Catholic Church and a large and firmly entrenched bureaucracy posed a challenge to the monarch who in the person of Louis XIV was attempting to consolidate governance.<sup>91</sup> So the practice had begun in France in the 1640s for the king to appoint an 'intendant' to the army for each of the French provinces or généralités. This independent official was tasked with examining best practices, listening to the people and taking corrective action, thereby allowing the king to routinely substitute his authority for that of the provincial military commanders, or 'gouverneurs', throughout France.

The governors in New France were military officers and aristocrats, equally, tasked with overseeing defence. The intendant came to be in charge of economic affairs and trade and of local administration of justice, finance, settlement and the seigneurial system.<sup>92</sup> The bishop remained responsible for religious matters. The length of time in office varied by office holder, with some being appointed multiple times and some being summarily removed from office by the king. This shifting royal favour was a variable in determining the relative influence of these colonial officers, whose specific area of jurisdiction was not clearly delineated.

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<sup>91</sup> In Britain, the power of the Church had been broken by Henry VIII one hundred years earlier, when he had parliament sever ties to the papacy and appoint him head of the church.

<sup>92</sup> Seigneur in French and seignior in English (which comes from French) refers to a middle level person of rank in a feudal system.

In law and on paper, the judicial, executive and legislative functions were assigned to the sovereign council, and the governor was the king's representative and thus tasked with both overseeing the work of the council and for implementing its ordinances. However, the power of the clergy, in no small way the result of the machinations and zeal of the Jesuit order, made the bishop a force to be reckoned with in local governance, even though his purview was in theory confined to canon law and ecclesiastical matters. The intendant was, through being tasked with improving justice as the king's inspector, empowered to act efficiently and beneath the jurisdiction of the council, a mandate that would lay the foundation for the shift of judicial power away from the sovereign council. While this system in many ways undermined the power of the sovereign council as a collective, given the overlap in jurisdiction between these three office holders, the council was often the forum by which the functions of the offices could be adjudicated and disputes between the personalities who held these positions in the early life of the colony resolved.

A dispute between Bishop Saint-Vallier of Quebec and the governor of New France is illustrative of the role of the council as an intermediary between strong personalities with seemingly independent authority to enact ordinances. Before even arriving in New France, Saint-Vallier had informed the then governor, the Marquis de Denonville, that theatre, dancing and balls were injurious to Christian principles and would be forbidden on spiritual grounds (Vance 2009, 48). While de Denonville was too preoccupied with native attacks and epidemics to take issue with this instruction during his time in office, his successor Louis de Buade, Comte de Frontenac, was more urbane in tastes and never above using his office to enjoy life. He was also not someone to take instructions from an ecclesiastic power which had no formal jurisdiction over his office. When he commissioned a subordinate, Lieutenant Mareuil, to stage Molière's play *Tartuffe*, a comedy which mocked the church for subverting religion, the wrath of the bishop rang out from the pulpit. Bishop Saint-Vallier went so far as to charge the lieutenant with committing blasphemy. As blasphemy was a civil matter, defined by the *civil code*, Frontenac was quick to rule that the bishop had overstepped his jurisdiction. It was only when the bishop offered to compensate Frontenac in cash for his out-of-pocket expenses, essentially a bribe that Frontenac only too

happily accepted, that a collision between the two offices was averted. Even then, the council was employed *ex post facto* to protect the reputation of both offices, ruling that “the bishop was in the wrong but that the governor was not in the right” (Cameron 1930, 17). And, in the end, Saint-Vallier’s decree against theatrical and other forms of social entertainment remained on the council’s books for two centuries.

This example is also significant because it represents a mechanism for control that the church had in the colony that was clearly designed to tame intellectual, cultural and political dissent. Plays and poetry in France had become avenues for political discourse, a development with which the Jesuit order was all too acquainted, so its prohibition was designed to restrain the emergence of a strong social cleavage over class in the colony. It was also a mechanism by which to stifle the dissemination of political ideas that might be used to encourage institutional change and political reform.

The sovereign council was chaired by the governor until 1674, when the intendant took over as chair and the number of councillors was increased to seven.<sup>93</sup> From this point on, appointments were made directly by the king. The number of councillors again increased in 1703 to eleven, and the bishop was granted the right to also have a deputy on the council. These changes reflect the influence wielded by the bishop and represent the growth in influence of the intendant. The intendant was always in close personal communication with the colonial secretary in France and, as a result, “passed, from being at first a spy on the governor and bishop, to a position of the widest authority, to which his theoretical third place in colonial precedence made little difference” (Kennedy 1922, 14). For his part, the governor remained in command of French forces in the colony, but his influence over governance became confined to his being a member of the sovereign council.

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<sup>93</sup> Laval was also granted his own Bishopric ‘see’ (or province) of Quebec in this year, firmly cementing his administrative hold over the church in the colony and recognizing his work in expanding its reach and entrenching its dominance.

Where in France the intendant was the mechanism best able to give agency to the crown in its attempt to challenge the bureaucracy and influence of the governor, in New France it was the mechanism that could begin to challenge the authority of the Roman Catholic Church and the Jesuit order. It is noteworthy that the first intendant, Jean Talon, had been intendant in the French province of Hainault, prior to him being sent to Canada. Talon had been an intendant since the age of 30, and was tapped for the new royal colony precisely because he was familiar with the office and the king's expectations. This is further evidence that Cahall (2005) is mistaken in his conclusion that the sovereign council was uniquely Canadian, growing out of the earlier councils under the Company of One Hundred Associates, rather than a replica of the sovereign councils of the provinces of France.

A number of factors can be identified for the rise in influence of the intendant over his colleagues in local administration, of which three have been widely accepted as the most significant. The first is the fact that having authority to issue ordinances and decide legal matters at the local level gave him the capacity to circumvent the formal structure of colonial government, and the sovereign council, and to settle disputes. This would be important when the British came as their system of justice was far more cumbersome at the local level in terms of cost and administration. The second is, as authority in all of France came to be centred in the king, even in communities as isolated as a colony, the monarch had the undisputed capacity to overrule decisions of governance in response to despatches, something that was done regularly in furtherance of imperial policy and simply to remind officials of regal control. In this climate of absolutism, the intendant, as the 'king's man', would greatly advantage this official over the theoretically superior colonial officers. Again, this would have implications for the British as the fear of micromanagement in London would be a constant source of unease for the French Canadians. The third, which we will explore more fully below, is the existence of the seigneurial system of feudal land allocation.

The overarching reason, however, which has not been identified in other literature on the colonial French period (given its usual interest in the offices of governor, bishop and intendant and the personalities who held them), lies in the sovereign council. While local governing authority came to be centred in the seigneurs, and thus in the intendant, provincial governing authority resided in the sovereign council. This was not simply a unicameral legislature but a unicameral government. In modern political science, the tendency for a unicameral government to allow individuals to centralize executive power has been well documented (Savoie 1999), and the counterbalance inherent in legislative structures due to the existence of bicameralism (Tsebelis et Money 1997) and on policy decisions due to the existence of veto players (Tsebelis 2002), is also well known. A single body vested with legislative, executive and judicial powers will be void of counterbalance and thus prone to the dominance of individuals.

Where scholars of history have identified the cult of personality of leaders like Levis, Frontenac and Talon as responsible for the fluctuations in influence between the offices of bishop, governor and intendant (e.g. Kennedy 1922) and concluded that the rise of individual influence meant a decline in influence of the sovereign council (Cahall 2005), it can also be seen to be simply a by-product of institutional design. The positions of bishop, governor and intendant were each vested with royal and governance authority, but equally they were granted overlapping jurisdiction, the oversight of which resided in the sovereign council. The capacity of an individual to dominate New France temporarily can thus be seen to be an artefact of the sovereign council having been vested with singular governing authority.<sup>94</sup>

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<sup>94</sup> Looked at this way, it is inevitable that a prime minister would absorb the legal authority vested in cabinet and the crown, even though the institution of the office did not change, with the sole restraint being the cultural, historic and temporal circumstance (Hicks 2010a, 2010b). While it might be interesting to chronicle the shift of power in modern government to the person of the prime minister (e.g. Savoie 1999), surely the more interesting question is why had this concentration of power not occurred more quickly. In communist countries, there is an assumption that power will be centralized, but again the interesting question is why it is neither uniform nor absolute.

In terms of composition, the sovereign council by design included the largest landholders. So when we look at this institutional design through the sociological lens, in the subsistence economy of New France, the political cleavage between religious and civil society and between classes, would necessarily advantage the intendant who could navigate both sides of each cleavage. His capacity to exert authority at the provincial elite level is facilitated by his standing in society as a royal favourite, and at the local level by the seigneurial system.

Our interest is in the sovereign council. But governance in a colony is ultimately about land allocation, revenue and defence, three functions of which the seigneurial system was designed to merge at the local level under the sovereign council, which had been given ultimate jurisdiction as the court of appeal and as a combined legislative and executive council.

Every charter, which allowed mercantile interest to develop in New France, included provision for the creation of seigneuries. However, it is only with the establishment of a royal colony that the seigneurial system truly emerged and, second only to the church, began to define the cultural fabric of New France. This was a feudal system of land tenure. Instead of allowing people to acquire the title to land, lords were given tracts of land *en fief* or *en seigneurie* in exchange for an oath of fealty, a commitment to perform military service, a regular report on the use and population of his lands, and a fee of a *quint* (or one-fifth) of the price of the seigneurie should he transfer his obligations to another (except by inheritance). He, in turn, would assign plots of land to habitants who would pay annually *cens et rentes* (money or payment in kind or both) for the privilege of farming a portion of the land, a commitment to work for the seigneur a number of days a year and to military service. The seigneur was supposed to administer the king's justice within the seigneurie subject to the terms of the grant, and to provide a grist mill and an oven for which the habitants (or tenants) would pay for use.

Kennedy (1922, 21) suggests that it is “a surprise that a system which was honey-combed with decay in seventeenth-century France should be introduced into a new country

and have continued there for more than two centuries”. The reason for this, as will be explored more fully in this chapter, lies at the heart of our theoretical model, and that is a social cleavage will restrain institutional change and an ‘out’ social group will opt for the *status quo* rather than agitate for change. The system began, as it was the familiar norm in France, it functioned effectively at the outset due to the challenges of settling untilled land in a harsh environment and, following the British conquest, became synonymous with the French cultural identity.<sup>95</sup> Normative ideas that emerged in both Britain and France and spoke to the inherent flaws in feudal relationships were readily dismissed by habitant and seigneur, alike, as a negative and oppressive attack on their historic cultural values and practices.

The seigneurial system was designed to support both church and aristocrat. The seigneur was an institution designed to maintain social structures. He was a middle aristocrat, who could manage local interests at a distance on behalf of the higher nobility. With some irony, the sovereign council was to be the council of the higher nobility, yet the subsistence nature of colonial life and the feudal approach to land grants was a natural limit on its authority and on the emergence of an aristocratic class.

The other social cleavage that can be seen to exist during the time of royalist New France was between rural and urban. With one third of the population living in the towns, this more affluent merchant class was, in spite of the church’s restraint of independent thought and behaviour, developing culture and knowledge.

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<sup>95</sup> That is not to suggest that habitants were entirely supportive of the system or were advantaged by the system even at the outset. As intendant Raudot reported to the king, after he discovered a royal decree that was designed to enhance the rights of the habitant and that had never been disclosed to the population: “It was the interest of the attorney-general as a seigneur, as it was also the interest of other councillors who are seigneurs, that the provisions of this decree should never be made public” (Munro 1899, 27). The system was one to maintain a class structure, through a middle aristocratic class that could support the higher and more propertied nobility.

## II. Fighting for the *Status Quo*

The era under British domination offers the first opportunity to examine how an ‘out’ social group, even though more populous than the new British settlers, was able to maintain what for it was the *status quo* in institutions of governance. An elected lower chamber was demanded by the British settlers and merchants, who had the support of important officials in the British government.

There were social divisions in New France prior to the conquest of 1763 – between classes, between religious and civil society and between urban and rural – but these cleavages were dwarfed by the new French catholic and English protestant divide. This was initially a religious more than a linguistic divide. That is because language was not charged with identity politics in this era. Language was a means for communication rather than cultural identity. British colonial officers, and even the less educated merchants and traders, had the capacity to function in the language of the province’s majority, which was French, and many merchants and clerics learned aboriginal languages. French had been the language of diplomacy and of the British king’s court. Religious divisions had dominated Europe for centuries, and this caused the existing French Canadian population to close ranks and form a common identity in response to British protestant imperial rule. While the Church of England had vacillated back and forth between protestant reformation doctrine and more traditional catholic practices, it was the official religion of the British empire and the British king was head of his own church.

From an institutional perspective, the two social groups that emerged on either side of this growing cleavage over religion each wanted the *status quo*.<sup>96</sup> The problem was obviously that one cannot have two *status quos*. For the French Canadians, the *status quo* was the system of colonial government that had become familiar under royalist New France, a system based on the provinces of France, with a sovereign council, seigneuries and a civil law system. For the British colonists it was the system of colonial government

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<sup>96</sup> While in the first instance it was religious, it would increasingly be defined by other identity markers.

that had operated in the 13 British North American colonies to the south, a model that found its roots in the government of the parent Britain, with a governor's council, a representative assembly and common law.

That the French were able to restrain the introduction of the new British model is significant. This was a conquered people with no legal right to their law or institutions. The British model had support in the halls of government at Whitehall and Westminster in London, not simply due to its familiarity, but due to the practical benefit of its capacity to raise money for local public works projects and to pay for the civic list (i.e. the salaries of local officials like judges). It was also commended by normative ideas about justice and democracy that were finding traction in this era.

### **Governor's Council of Quebec (1763-1774)**

There can be no question that the British fully intended to impose the model of representative government that was familiar to its officials and settlers upon the French Canadians, which it intended to carve out as a province in the surrendered territory of New France. Article IV of the *Treaty of Paris*, 1763 had committed the British king to “grant the liberty of the Catholick religion to the inhabitants of Canada” and to “give the most precise and most effectual orders, that his new Roman Catholic subjects may profess the worship of their religion according to the rites of the Romish church”, but it had qualified this commitment by the clause “as far as the laws of Great Britain permit”.<sup>97</sup>

The *Royal Proclamation, 1763* subsequently divided up the territory of New France, and established four colonies, or provinces, one of which was to be named Quebec. The colony would have a governor and a governor's council. The governor was instructed to, “with the Advice and Consent of the Members of our Council, summon and call General

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<sup>97</sup> It has been argued that the French regime weighed the merits of keeping Canada or Guadeloupe, and found Canada wanting (Grant 1912), and Voltaire reportedly planned to force the government to abandon Canada had the French crown not made the decision to do so (Kennedy 1922, 31). For their part the British had designs on this territory as it offered a buffer against expansion by the 13 colonies to the south, something that would require new settlement. These conflicting interests would explain the ambiguous commitment made to the catholic church on the ceded area of Canada.

Assemblies” and empower the “Councils, and the Representatives of the People so to be summoned as aforesaid, to make, constitute, and ordain Laws, Statutes, and Ordinances for the Public Peace, Welfare, and good Government” of the colony, “as near as may be agreeable to the Laws of England”. It was the British common law that was proclaimed to be in force, and the governor-in-council was instructed to establish courts for the administering of that justice.

The military governor, James Murray, was appointed the first ‘captain-general and governor-in-chief in and over our province of Quebec in America’.<sup>98</sup> His *commission* of appointment made clear that the members of the governor’s council were to take the various oaths required by the statutes of the British parliament (George R, November 14, 1763). The form of these oaths at the time, as used in North America, included an oath of allegiance to the king<sup>99</sup>; the oath of supremacy denouncing papal authority,<sup>100</sup> an oath of abjuration that repudiated the rights of the Stuarts to the Throne;<sup>101</sup> and an oath repudiating

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<sup>98</sup> After the fall of Quebec on September 18, 1759, until the *Treaty of Paris* was signed on August 10, 1764, Canada fell increasingly under British military control, and thus military rule. Murray, an officer under General Wolfe at Quebec (Wolfe having died as a result of the battle), was made military commander of the town of Quebec following the battle and, in 1760, military governor of the district of Quebec.

<sup>99</sup> The first of these oaths taken and signed by the Chief Justice William Pepperrell and other 13 court officers in Massachusetts *circa* 1730 reads: “I, A.B., do sincerely promise and swear, that I will be faithful and bear true allegiance to His Majesty King George the Second. So help me God.”

<sup>100</sup> *Ibid.* for supremacy: “I, A.B., do swear that I do from my heart, abhor, detest and abjure as impious and heretical, that damnable doctrine and position, that princes excommunicated, or deprived by the Pope or any authority of the See of Rome, may be deposed or murdered by their subjects, or any other whatsoever; and I do declare that no foreign prince, person, prelate, state or potentate, hath or ought to have any jurisdiction, power, superiority, preeminence or authority, ecclesiastical or spiritual, within the realm of Great Britain. So help me God.”

<sup>101</sup> *Ibid.* for abjuration: “I, A.B, do truly and sincerely acknowledge, profess, testify and declare in my conscience, before God and the world, that our sovereign lord King *George* the Second, is lawful and rightful King of this realm, and all his other Majesties dominions and countries there-unto belong; and I do solemnly and sincerely declare, that I do believe in my conscience, that the person pretended to be the Prince of *Wales* during the life of the late King *James*, and since his decease pretending to be, and taking upon himself the style and title of King of *England*, by the name of *James* the Third, or of *Scotland*, by the name of *James* the Eighth, or the style and title of King of *Great Britain*, hath not any right or title whatsoever to the Crown of this realm, or any other dominions there-to belonging; and I do renounce, refute and abjure any allegiance or obedience to him. And I do swear, that I will bear faith and true allegiance to His Majesty King *George* the Second, and Him will defend to the utmost of my power against all traitorous conspiracies and attempts whatsoever which shall be made against his Person, Crown, or Dignity; and I will do my utmost endeavor to disclose and make known to His Majesty and his successors, all treasons and traitorous conspiracies which I shall know to be against Him, or any of them; and I do faithfully promise to the utmost of my power to

transubstantiation.<sup>102</sup> These would have prevented Roman Catholics from holding office and, if applied to voters, as they *could be* and in certain places (like in Ireland where Roman Catholics were in the majority) they were, would have prevented French Canadians from voting.

He was instructed to call an assembly “as soon as the Situation and circumstances of our said Province under your Government will admit thereof, and when & as often as need shall require” with members of the assembly also required to take these oaths (*ibid.*, 128). The council and assembly was imbued with the power to enact laws, provided they were not repugnant to the laws of Britain; the governor was assigned the power to adjourn, prorogue and dissolve all general assemblies, and the power of veto over both chambers; and the king reserved for himself the power of reservation and disallowance. This was the prevailing model for colonial government within the British empire at the time, and includes provisions incorporated into the *British North America Act* a century later – a document, that Canadian scholars claim was written solely and independently by the Canadian Fathers of Confederation.

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support, maintain and defend the succession of the Crown, against him the said James, and all other persons whatsoever; which succession by an Act, intituled, *An Act of the further Limitation of the Crown, and better securing the Rights and Liberties of the Subjects*, is and stands limited to the Princess Sophia, Electress and Dutchess Dowager of Hannover, and the heirs of her body, being Protestants. And all these things I do plainly and sincerely acknowledge and swear, according to these express words by me spoken, and according to the plain and common sense and understanding of the same words, without any equivocation, mental evasion, or secret reservation whatsoever. And I do make this recognition, acknowledgement, adjuration, renunciation and promise, heartily, willingly and truly, upon the true faith of a Christian. So help me God.”

<sup>102</sup> *Ibid.* for transubstantiation: I, A.B., do solemnly and sincerely in the presence of God, profess, testify and declare, that I do believe that in the sacrament of the Lord’s Supper there is not any transubstantiation of the elements of *bread and wine* into the *body and blood* of Christ, at or after the consecration thereof by any person whatsoever: And that the invocation or adoration of the Virgin Mary, or any other Saint, and the sacrifice of the *Mass*, as they are now used in the Church of *Rome*, are superstitious and idolatrous. And I do solemnly and in the presence of God, press, testify and declare, that I do make this declaration and every part thereof, in the plain and ordinary sense of the words read unto me, as they are commonly understood by *English Protestants*, without any evasion, equivocation or mental reservation whatsoever; and without any dispensation already granted me for this purpose by the *Pope*, or any authority or person whatsoever; or without thinking that I am or can be acquired before God or man, or absolved of this declaration or any part thereof, although the *Pope* or any other person or persons or powers whatsoever should dispense with or annul the same, or declare that it was null and void from the beginning. So help me God.”

Democracy was a concept in its infancy in this era, and was tied to concepts of property ownership and thus responsible citizenship. Due to the ample land in North America, the 13 colonies that would break away to form America had a wider franchise than that enjoyed in Britain, causing one MP to note in the debate over repeal of the *Stamp Act* – which had been imposed on the colonies to pay for the Seven Years War – “the inhabitants of the colonies are as much represented in parliament as the greatest part of the people in England are, among nine millions of whom there are eight who have no voice in electing members of parliament: every objection therefore to the dependency of the colonies upon parliament, which arises on the ground of representation, goes to the whole present condition of Great Britain” (cited in Crick 2002, 44).

The language of democracy was emerging through pamphleteering in the 13 colonies to the south, but the prevailing belief was in a limited form of democracy. The problem with elected legislatures was they invariably “yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions” (Federalist Paper 62 by Madison 1999, 347). An appointed upper chamber was always accepted to be necessary. So while the degree of local control over taxation may have been unsatisfactory to the British colonists in North America, this was consigned to the belief in representative government, itself inspired by the British slogan of ‘no taxation without representation’. Thus the institutional design, being proposed by the British for their new colony of Quebec, was an accepted template that existed in the 13 colonies to the south, and which was popular among many of them.

More detailed *instructions* were issued to Governor Murray, setting the size of the council at eight, for which the governor could make the first interim appointments subject to confirmation by the king, and from that point on when a vacancy occurred the governor was to submit three names for the king to fill the vacancy, though should the council fall below seven then interim appointments could be made to bring it back up to seven, subject to royal confirmation (George R, December 7, 1763). Councillors could be removed for cause, with the concurrence of the majority of the council and subject to the king accepting

the validity of the cause, or they could be removed if absent for more than six months without the governor's permission or 12 months without the king's.<sup>103</sup> The establishment of protestant schools and churches and British law and courts was identified as the governor's principle priority. The size of the population was approaching 70,000, with almost 6,000 in Montreal and 9,000 in the town of Quebec (*Census of Canada*, 1765).

The first three constitutional documents issued under the British for the formation of civil government were clearly designed to extinguish the French institutions of governance and replace them wholesale with the British colonial model. For the French Canadians this would have been an entirely unfamiliar system. At the time of the surrender of Canada to the British, there had only been a single chamber of governance with legislative, judicial and executive power. This chamber had allowed the Roman Catholic Church to dominate both civil and religious life. And the intendant enforcing civil law within the seigneurial system had created an efficient and inexpensive, though not always fair, local legal system. Authority was royal and absolute, though given legitimacy through an appointed body composed of the largest and most influential seigneurs. Mid-level seigneurs managed day-to-day life outside of the towns.

These constitutional documents made provision for a delay in the establishment of a legislative assembly until permitted by "the state and circumstances" (*Royal Proclamation*) and "the situation and circumstances" (George R *Commission* to Murray, November 14, 1763), and while it was to be done "as soon as the more pressing Affairs of Government will allow", it was also acknowledged that "it may be impractical for the present to form such an Establishment" (item 12 of George R *Instructions* to Murray, December 7, 1763). This provided some flexibility for the governor in terms of the calling of an elected assembly.

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<sup>103</sup> As noted in the previous chapter, the provision for removing councillors who absented themselves was to correct a defect in the 13 colonies where quorum was sometimes not obtainable due to absentee landlords serving on council.

That the British, in law, saw representative institutions as being a settler's right and, in institutional design, favoured their own institutions for their own citizens is undoubtedly true. They were also revenue generating as they could levy local taxes to support public works. The only reason to delay establishing such institutions from the British colonial office's perspective was that there needed to be a sufficiently large population to tax and to provide capable politicians to run for office.<sup>104</sup> But what we find in Quebec is not a supply side reluctance to establish assemblies without sufficient social capital for their proper functioning, but demand side resistance to institutions that were perceived as foreign to the social structures of the province, at least to the social side represented by the pre-conquest Francophone population.

What occurred instead, therefore, was not the planned delay in establishing the prescribed British institutions but rather a rescinding of the governor's *instructions* via an Act of the British parliament. At the request of the French Canadian elites, *The Quebec Act, 1774* overrode the governor's *instructions* and, in the process, extinguished the royal prerogative to establish a constitution for the province, as it variously established a governor's council, guaranteed French civil law and the right to the catholic religion in the process. With no elected assembly, the governor's council could not levy local taxes, so the British parliament also enacted *The Quebec Revenue Act*.

Colonial scholars, informed by normative law and, undoubtedly, by their personal loyalty to the British-model and the principles upon which it was based, are quick to dismiss this institutional design as anything more than a temporary aberration. As Madden (1987, xxxi) writes: "These radical departures should not be construed in terms of either religious or ethnic liberalism. They were seen as temporary (until an influx of settlers eventually took place) and were designed primarily to mollify a hostile population whose continued attachment to France would be a serious danger if the French were to invade Quebec during the next predictable Anglo-French war".

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<sup>104</sup> Certainly Guy Carleton, in his despatches to London frequently expresses concern about the level of civic awareness among the French and, later, about the number of British settlers in Upper Canada that might be required to sustain the level of discourse needed for an elected assembly.

When one looks at the lobbying exercise that took place, a different picture emerges. This is not a simple attempt to mollify a hostile population. This was a conquered and subservient population that readily accepted its transfer from one king to another, with most of the residents living a subsistence agrarian existence within a feudal system of land tenure. The local militia had proved inconsequential and with the withdrawal of French regulars the population had no illusion that, with the French crown having no interest whatsoever in their survival, the British crown had the military capacity to enforce its will on the populous. Nevertheless, the elites among the French Canadians immediately began to petition for the continuation of their familiar institutions of governance, first with the governor and then with London. The new British merchant class responded by demanding the implementation of the new constitutional structure and equally lobbied London, at the government, through the Board of Trade and Plantations, before parliament and at the feet of the throne.

On the face of it, the merchant class had more resources, which they were able to use to get Governor Murray recalled when he failed to act on his *instructions* and remove the existing French institutions and replace them with the British-model. For their part, the French had no strong support within parliament, the new British design had already received government support and they had powerful opposition in the Church of England (which sits in the British house of lords) and the Board of Trade and Plantations (which was sensitive to the prejudices of its North American settlers in places like puritan Massachusetts), and in the British people who had been at war with France for years.

The despatches between those concerned with colonial affairs in London and the elites in Quebec were numerous and frenzied. There were even hybrid positions considered, such as: an assembly of 27 persons elected by both catholics and protestants in the 6 districts and towns of the time (Board of Trade to the P.C., July 10, 1768), a new civil law system which would have elements from both French and English property law (Solicitor General of Quebec, December 6, 1772), and the use of the king's authority to

appoint bishops and priests to bring the Quebec Catholic Church within the fold of the Church of England (*Despatch* from Dalhousie to Cramahé, December 1, 1773).

With all the suggestions for compromise, it is interesting that only the two absolutes were given any serious consideration at the British cabinet level and in parliament. At the local level, no compromise was acceptable to either the French Canadians or British merchants in Quebec, and neither accepted the other's position. It would seem that institutional design in the face of social division is not naturally amenable to compromise.

The choice for the British government and parliament came down to the model with which the British settlers were familiar, which had already been adopted by the British crown for the new colony, or a reinstatement of the institutions of governance with which the French Canadians were most familiar. The French Canadians had already won the support of the British governors. All three of the first governors made a case on behalf of the French for maintaining the *status quo*. What is more, each governor in turn defied their royal *instructions* and refused to alter the institutions or the laws of Quebec, writing regularly to argue the need for their *instructions* to be rescinded so that civil law could be continued, the seigneurial system maintained, and local dispensation of justice returned to an efficient and inexpensive form that had been enjoyed under the French regime.<sup>105</sup>

One of the first victories for the Canadians was the result of a *despatch* to the colonial secretary in 1767 from Governor Carleton, who pointed out that his *instructions* to established crown lands and a system of freehold land grants are incompatible with the existing feudal titles. The feudal titles themselves, in the absence of French civil law, were in all likelihood invalid, meaning no one had a legal right to the property they were on, and their current and long-established obligations, from habitant to seigneur and from seigneur to the crown, were in doubt. While he noted that the Canadians were, as yet, unaware of this situation, he predicted that once it became public knowledge the result would be turmoil as people tried to transfer title, settle monetary obligations and even challenge

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<sup>105</sup> Among other things, this meant no juries.

inherited property (*Despatch* from Carleton to Shelbourne, December 24, 1767).<sup>106</sup> He also pointed out that the new system would be more expensive for the habitants who had enjoyed a relatively inexpensive legal system under the French since they could have disputes settled by the local seigneur under the direct oversight of the intendant (who would directly deal with appeals), a change that would also irritate the local population. In 1771, Carleton was given new *royal instructions* that rescinded his earlier ones, and allowed for the continuation of the feudal land granting system that had been established under the French (George R, July 2, 1771).

Carleton went to London to help pave the way for *The Quebec Act*, which in the words of parliamentarian, constitutional scholar and philosopher Edmund Burke, was simply the continuation of the French colonial government that had existed prior to the conquest, and with its laws and institutions the same, the only difference being the substitution of King George III for King Louis XV (U.K. Commons *Debates*, May 31, 1774).<sup>107</sup>

### **Legislative Council of Quebec (1774-1791)**

*The Quebec Act, 1774* shelved the idea of an assembly and the governor's council, In its stead, a 'Council for the Affairs of the Province of Quebec' was established and authorized to "make Ordinances for the Peace, Welfare, and good Government, of the said Province, with the Consent of his Majesty's Governor, or, in his absence, of the Lieutenant Governor, or Commander in Chief for the Time Being" (Article XII), though it could issue no ordinances with respect to religion and it could only levy taxes to build public roads and buildings. Where a typical British governor's council had the authority over ordinances

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<sup>106</sup> Carleton noted that the French Canadians are a very litigious people. It is noteworthy that Tocqueville (2000) made the exact same observation about the Americans. While each were making comparative cultural observations, the fact that these seem to run counter cultural, it is likely that what they were observing was an artifact of the new world, where land was readily available and thus property disputes more widespread.

<sup>107</sup> For an interesting discussion of Burke's views on the conquest, beginning with the debate over the *Quebec Act*, and how it fit into his philosophical ideas, see Bourke (2007). It is his conclusion that when one looks specifically at his views on conquest, Burke was less influenced by Montesquieu than previously thought. This, in turn, casts doubt on 'Burkian conservatism'.

placed in the hands of the governor with the council given the role to advise and consent, this council would now approve ordinances and the governor would advise and consent. This was a council much more in line with the earlier sovereign council the French Canadians had enjoyed.

The size of the new legislative council was increased to not more than 23 and not less than 17, with councillors taking a new non-denominational oath so that catholics and protestants could equally serve on the council.<sup>108</sup> The *Act* provided that a board of no less than five councillors would have the authority to transact executive business, but that the larger council would be needed to enact ordinances. Governor Carleton mistakenly took this to be a licence to create a smaller executive or cabinet, something the chief justice objected to, and Carleton's successor Frederick Haldimand continued the practice until ordered to cease and desist by the British government. What had been intended by *The Quebec Act* was merely a provision for lower quorum in the council to deal with the day-to-day administrative business of governing a colony. This confusion was remedied by way of a reprimand to the governor.

The *Custom of Paris*, as modified by the edicts and amendments of the governors and intendants of New France, and interpreted by French legal authorities up until the time of the conquest, was fully restored as the basis for civil law, though the governor-in-council was given authority to alter this law, including with respect to trade and commerce. The authority of the Vatican over local bishops and priests was outlawed and their appointment was, in theory, to be done under licence from the governor, though in practice the Roman Catholic Church returned to the system that existed prior to the conquest with minimal interference from the local or British government. And the boundary of Quebec was

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<sup>108</sup> "I \_\_\_\_\_ do sincerely promise and swear, That I will be faithful, and bear true Allegiance to his Majesty King George, and him will defend to the utmost of my Power, against all traitorous Conspiracies, and Attempts whatsoever, which shall be made against his Person, Crown. and Dignity; and I will do my utmost Endeavor to disclose and make known to his Majesty, his Heirs and Successors, all Treasons, and traitorous Conspiracies, and Attempts, which I shall know to be against him, or any of them; and all this I do swear without any Equivocation, mental Evasion, or secret Reservation, and renouncing all Pardons and Dispensations from any Power or Person whomsoever to the contrary. So help me GOD." (*Quebec Act, 1774*, article VII).

expanded so it was more in keeping with the earlier boundaries of the French province of Canada.

While the seigneurie system had been restored by instruction and ordinance, *The Quebec Act* guaranteed the seigneurs' position in the community, and allowed them to continue to collect rents and act as judges in local disputes. A legislative assembly would have facilitated the periodic levying of local taxes and the establishment of civil lists. This system required Britain to manage taxation, again replicating the formula of colonial micromanagement by the imperial crown that existed during the French regime. As the French system of seigneurie rents provided an ongoing financial income to the colonial government, this made the lack of assembly more manageable.

Table 4.1 Governing the Province of Quebec

King	Governor		Council
King George III of Great Britain (1660-1820)	James Murray*	1764-1768	<i>Governor's Council (1764)</i> : Chief Justice Hector Theophilus de Cramahé, Thomas Dunn, William Gregory, Samuel Johannes Holland, Paulus Aemilius Irving, Adam Mabane, François Mounier and Walter Murray.
	Guy Carleton	1769-1778	
	Frederick Haldimand	1778-1786	<i>Legislative Council (1775)</i> : Lieutenant Governor Hector Theophilus de Cramahé, Walter Allsopp, Charles-Régis des Bregères de Rigauville, George Pécaudy de Contrecoeur, Gaspard-Joseph Chaussegros de Léry, John Collins, James Cuthbert, Colin Drummond, Thomas Dunn, Hugh Finlay, John Fraser, Conrad Guty, Edward Harrison, Alexander Johnstone, Francis Lesvesque, Adam Mabane, François-Marie Picoté de Belestre, Paul-Roch de Saint-Ours, La Courne Saint-Luc, Charles-François Tarieu de La Naudière.
	Guy Carleton, Baron of Dorchester	1786-1791	

\* James Amherst was military governor of Quebec from 1760-1763, whereupon James Murray became military governor in advance of civil government.

The domination of seigneurs on the council following its redesign with *The Quebec Act*, ensured that body would provide legislative protection for feudal property and civil law interests, even though French Canadian membership was not in majority (see Table

5.1).<sup>109</sup> This further brought the council into line with the familiar sovereign council of New France, in terms of it being a body which could formalize and convey ordinances to the people. For the time being anyway, the *Canadiens* had been successful in getting the system of government they were most familiar with re-established.

One final point should be made about *The Quebec Act*. Historians and constitutional scholars have, to a person, suggested that Guy Carleton's strong support for a continuation of institutions of which the French were familiar, along with protection for the civil law, seigneurial system and catholic faith, was tied to a belief that such generosity and the resultant elite accommodation through the clergy and seigneurs would get French Canadians to take up arms on behalf of the British in future conflicts. This cannot be disproven. Carleton's despatches contain frequent reference to this possibility in making his case to London. Equally, the petitions from the French Canadians themselves contain such arguments.<sup>110</sup> This could simply be strategic positioning on the part of both. But either way, it in no way diminishes the fact that the governor and British government were responsive to an 'out' social group when they were under no legal obligation to accommodate their demands, particularly when such a change could cause problems in other colonies by way of a precedent. In fact, *The Quebec Act* is one of the 'intolerable acts' referred to in the Declaration of Independence, which launched the American Revolution.

Historians and constitutional scholars also read a great deal into the disdain that Carleton had for the new English merchants who arrived with British rule in the colony. The contempt he held for them is evident in his correspondence. But merchants had long

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<sup>109</sup> As Table 5.1 also illustrates, the persons appointed to the first legislative council had at its core many of the influential members of the British governor's council. While these persons were predominantly English, they had become propertied and affluent seigneurs, so their re-appointment was in keeping with the French template for feudal legislative government.

<sup>110</sup> Attached to a petition from December 1773, elite French *Canadiens* wrote in a detailed memo concerning their laws, religion and institutions of governance: "Nous demandons avec ardeur la participation aux emplois civils et militaires l'idée d'une exclusion nous effraye. Nous avons prêté à l'auguste famille d'Hanovre le serment de fidélité le plus solennel : et depuis la conquête nous nous sommes comportés en fidèles sujets. Enfin notre attachement nous feront toujours sacrifier nos jours pour la gloire de notre zèle et notre souverain et la sûreté de l'état" (*Mémorial* of Father Simonnet, etc., attached to Petition of December, 1773).

been held in contempt by the upper class. Going back to Roman times, the possession of property was a sign of rank, but being seen to earn money from commercial enterprise was looked down upon (Senators were prevented by law from owning businesses). The middle ages saw the church place prohibitions on what it considered disdainful money oriented practices, making the lending of money illegal for christians. In Britain of this era, mercantile policies had been aimed at generating staples for Britain, which could only be shipped to ports in England so as to prevent a local merchant class emerging that might move a colony towards self-sufficiency.<sup>111</sup> And of course, the nature of war on the high seas and in undeveloped territory allowed for the blurring of lines between merchant and privateer, as the confiscation of another country's commercial ships and merchandise was a state-sanctioned practice. Thus, Carleton's disrespect for merchants should not be seen as his preference for one social group, the French, over the English, as is stated by a surprising number of scholars. Britain was a county for which he had risked his life in battle, in whose name he governed, contained the cultural group with which he self-identified and in whose ranks of nobility he would soon find himself a member in reward for his service. Any contempt for 'merchants', English or otherwise, was merely a reflection of the prejudice of his time, and times were changing with Adam Smith setting England on a path toward free trade and capitalism, as it got set to enter the industrial era.<sup>112</sup>

We must conclude, therefore, that the desire to get an 'out' social group to participate in society, which in the 17th century meant picking up arms as a militia and in the 20th century meant willingly paying taxes, is an explanatory variable for how a social cleavage can influence institutional change. Another explanation lies in a sense of moral obligation, something that subsequent debates in the British parliament would tend to support, as would the normative arguments that were emerging in British law about the

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<sup>111</sup> The desire to move in this direction is at the centre of the American independence movement, of which The Quebec Act was an additional irritant both in terms of its recognition of the catholic faith and in its redrawing boundaries so as to prevent American western expansion.

<sup>112</sup> It is interesting to contrast the prejudices of this time with the modern era, where the conflation of capitalism and democracy has made hereditary privilege the object of scorn and merchant success the most accepted barometer of personal success and socio-economic standing.

need for representation when it comes to such things as taxation. The outcome in either instance is that the strong cleavage in this society was able to create a restraint on those who took over the government, even in a society and era where the consent of the governed through democratic election was not required.<sup>113</sup>

### III. Resisting Popular Ideas for Institutional Design

The third period is where we see the struggle between normative ideas about governance in the face of resistance to those ideas by competing social groups. In each province of Upper and Lower Canada, minority social groups advanced ideas for institutional change, including an elected upper chamber and responsible government. The lower chamber came to reflect the majority in each province which was in each case the out social group, while the upper chamber represented the ‘in’ social group. Frustrated by their inability to make institutional changes the ‘out’ social groups in both provinces would unsuccessfully attempt revolution. This was a period where the social cleavage and the partisan cleavage were aligned. As will be seen in the next chapter, it would take a shift in both cleavages and the emergence of a political party with leading members from each side of the social cleavage to obtain the institutional changes of responsible government and an elected upper chamber.

The American Revolution, which ended with *The Paris Peace Treaty*, 1783, resulted in large-scale migration from the south. The decision to grant representative institutions to Quebec was only partially tied to the influx of new Anglo-white settlers and must also be seen as being financially desirable to the British government, since these representative institutions could levy taxes in these provinces to support local governance and the rapid expansion of public works projects which would be necessary to

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<sup>113</sup> One might posit that the degree of restraint posed by a cleavage in a totalitarian regime would be less than in a democratic regime, even in relation to their colonial possession, as the democratic process might instill a sense of moral obligation. Yet, totalitarian regimes that have had large social cleavages in the modern era (e.g. the U.S.S.R. or Iran) also appear more intransigent when it comes to any sort of change - institutional, economic or cultural - than those where the population is more homogenous (e.g. China), something that might suggest further approaches to inquiry and testing of this hypothesis.

accommodate the new settlers, something that the Council for the Affairs of the Province of Quebec could not accomplish. Second, the transition to this form of government was an artefact of the creation of two provinces in order to sever the province along what was seen as its social cleavage. Third, the influx of loyalists put a strain on *The Quebec Act* in terms of the system of land grants and civil law. The seigneurial system, so much the fabric of the French Canadian colony, was not well suited for the rapid re-settlement of so many loyalists and was not a system of law that this burgeoning population, being settled in the West of the province, had even a passing acquaintance.

Guy Carleton had been appointed commander-in-chief of British Forces in North America in 1782 and elevated to the peerage as Baron Dorchester in 1786. He now found himself responsible for the settlement of loyalists at the end of the War of Independence and, to that end, he was appointed ‘captain-general and governor-in-chief of Quebec, of Nova Scotia and of New Brunswick, and its dependent territories, and Vice Admiral of the same’, as well as ‘General and Commander in Chief of all of His Majesty’s Forces in said colonies, and the Island of Newfoundland’. Dorchester’s *instructions* in his capacity as governor-in-chief of Quebec laid out the specific grants to be given to families in that province at 100 acres for the head of family plus 50 for every other person, single men would get 50 acres, field officers 5,000 acres, captains 3,000 acres, 2,000 to subalterns, non-commissioned officers 200 acres and privates 50 acres (George R, August 23, 1786).

Pressure to repeal *The Quebec Act* had continued to be brought to bear in London from merchants and traders in the province, mostly non-stop since its passage. With the influx of loyalist settlers there was an expectation among the existing merchant class in Quebec that they would soon be entitled to all the things that had been denied to them under *The Quebec Act*, including an assembly, trial by jury, common law for property and civil matters, construction of protestant (specifically Anglican) churches and schools, and the system of free and common soccage for land ownership.

Nova Scotia had been divided in 1784 to accommodate the influx of loyalist settlers, and the idea of dividing Quebec was now appearing in petitions from the new loyalist

settlers of western Quebec, who also were petitioning for all that was their right as loyal British subjects – all of which had been automatically granted to loyalists who had settled in the newly-created province of New Brunswick. The merchants lost no time in increasing pressure on London, dissatisfied as they had been for years under *The Quebec Act*.

For his part, Lord Dorchester requested that the king once against change his *instructions* with respect to land grants in the province of Quebec, this time from the feudal tenure system that he had convinced the British government to allow, to a system of “free and common soccage, unencumbered with any crown rent whatever” (*Despatch* from Dorchester to Sydney, June 13, 1787). With regards to new settlement, he recommended that no more than 1,000 acres should be held by any one person and floated the idea that 30,000 acres should be set aside in each township so that in the future grants of 5,000 acres could be made to create an aristocracy.

Dorchester’s desire was to prevent land speculation and absentee landlords on the one hand and to create a landed aristocracy who would take an interest in the development of the province on the other. This idea of aristocracy was not, as suggested by many constitutional scholars who interpret the Canadian-British correspondence through the lens of U.K. governance, an attempt to replicate the Westminster model of nobility and commoners in the English half of the colony. It was rather a desire on Dorchester’s part to keep the entire province as close to the French-model as possible. Dorchester even notes that his reason in recommending any change was out of necessity for repaid land grants and settlement and not out of any agreement with the petitions from the British settlers and merchants. He notes that he would have recommended applying the seigneurial system to the West of the province, but it was not conducive to relocation of a large number of settlers quickly and at a great distance from the seat of government in Quebec City.<sup>114</sup>

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<sup>114</sup> In what would become Ontario, the land had to be obtained through negotiation with the Algonkian Mississauga (Hayes 2002). This surrender of land was done using the lakes and rivers. At each tributary river, town sites could then be established at the mouth and agricultural land created by settlers, deforesting the surrounding area. Food could be provided by the government for the settlers at these small new towns while they cleared the land.

The British government requested a refresher course on what exactly the French Canadians objected to with respect to a house of assembly and common law legal system. The question appears rhetorical. The British despatch has such a comprehensive explanation of the issues and shows such insight into how social divisions were impacting on the current, and would likely impact on the proposed, British institutions, that it is worth quoting at length:

“In particular, They wish to be informed from what Causes the objection of the old Canadian Subjects to an House of Assembly chiefly arises: Whether, from its being foreign to the Habits and Notions of Government in which they have been educated, or, from an apprehension that it would be so formed as to give an additional Weight to the New Subjects, and lead to the introduction of Parts of the English Law which are obnoxious to them; or from an idea that being invested with a Power of Taxation, it would eventually subject their Property to Burdens from which they are at present exempted; In like manner, whether the Objections which appear to exist to a farther Introduction of Trial by Jury, arise either from Prejudices against the Nature and Mode of such a decision, or from the difficulty of finding Jurors properly qualified, and the species of Trial being necessarily could with Modes of Proof and Rules of Law, different from those to which they are accustomed” (*Despatch* from Sydney to Dorchester, September 3, 1788).

The colonial secretary also makes it clear that the government was already considering dividing the province in two, given the settlement of most of the loyalists into the westernmost part (*ibid.*).

Dorchester opposed the idea. He believed the French Canadians did not want an assembly or any change to its laws. As for the new loyalist settlements, they were not sufficiently developed to support its own provincial infrastructure, though he supported the appointing of a separate lieutenant governor for the four districts he had created in the west and suggested that perhaps an assembly could be created just for this western part of the province with respect to local matters (*Despatch* from Dorchester to Sydney, November 8, 1788).

The French merchants in Lower Canada, however, had formed an alliance with the English merchants in support of the division of the province (Sturgis 2004). This

buttressed the case that the English merchants had been making before the Board of Trade, and undermined the claim of a common French position in support of the *status quo*. Presumably Dorchester knew he was beat because, included with his arguments against division, he offered the imperial government a suggestion on how to divide the province if it so wished (*Despatch* from Dorchester to Sydney, November 8, 1788).

A draft Bill was sent to Dorchester for his input, stating unequivocally that there would be two provinces under the king, who would each have a governor, a lieutenant governor, an executive council, a legislative council and a house of assembly. The thinking in separating the legislative and executive councils was to give the members of the legislative council “a right to hold their Seats during life” (*Despatch* from Grenville to Dorchester, October 20, 1789). The government had also decided to create a local aristocracy, where those called to the legislative council would be given a mark of honour, such as a provincial ‘Baronetage’ (though higher titles might be contemplated in the future), either to be held for life or made hereditary. Lord Grenville wrote:

“The Object of these regulations is both to give the Upper branch of the Legislature a greater degree of weight and consequence than was possessed by the Councils in the Old Colonial Governments, and to establish in the Provinces a Body of Men having that motive of attachment to the existing form of Government, which arises from the possession of personal or hereditary distinction” (*ibid.*)

Choosing the right persons for such an honour would be key Grenville noted.

The response of Dorchester was that while “many advantages might result from an hereditary Legislative Council, distinguished by some mark of honour, did the condition of the country concur in supporting this dignity; but the fluctuating state of Property in these Provinces would expose all hereditary honours to fall into disregard; for the present therefore it would seem more advisable to appoint the members for life, good behaviour and residence in the province” (*Despatch* from Dorchester to Grenville, February 8, 1790). Dorchester recommended a council of not less than seven for Upper Canada (later Ontario) and fifteen for Lower Canada (later Quebec), with the number to increase as the wealth and population might warrant.

So how was an alliance of French and English merchants able to overcome the resistance offered by the aristocratic French elite in Quebec to split the province and achieve institutional change? French elite representatives served on the governor's council and clearly had the governor on their side. But colonial elites had two direct access points into the British government: The British cabinet, which is in law a committee of the imperial privy council; and the Board of Trade and Plantations which was also a committee of the imperial privy council. The partisan cleavage briefly became unaligned from the social cleavage as a divide between elites who wanted union and those who opposed institutional change. Each had representation in the British privy council. While the American Revolution increased the demand for institutional change, the fact that the partisan group of merchants wanting change included both French and English elites made their case easier to make.

### **Legislative Councils of Upper and of Lower Canada (1791-1840)**

The period following the division of the province into two was an era where certain ideas about democracy, rights and liberties were gaining momentum in both the English-speaking and French-speaking worlds, not the least of which was a belief in the right to representative government and the right to no taxation without the concurrence of the people's representatives. While this principle had been denied on the face of it by the British government in response to demands by the 13 American colonies, this was not due to a uniform rejection of the principle, as the local assemblies had the capacity to consider the financing of local public works.<sup>115</sup> And in British law, the year of passage of *The Quebec Act* was the same year that *Campbell v. Hall* was decided.<sup>116</sup> Most recently, the

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<sup>115</sup> The levying of fees in support of British mercantile practices, to ensure that staples travelled to England and that British merchandise had the advantage in the colony, was imperial policy and thus outside the purview of the local legislature. And, of course, the additional taxation imposed by the British on the colonies to pay for the Seven Years War, including the conquest of Quebec, took an existing irritant to an intolerable level. Yet the principle of representation being tied to taxation did exist in British colonies in North America even before the War of Independence.

<sup>116</sup> While this ruling did not apply to Quebec, in that the governors of the province of Quebec had resisted establishing such institutions when instructed to do so, they had not been irreversibly granted institutions (the French Canadian representatives having rejected these institutional changes); and nothing in British law could

American Revolution had been a fight about self-administration and self-determination and its experiment in democracy and institutional design had informed the French revolution, which, while still not fully resolved at this time, had also been about the right to participate not just in decisions for the raising of taxation but in its allocation and spending, and on the question of liberty and freedom from the very regime that had given birth to Quebec.

These ideas had not entirely manifested themselves in Canadian politics, but the separating of Quebec into two provinces was an attempt on the part of the British cabinet to solve what they saw as the largest challenge facing the provinces, and that is a ‘racial’ division (no longer just a religious division) and the challenges this presented for the creation and management of institutions of governance.<sup>117</sup> The solution was to essentially cleave the province down the deepening fault line, as the British government saw it, leaving each social group with its own half to develop as it saw fit. This is how Prime Minister William Pitt explained the change when he introduced the legislation in the imperial parliament (Britain *Debates*, HC, March 4, 1791).

The *Constitutional Act, 1791* does not itself split the province; rather it assumes that such a division will take place, as there were a number of boundary issues still to be resolved between the two provinces, and between each province and their neighbours, the United States and New Brunswick. The section of *The Quebec Act* relating to a council was repealed and legislative authority was vested in the governor (or in his absence the lieutenant-governor), acting by and with the advice and consent of the legislative council and a house of assembly in each of the two provinces, the full British bicameral colonial government formulation.

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stop the British parliament from taking away a right given the common law principle of parliamentary supremacy. Nevertheless, the decision reflects the growing influence of these ideas about rights, freedoms and democracy.

<sup>117</sup> This change to seeing the French-English divide along racial lines, instead of along religious or some other fault line like rural-urban or merchant-agrarian (fault lines that had pre-existed the time of conquest) is reflective not just of the impact conquest had on group identity, but growing national identities that statehood and war was fueling around the world.

Seven councillors for the legislative council of Upper Canada and 15 councillors for the legislative council of Lower Canada were to be summoned under the great seal of each province, though additional members could be added by royal direction. Councillors had to be 21 years of age, natural-born or naturalized British subjects and appointment was for life. Permission was given to create provincial nobility whose members could demand a writ of summons to the legislative council.<sup>118</sup> The governor appointed and could remove the speaker.

The king would authorize the governor to call, prorogue and dissolve the house of assembly and to divide the province into electoral districts. The minimum number of members was 16 in Upper Canada (Ontario) and 50 in Lower Canada (Quebec). These relative differences reflected the disparities in population at the time. Bills passed by both chambers – the legislative council and the house of assembly – could be assented to by the governor, or reserved by him and sent to London for approval or disallowed by the British government directly inside of two years.

The guarantees of *The Quebec Act* with respect to the Roman Catholic religion were confirmed; and tithes from protestants for the support of the protestant clergy was continued; but a new provision was added where the governor would take one seventh of the crown land granted and set it aside for the protestant clergy.<sup>119</sup> For Upper Canada, civil law was to be replaced by British common law by the following year (*An Act Introducing English Civil Law into Upper Canada*), and trial by jury was established (*An Act Establishing Trial by Jury in Upper Canada*).

The British had intended that the legislative and executive councils should be separate persons, as had been made clear in the *despatch* from Grenville to Dorchester. Yet

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<sup>118</sup> No nobility was created at the outset, and developments in the provinces would render the entire apparatus moot, when the British government was forced to temporarily suspend the local government in response to rebellion. Lord Dorchester had, on November 9, 1789, created by order-in-council a mark of honour for Loyalists and their descendants, so the post nominal 'U.E.' (Unity of Empire) or U.E.L. (United Empire Loyalist) remains the only hereditary honour in Canada.

<sup>119</sup> Royal direction to the governor and the executive council was that parsonages or rectories should be established for the Church of England out of these clergy reserves, as required by the new settlement in each province.

in both provinces the legislative and executive councils came to be dominated by the same people, ensuring patronage for their friends and placing them at loggerheads with the assembly. The people who came to dominate these bodies became known famously as the 'Family Compact' in Upper Canada, and the 'Château Clique' in Lower Canada.<sup>120</sup>

The despatches from the governors of Lower Canada from this period increasingly show a divide between English and French, manifesting itself in constant conflict between the lower house and upper house. Governor Robert Shore Milnes (1800) reports on the debates among the French in the lower chamber as having led to a decline in seigniorial authority, the increasing independence of the Roman Catholic Church from the government and the decline in aristocratic influence of the legislative council. Governor James Henry Craig (1807) reports the formation of a political party of *Canadiens*, led by doctors, lawyers and journalists, in opposition to the executive and legislative councils which were still supported by the merchants and English settlers. The British government's ill-conceived solution to the reported increase in 'racial' tension that was pitting a predominantly French lower chamber against a predominantly English upper chamber was to suggest the governor keep using the power of prorogation and dissolution to try to bring the lower chamber into line (*Despatch* from Jenkinson to Craig, September 12, 1810).

In Upper Canada, a social cleavage over religion was coming to the fore. The lieutenant governor, beginning with John Graves Simcoe, and the members of the legislative council, among whom Bishop John Strachan would emerge as the most powerful figure, had placed their Anglican faith front and centre of the province's development plan. While the clergy reserves had not been specifically designated for the Church of England, they were not shared with the Methodists, Quakers and Mennonites who formed a large portion of the growing population.

There are strong, but different, social cleavages in both of these provinces; there is also the emergence of political parties. Membership in these political parties was not

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<sup>120</sup> For an exploration of these relationships see Wallace (1915), Earl (1967), Craig (1963), Ouellet (1980), Raible (1992) and Buchner (1985).

strictly bound by social group, though in the reports of the governors to London they are frequently referred to by linguistic or cultural identity of the majority or of its principle leaders. There are frequent references to a 'French Party' coming to dominate the assembly in Lower Canada, for example. In Upper Canada, the 'family compact' began to refer to its critics as the 'Scotch faction', claimed they were marching under an 'Irish rebel flag' and derided the disloyal as 'Yankees'. Social identity was coming to dominate partisan politics.

From these 'out' social groups, which were more populous in each province than the 'in' group, demands were emerging that the governor and the executive council should be accountable to the majority in the lower chamber. The British government was convinced as a matter of law, based on the widespread belief in the Austinean-Dicean doctrine of British parliamentary supremacy that this was impossible. In 1810, the colonial secretary again rejected the idea as impossible for Lower Canada (*Despatch* from Liverpool to Craig, September 12, 1810).

In 1822, the English Merchants' Party in the assembly of Lower Canada submitted a proposal directly to the British government that the two provinces be united to further economic development. These merchants in Montreal had responded to a growing market for wheat in India and then in Europe. Banking, shipping and trade made Lower Canada, or at least Montreal, key ports of departure for commerce coming from Upper Canada.

In response, the British Government introduced "A Bill for the Uniting of the Legislatures of Lower and Upper Canada" (U.K. *Journals*, Commons, July 30, 1822). This was the last sitting day before the end of the session, so the seriousness of the British government's move must be questioned. Also, the majority in the British house of commons voted to table it for three months, thereby killing the legislation (*ibid.*, July 31, 1822). But the effect in Lower Canada was great, where it further polarized the legislature along what members of both chambers increasingly refer to in their debates as between 'races'.

In 1828, a petition against union signed by 87,000 people in Quebec was taken to London. The house of assembly in Upper Canada equally sent its list of grievances with its

upper chamber and executive council. The first of a long series of committees of the British house of commons was struck to look into the problems in governing the Canadas. The agent hired by Lower Canada to deliver their petition, John Neilson, was asked by the committee what could improve the legislative council and he replied that appointing individuals who were not members of the executive, which he had no confidence would be done by the governors using the royal prerogative, or making the body elected. The committee concluded that the constitution had not been properly administered in either of the Canadas, placing the blame on the members of both legislative chambers and the governors, though it made several specific recommendations such as the removal from the legislative council of all judges except for the chief judge (*ibid.*, July 18, 1828).

The commons' committee noted that the assemblies in each province had their own mechanisms to remedy grievances, such as the withholding of supply. But the fact that the government had independent revenues allowed it to operate independently of the wishes of the majority in the lower chamber. Included in the demand for institutional change coming from the assembly, therefore, was that crown revenues be placed under the control of the legislature and that the lower chamber be the lead chamber on all money matters. In Upper Canada, a committee on grievances was established by the assembly each year to chronicle its on-going dispute with the upper chamber and with the executive council.

In Lower Canada in 1831, what the upper chamber called “a violent and reckless party in the lower house”, namely the Patriote party led by Louis-Joseph Papineau as speaker of the assembly, called for the abolition of the legislative council (*Lower Canada Journals*, LC, April 31, 1933). In 1833, the assembly adopted an “address to the king” which proposed that a special ‘general assembly’ of delegates chosen across the province be convened and that this special assembly be empowered to decide upon replacing the legislative council with an elected chamber structured as follows:

- Voters would be landowners who lived in the district for at least one year with a net annual income of £10 in the country or £20 in the city;
- To be elected one would need to be a British subject, at least 30 years of age, have resided in the province for at least 15 years and own £100 of property in the country or £200 in the city;

- The council would not dissolve when an election was called for the lower chamber, but rather councillors would be elected for six year terms with one-sixth elected every year;
- The number of councillors would be equal to the counties, cities and divisions, such as boroughs, over 2,000 persons, so that the council would be half the size of the assembly (*Lower Canada Journals*, LA, March 20, 1833).

The legislative council responded with its own address to the king calling for the constitution to be preserved and accusing the majority party in the assembly of being against the British constitution (*Lower Canada Journals*, LC, April 31, 1833).

In 1834, the assembly adopted an address to the king asking that the constitution be changed so that members of the legislative council would not be permitted to sit in the executive council and *vice versa*, and for the removal of judges from both councils (*Lower Canada Journals*, LA, February 10, 1834). That same year, the assembly in Lower Canada adopted *Ninety-Two Resolutions*, which called for a series of institutional changes (*ibid.*, February 21, 1834). Included in the list was a request that the upper chamber be made elected with a property qualification for electors and a property qualification to serve on the council (article 12). While the 92 resolutions became symbolically significant for the Francophone population in the province, the actual request for institutional change was contained in a lengthy address to the king, and identical addresses to each chamber of the British parliament, which chronicled the divisions between the two chambers, highlighted the behaviour of certain English ministers and councillors and called for an elected upper chamber using both a property qualification to vote and a property qualification to serve (*Lower Canada Journals*, LA, March 1, 1834). In response, the British government expressed its unwillingness to make institutional changes, though threatened that if the issue of granting money (supply) for the local government could not be resolved, it was prepared to introduce legislation in the British parliament to suspend the local legislature (*Despatch* from Rice to Aylmer, June 29, 1834).

In Upper Canada, the assembly was being led by a Scot, William Lyon Mackenzie, and was equally fighting the upper chamber over supply for the operations of the executive branch. He authored the *Seventh Report on Grievances* which called for the establishment

of responsible government (Upper Canada *Journals*, HA, 1835, appendix 21). The assembly then adopted the report of the finance committee which detailed the money that was outside of the control of the legislature as well as a resolution calling for the placing of all revenues, and sources of revenue, including Crown and clergy reserves, under the control of the legislature and authorized forwarding the same to the British colonial secretary (Upper Canada *Journals*, LA, April 15, 1835). Finally, it adopted an address to the king, outlining the fact that the legislative council and assembly were constantly at odds, that the executive council dominated the upper chamber and asked the king to remedy the situation, though did not suggest a preferred course of action (*ibid.*).

In response to the demands coming from the two provinces, Lord John Russell introduced ten resolutions into the British house of commons. While not an outright rejection of the elected principle, it states at item 4: “That in the existing state of Lower Canada, it is unadvisable to make the legislative council of that province an elective body; but that it is expedient that measures be adopted for securing to that branch of the Legislature a greater degree of public confidence” (U.K. *Debates*, HC, March 6, 1837).

Lieutenant Governor Francis Bond Head had been told in his *instructions* that he was not accountable to the local legislature in Upper Canada, nor bound by local officials on the executive council, since a governor takes his direction from the colonial secretary, who is accountable to the imperial parliament (*Despatch* from Glenelg to Head, December 5, 1835). And Lord Russell put the point again before the British house of commons when he tabled his 10 resolutions to be sent to the Canadas as a response to their demands for institutional change:

“That part of the constitution which requires that the Ministers of the Crown shall be responsible to Parliament, and shall be removable if they do not obtain the confidence of Parliament is a condition which can only exist in one place, namely, the seat of empire. Otherwise we should have separate independent powers existing not only in Great Britain but in every separate colony” (U.K. *Debates*, HC, March 6, 1837).

Frustrated over Russell's response, armed insurrection, led by Papineau in Lower Canada and Mackenzie in Upper Canada, occurred in each province, in succession, and were quickly put down. These rebellions have been well studied.<sup>121</sup>

The immediate result was the British parliament adopting *An Act to make temporary provision for the Government of Lower Canada*, which was proclaimed on November 1, 1840. This law did not suspend the *Constitution Act, 1791* (as suggested by Kennedy 1922, 115), but rather allowed for the governor to appoint a special council and, together with the special council, assume all the powers of the Legislature of Lower Canada. Only the governor could propose laws, and laws passed by the special council would have the same effect as if they had been passed pursuant to the *Constitution Act, 1791* by the house of assembly and legislative council and given assent. Any laws so passed would not extend past November 1, 1842, unless continued by competent authority, nor could this body impose taxes or make constitutional changes. Lord Durham would be sent as governor general for British North America to examine the problem, but in the meantime John Colbourne summoned 21 members to sit on the special council, of which 11 were French Canadians.

The breakdown in the model used for both of these provinces, it has been argued, was the result of confusion over who controlled supply and the lack of accountability of the executive to the legislature (Kennedy 1930), and, in the alternative, that simply land speculation and graft destroyed the proper functioning of government in Upper Canada (Gagan 1978) and Lower Canada (Kennedy 1922, 91). The actions of Louis-Joseph Papineau may have led his followers to a dizzy height of foolishness (Kinchen 1956; Ouellet 2000a) and William Lyon Mackenzie may have been too erratic to lead anyone (Dent 1885).<sup>122</sup>

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<sup>121</sup> For example, with respect to Upper Canada see Kilbourn (2008) and da Silva and Hind (2010); and for Lower Canada see Bernard (1983), Greer (1993), Schull (1996) and Filteau (2003); for an examination of the legality of the trials and sentences given to the rebels see Greenwood and Wright ; and for William Lyon MacKenzie's own perspective see MacKenzie (2000).

<sup>122</sup> For a contemporary rebuttal of Dent, also drawing on the experiences of those present, see King (1886).

Yet when one steps away from the minutia and the personalities involved in these events, natural trends of institutional development in Britain and its colonies begin to emerge. The breakdown in the model may, in fact, simply be a natural breakdown in the British monarchical model, and thus would inevitably have occurred in each of Canada's provinces. In England, the monarch had experienced a loss of influence in specific stages as follows: (i) The legislature came to object to being asked to levy some taxes without having a say in where and how the money was spent (this happened first with the nobility and then with the commoners, as they each in turn came to be taxed); (ii) and then the legislature began to object to the monarch having outside sources of revenue that made him less dependent on the legislature for supply. In response, the monarch began (iii) to use the power of the purse to co-opt legislators, by offering them positions on the executive; (iv) used its prerogative for appointments and to build public works so as to dispense patronage and influence electoral and local politics directly and; (v) used the upper chamber and its own royal prerogatives to try to keep the lower chamber in check, (vi) resulting in the elected lower chamber, emboldened by the normative claim that it had a mandate from the people, objecting to the appointed upper chamber having an equal say with respect to money matters and to the composition of the executive council. These had been the developments in mother England centuries before, and, as we have seen in this chapter, these were equally the developments in both of the provinces of Canada with respect to the governor, the governor's council, then the legislative and executive councils.

In England, the next developments were that (vii) the monarch began to appoint persons to the cabinet who could ensure passage through the lower chamber of 'supply' (i.e. a budget for government spending) and of a civic list (i.e. salaries for office holders). These 'ministers' of the crown (viii) came to be accountable to the legislature individually for their departments and then (ix) collectively for the actions of the executive. With collective responsibility (x) the cabinet then demanded that its advice be followed without question. It is these developments in terms of individual and collective 'responsibility' which led to the identification of a system of 'responsible government', which is the focus of the next chapter.

## **IV. Conclusion**

In formulating our hypothesis that institutional change will be restrained by social cleavages, it was believed that restraint operated through the institution itself. Groups that had formal or informal representation within the institution would likely oppose change in the belief that any change in the way the institution was formed or composed might lessen their relative representation. This was based on a very modern conception of representation.

By going back to the early colonial governments and tracing the councils through their development, we see a different picture emerge. Resistance to change is magnified by a social cleavage. If 'out' social groups perceived that the advocacy for a change was coming from the 'other' social group, their resistance to change became absolute, even in situations where change would have likely been beneficial to their interest. French Canadians opted for governors and appointed legislative councils over representative assemblies, and clung to their feudal systems of land ownership, initially because they were familiar, but, even after other models became understood, the continued attachment can only be attributed to a perceived connection between it and their social identity. This resistance to change extends to a resistance to political ideas that have a temporal or normative popularity.

Much of our understanding of how political movements and policy communities operate in modern times is tied to modern assumptions about representation and a belief that political pressure can be brought to bear through political institutions. Even when political communities are seen to influence policy outcomes at the bureaucratic level, it is believed that the elites of these communities have been successful because of their capacity to represent larger communities of interests that might have an impact on the institutions of governance through the mechanism of election. However, in the pre-democratic period of Canada, social groups were able to restrain change even when they did not have representation.

This would support our initial hypothesis that a divisive cleavage in a society will restrain institutional change. In the case of Canada after the conquest, the British parliament had taken control of institutional design and had even made decisions to establish a governor's council, elected legislative assembly and English common law, with the usual exclusion of catholics from the public sphere. Yet it was resistance from the elites of the French social group that led to the maintenance of the *status quo* of a sovereign council and seigneurial system.

When the cleavages aligned, the changes being advocated in each of the provinces were seen as coming not from a political party that had the confidence of the local citizens, but from a social group. This is evident in the despatches to and from the governor and in the debates in the British house of commons. This opposition is perhaps more significant than resistance coming within the province from the 'in' social group, as the changes being advocated would lessen that group's hold on power. The British government and parliament opposed the changes because they were seen to be demands from one side of the social cleavage.

## **Chapter 5: Effecting Institutional Change - The Province of Canada**

This chapter examines the period following the rebellions of 1838 in the two provinces of Canada, Upper and Lower, until 1856. This was a period where institutional change occurred. The provinces were united and a single bicameral legislature was created: with equal representation from the two halves; responsible government was obtained; and the upper chamber was made elected. This all occurred in a relatively short period of time.

Our hypothesis is that for institutional change to occur the partisan cleavage and the social cleavage would not be aligned. In the previous period they had been seen to be aligned, except for the one period surrounding the division of the province in 1791. For change to occur, it is expected that it would be driven by a partisan group that has, among its leadership, representatives of both sides of the social cleavage. It is also expected that shifts in the social cleavage would precede change in a province where previous attempts to achieve change had been successfully resisted by social groups.

Our methodology is the same as in the previous chapter. The constitutional and institutional changes are process traced and then placed in a societal context to examine the social and partisan factors surrounding the proposed unsuccessful and successful changes. The first half of this chapter reports our analysis of the shifts in societal cleavages and group identity, first social and then partisan. This allows us to place the current period of change in context with the previous period of resistance to change and to identify the shifts in cleavages and in social and partisan group identity. The second half returns to a chronological reporting of institutional changes which were proposed and occurred in the united province of Canada, and the societal events surrounding these changes. In each case, a partisan group that had leadership from both sides of the social cleavage, which in the new united province of Canada was a French-English cleavage, drove the institutional change.

## I. Shifting Cleavages

Our examination of societal cleavages in this section begins in advance of the union, so as to place the shifts in cleavage in context. What we find during this period is a shift in group identity. This begins with the elimination of the strong social cleavage in Upper Canada, which becomes subsumed by the French and English cleavage of Lower Canada, and ends with an emergence of a new 'Canadian' identity. In terms of a partisan cleavage, as will be shown in the second section, we observe the emergence of partisan movements surrounding agitation for institutional change and then more organized political parties as vehicles for change. This allows for the establishment of responsible government and then the introduction of elections for the upper chamber.

### ***Social Groups***

At the time of the British conquest, there had been divisions within New France that separated religious and civil society, merchant from fur trader, seigneurs from habitants, and urban from rural. The conquest of Quebec by the British introduced an English merchant class to replace the French merchant class, as mercantilist trade policy required that goods be shipped to and from the imperial parent, and London thus replaced Paris as the centre of trade. While by no means homogeneous, the 'Canadiens', as the French were known even before the conquest, and the British merchants and landed gentry co-existed in relative harmony for the first three decades of British rule, with a class division of wealth trumping any group identity based on ethno-religious-linguistic origin.

The *Constitution Act, 1791* had been enacted to separate the province of Quebec along the lines of what was emerging as a social cleavage, between the British Loyalist settlers who had been added mostly, but not exclusively, to the west of the province in the wake of the American Revolution, and the Canadiens in the east. It had two seemingly contradictory unintended consequences with respect to group identity. The first is that it facilitated the formation of multiple sub-group identities which reflected class, country of origin and religious divisions in each of the two provinces of Upper and Lower Canada. The second is that it solidified the French-English cleavage for the residents of Lower

Canada, the very province it was intended to emancipate from this emotionally charged division.

In Lower Canada, the French merchant class and English merchant class, which had briefly teamed up in support of the *Constitution Act, 1791*, had turned on each other after the provinces had been divided (Sturgis 2004). There was an emerging Francophone middle class of lawyers, notaries, doctors and journalists, and the introduction of representative institutions gave this group a forum (Riendeau 2000, 112). Leaders of these groups were aspiring to replace the seigneurs and the British merchants as the elites of Lower Canadian society. This French Canadian political class were economic conservatives who defended traditional agriculture in the face of commercial expansion, but also political radicals, given their demands for greater provincial autonomy, the supremacy of the lower chamber over the executive branch and a flirtation with American-style republicanism (Paquet et Wallot 1988).

The legislature, with an elected lower chamber and an appointed upper chamber, became a cauldron for social cleavage formation, as policy disagreements helped to transform a nascent political movement into a social identity. This began with policy disagreements over the day-to-day issues of governance, like taxes and spending, and grew into more philosophical and constitutional disagreements over power-sharing through institutional change, which, when conflated with a growing group identity, helped to widen this province's social cleavage. A good summary of the political situation in Lower Canada in the lead-off to the rebellion and then union is as follows:

“The French-dominated Assembly sought to preserve a rural society in which public funds would be directed to building roads and other local improvements beneficial to an agrarian economy. The English-dominated oligarchy strove to expand international trade and to promote urban growth through public expenditures on canals and other improvements to the St. Lawrence system of waterways” (Riendeau 2000, 113).

While the cleavage in Lower Canada could be just as easily characterized as rural versus urban, agrarian versus commercial, or one of class, the despatches and legislative debates reflect how a group identity surrounding French and Anglo-Saxon ‘races’ was coming round to colour all discourse in the province. The sense of identity that a common

language and religion manufactured for people in this province, reinforced by shared stories of their history and culture, came to trump all other possible identity markers that could have united or divided this population.

In this socially divided province, Thomas Cary, a one-time member of the executive council under Governor Robert Prescott, established the *Quebec Mercury* as a political organ and newspaper for the ‘British’ residents in 1805. It was conservative, advocated for the assimilation of French Canadians and argued that the rise of a French middle class and French majority in the assembly was a threat to Anglo commercial interests (Gauvin 2000). In response, *Le Canadien* was founded in 1806, which was also conservative, though advocated for institutional reform and the replacement of the English elites by the French as the distributors of patronage and the wielders of political power (Ouellet 2000b).

Specific policy initiatives further exacerbated the ‘racial’ division in Lower Canada, as these policies were seen as direct threats to the preservation of a French and catholic community in North America. First, the Anglican Bishop of Quebec, Jacob Mountain, tried to get education taken away from the Roman Catholic Church, a move that was supported by the legislative council and opposed by the Francophone majority in the lower chamber of the legislature (Millman 2000). In 1801, the Royal Institution for the Advancement of Learning began to establish a non-denominational educational system which was seen as a direct challenge to the Roman Catholic Church.<sup>123</sup>

Governor James Craig pressed for the right to make clerical appointments within the Roman Catholic Church, which was opposed by Archbishop Joseph Octave Plessis of Quebec, and Craig’s prejudices led him to accuse the catholic clergy of being in league

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<sup>123</sup> The Royal Institution for the Advancement of Learning had as its goal the establishment of a broad non-denominational educational system for the province at its outset. It created two Royal Grammar Schools in 1816, which were supported financially by the provincial government through salaries. The original two schools closed in 1846 and it lost control of the 82 other schools it had established shortly thereafter. The only thing retained was McGill University, which had been founded as McGill College in 1821 from a bequest by legislative councillor James McGill of £10,000 and a 46-acre estate. The Board of Governors of McGill University are the only ‘members’ (these for a non-profit company are the equivalent of shareholders) of the Royal Institution for the Advancement of Learning, which owns the assets of the university as a separate provincial corporation from McGill University.

with the nationalists (Sturgis 2004).<sup>124</sup> Between 1807 and 1811, Craig had troops seize the printing press of *Le Canadien* and imprison its writers for treason, and he advocated increased immigration from Britain and the merging of the two Canadas as a way to reduce the political influence of the French in the province. While he was recalled to Britain over his behaviour, his ‘reign of terror’, which included frequent prorogations and dissolutions of the assembly and the use of the military and the law courts for partisan purposes, helped to politicize social identity. Thus, when the *Canada Tenures Act* was adopted in 1825 to allow landholders to change from seigneurial to freehold tenure, and the British American Land Company acquired significant property in the Eastern Townships, French political leaders were convinced that the elimination of the French ‘race’ was the government’s motivation.

This rise in French Canadian nationalism was not happening in isolation. Where the *Peace of Westphalia* in the 17<sup>th</sup> century had laid the groundwork for the rise of nation-states, the 18<sup>th</sup> century saw the emergence of ‘race’ as an identity marker. As race was seen as immutable, this would have a significant impact not just in Canada but around the world. The debates of both chambers of the legislature of Lower Canada, in advance of union, are peppered with allegations of race being the motivation for virtually every policy initiative, spending scheme and constitutional reform proposal advanced by members of either chamber and between the chambers. ‘Racism’ had not yet emerged as a word (it would not be until the 1930s), but all initiatives advanced for institutional design were debated in terms of whether or not they would diminish the other ‘race’.

The conclusion of Lord Durham was that “I expected to find a conflict between the government and the people – instead, I found two warring nations within a single State; I found a struggle, not of principles, but of races; and I perceived that it would be idle to attempt any amelioration of laws or institutions until we could first succeed in terminating the deadly animosity that now separates the inhabitants of Lower Canada into the hostile

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<sup>124</sup> Plessis was in fact very accommodating to Craig. He described the British conquest as ‘*la conquête providentielle*’, as it had saved Canada from the horrors of the French revolution, and he would have Craig’s proclamations read out loud in catholic churches.

divisions of French and English” (Durham 1912a, 22-3), which reflects the language of discourse of the era, and especially in Lower Canada. It also reflects the way social cleavages colour discourse surrounding institutional change.

To Durham, and to the British government that received his report, institutional change as demanded by the ‘other’ social group or ‘race’ should not be granted as it would be used to their advantage over the other side of the social cleavage, the loyal British subjects. The fact that armed insurrection had occurred made this prejudice impossible to shake. Remove the bias of ‘race’, and Durham would have simply been an advocate of the right of any people to have self-government, which was the position he took when he met with English politicians from the other provinces of Upper Canada and Atlantic Canada.

The language of ‘race’ did not simply colour the discourse of the time. It has coloured scholarly analysis since. The similarities in aspirations between the emerging middle class in both Upper and Lower Canada are never pointed out, even though the demands for change coming from the assembly in Lower Canada, and the disagreements between the two chambers of the legislature over economic policy, were identical to that which was occurring in Upper Canada. The only difference between the two provinces is that in Upper Canada the social cleavage was seen as racial.

In Upper Canada, the province had its social cleavage, from before the time of the American Revolution until after the War of 1812, defined by British and Yankee mistrust. ‘Yankees’ were seen as a breed of North American settler who had no allegiance to crown and empire, only to the potential for profit in the new world. They did not respect borders, and some trafficked and traded materials restricted under British mercantilist law, including liquor and guns. The American Revolution instilled mistrust in the Loyalists for Yankees, even some of those who had been in Quebec prior to the revolution. Irrespective of their date of arrival, those who were not Loyalist were potential spies in a period where annexation by the U.S. was a threat for some and a political goal for others. This mistrust is reflected in the province’s electoral law. From 1800 onward, immigrants from the United States would be required to live in Upper Canada for seven years and take an oath of allegiance to the king before they could vote (Massicotte, Dufour, Young et Jorgensen

2007, 23).<sup>125</sup> Even then, those who had once lived in the U.S. were not accepted as equals by many, and the label Yankee could run for generations.

Added to this mistrust of Yankees before the War of 1812 was a mistrust of British immigrants who arrived afterwards, and soon the ‘banished Briton’ became a solid ‘out’ social group which would redefine the social cleavage in the province (Riendeau 2000, 115). While the province might have looked racially homogeneous to outsiders, especially in contrast to Lower Canada, the province of Upper Canada was divided by English, Scottish and Irish ancestry. The Anglican English elite held the power and made up the majority of government officials, bankers, military officers and professionals (Romney 1984, 12). Scots formed the bulk of the middle class, including merchants and manufacturers. Irish immigrants arrived bitterly divided between protestant and catholic and, with few skills and little money, were relegated to the building of canals and railways, with many ending up as part of the underclass of urban poor.

In Upper Canada, it was the policy issue of the ‘clergy reserves’ – where one-seventh of the land in each community was held in reserve for the building by the church of schools, hospitals and places of worship – that politicized the province’s dominant social cleavage. The Anglican Church leadership had successfully used its advantaged position in the upper chamber of the legislature, and in the executive council, to make this land singularly of use to them, pitting the two chambers against each other as devotees of other faiths were able to win election to the lower chamber (Wilson 1969). The Church’s favoured status in England, where the king was formally head of the church and its senior members sat in the house of lords, helped to buttress the provincial elite.

The rebellion in Lower Canada was a product of the social cleavage created by the French and English languages and protestant and catholic religions, and exacerbated by differing conceptions of the future of the province, including divergent economic interests (Ouellet 1979). In Upper Canada it was assumed that it was not identified with a particular social group and it was simply partisan opposition to the Family Compact (Read 1988).

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<sup>125</sup> When the Reformers won a majority in 1804, they tried to repeal the law but the Conservatives were able to use their majority in the legislative council to protect the legislation.

But this is incorrect. In both provinces the agitation for reform came to be linked at the time to that province's social cleavage.<sup>126</sup>

The union of Canada altered group identity in the two provinces, but not in the way Durham expected. By creating a single province of Canada which would be governed by a single bicameral legislature and which would have the power to make laws for the two halves, it solidified an Upper and Lower Canada cleavage that would be seen as English and French, respectively (even though there was a minority of the other in each half of the province and in its legislature). By creating a new dominant cleavage, this forced both halves to subsume their own social divisions. So Scots, Irish, Yankees and English were united as English Canadians, just as those who spoke French had come to be united as Canadiens.

Table 5.1 reports census data for the two parts of Canada from the time of Union to the lead up to Confederation. They are reported here as data from Canada West and East, because those are the labels given to the two halves of the united Province of Canada by the *Act of Union, 1840*, but it should be noted that residents of Canada continued to refer to the two halves as Upper and Lower Canada. Two things are apparent from this data. The first is that while English speakers are consistently dominant in the West and French speakers in the East, migration was changing the internal structure of both parts of the province. There was increasing diversity of source country for immigrants, with the greatest change occurring in the West of Canada. The second is that the relative influence of the two halves shifted during this period, with Canada West going from less populated and thus over-represented in the legislature to being the more populous half of the province and thus under-represented in the legislature. The growth in population in Canada West was a product of the 'pull' factor of land being marketed (both crown and clergy reserves) aggressively by the Canada Company, but also 'push' factors like the great potato famine in Ireland, between 1845 and 1852, which forced millions from the rural countryside to move to North American cities.

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<sup>126</sup> Though it is noteworthy that only one to two percent of the population participated in either rebellion (Riendeau 2000).

Table 5.1: Birth Place of Canadians

	<i>West 1842 AD</i>	<i>East 1844 AD</i>	<i>West 1860/1 AD</i>	<i>East 1860/1 AD</i>
England and Wales	40,684	11,895	114,290	13,179
Ireland	78,255	43,982	191,231	50,337
Scotland	39,781	13,393	98,792	13,204
British Possessions			1,058	815
French Canadian	13,969	524,244	33,287	847,615
English Canadian	247,665	85,660	869,592	167,949
Atlantic British Provinces			8,085	2,061
United States	32,809	11,946	50,758	13,648
Europe	6,581		25,917	2,075
Other Foreign Countries		1,329	1,194	270
Not given	27,309	4,633	1,394	414
TOTAL POPULATION	487,053	697,084	1,386,091	1,111,566

*Source:* E-Stat Table(s), Statistics Canada (accessed July 21, 2011)

This shift in relative influence created a tension between the two sections. Where the circumstances surrounding union had created a mistrust and antagonism on the part of the French Canadian elite towards Canada West, the shift in population generated antagonism in the West to what was seen as “French Canadian domination” (Skelton 1963, 333). As the legislature was divided equally in terms of seats between Canada West and East, this sectional divide was the backdrop for party politics, as will be discussed in the next section.

The English community in Canada West, while united on one side of the new province’s English-French West-East social cleavage, was not homogeneous. The social divisions of Europe and the British isles were imported by immigrants to Canada. Elections had long been fought by religious and ethnic groups rallying voters through strong arm tactics and free alcohol. This could have dangerous consequences, like the nine fatalities during the election of 1841 (Massicotte *et al.* 2007).<sup>127</sup> Groups of thugs would

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<sup>127</sup> Election violence was not unique to Canada West. There had been three fatalities during election riots in Montréal in 1832 and another death in 1844, two in Quebec City in 1858, one in New Brunswick in 1843 and another one in 1866 and three in Prince Edward Island in 1847.

ensure their candidate's supporters could vote and then block the polls until they were closed. Rival groups would come to blows.

One of the most effective of these groups was the Orange Order, a society formed in Ireland that was militant protestant (given its Scottish Presbyterian roots) and fiercely supportive of England and the British empire. As a structured (albeit secret) social group that had been imported to Canada West with the Irish immigrants, it was ideally situated to organize its members for political purposes. Its militancy and the strong arm nature of Canadian politics made it prone to violence, and, from the time of union until 1860, there were at least twenty-five riots in Toronto and almost all of these involved the Orange Order in some manner (Kealey 1984, 44).

A provincial commission established to look into Toronto municipal politics concluded that the "officers of the Corporation [of the City of Toronto] and the Police, are for the most part open and avowed Orangemen. Orangeism has become the watchword and symbol of the party which supports the Corporation, and the most efficient if not the indispensable recommendation to civic favour or employ. At the late Election, Orangeism was the Shibboleth of the Corporation Party. At the riots which ensued, Orangemen systematically brought into the City from the surrounding country were the most conspicuous actors" (Report of the Commissioners, *Canada Journals*, 1841, app.S). The Family Compact controlled the Corporation party and also controlled liquor licenses, and thus the distribution of liquor at election time. While the highest echelons of the Family Compact were Anglican, they found natural allies in this pro-England Irish protestant group.

But when we look more closely at religion in Canada West, as reported in Table 5.2, it becomes apparent that religious factionalism through immigration would have altered the province's social divisions, even if they were not being subsumed by the English-French West-East cleavage of the larger united province. The relative weight of the Church of England, and its offshoot Church of Scotland, was diminishing. Once the clergy reserves issue was settled, which it was during this period, religious affiliation as a source of social group identity began to decline.

Table 6.2: Religious Denominations in Canada West

	<i>1842 AD</i>	<i>1860/1 AD</i>
Adventists		1,050
Baptists	32,822	61,559
Christians		5,018
Catholics	130,406	258,151
Church of England	215,582	311,559
Congregational	8,506	9,357
Jews	2,210	614
Lutherans	9,048	24,299
Methodists - British Wesleyan	46,684	218,427
Methodists - Canadian	64,630	23,330
Methodists - Episcopal	40,250	74,616
Methodists - New Connection		25,199
Methodists - Bible Christians		8,801
Methodists - Others	14,282	
Mormons		74
Moravians	3,556	
Presbyterians - Church of Scotland	155,858	108,963
Presbyterians - Other Presbyterians	36,440	21,378
Presbyterians - Dutch Reformed Church	1,892	
Presbyterians - Free Church		143,033
Quakers	10,400	7,383
Unitarians		634
Universalists		2,236
Other Protestants		7,514
Other Denominations	38,844	27,396
Not given	162,696	25,500
TOTAL POPULATION	974,106	1,396,091

*Source:* E-Stat Table(s), Statistics Canada (accessed July 21, 2011)

In contrast to the religious and cultural group identities that immigrants brought with them to Canada, and its attendant animosity and sometimes violence, there was the counterbalance of an emerging sense of ‘Canadian’ identity. This is in part due to shifts in public attitudes in England towards the colonies. The British public was increasingly dissatisfied with the cost of the empire, and there was pressure on the British government to

reduce its military presence overseas. With a shift in British economic policy from mercantilism to free trade, Canadian loyalty to the British people and empire was weakening at the same time as an awareness of what it was to be North American was taking hold (Kennedy 1922). The U.S. Civil War further pitted Canadian public opinion, which was sympathetic to the North, against British public opinion, which appeared to favour the South, and there were increasing demands from British newspapers and politicians that Canada should defend itself if the U.S. conflict widened to threaten Canada (and these only increased when the provincial assembly in Canada failed to adopt a Militia Bill for the province's own defence). In response to these developments, a new 'Canadian' identity began to emerge.

### ***Partisan Groups***

When Charles Thomson was dispatched to Canada as governor general, following Durham, and assigned the task of implementing unification of the two provinces, he claimed that he found in Lower Canada “no such thing as a political opinion. No man looks to a practical measure of improvement. Talk to any one upon education, or public works, or better laws, let him be English and French, you might as well talk Greek to him. Not a man cares for a single practical measure; the only end, one would suppose of good government. They have only one feeling, a hatred of race. The French hate the English and the English hate the French, and every question resolves itself into that and that alone” (Scrope 1844, 68). This is not an accurate reflection of partisan politics in Lower Canada, but it does reflect the post rebellion prejudices which were at the fore in British society.

Following the introduction of representative institutions in Lower Canada in 1791, a new Francophone middle class came to dominate the elected lower house. This middle class increasingly espoused “liberal, democratic, and ultimately republican ideas” (Riendeau 2000, 112). The newspaper *Le Canadien* became the organ for the Parti Canadien. This was not a singularly Francophone party, though it would come to be seen as a French Canadian movement by the British government and the British public, and it

has since emerged as such in the popular mythology of Quebec during the 20<sup>th</sup> Century.<sup>128</sup> The candidates for the lower chamber in the assembly put forth by the Château Clique were known as the British Party, Tories or Parti bureaucrate.

Since the social cleavage and partisan cleavage in Lower Canada were closely aligned prior to union, many Francophones in the Parti Canadien had policy objectives that they argued were essential to the preservation of their social identity. For example, Pierre-Stanislas Bédard, emerging as an early leader of the movement, believed that the best way to preserve the French catholic ‘race’ was through agriculture, the seigneurial system and the *Coutume de Paris*, “protected from the American danger by England and the British constitution” (Ouellet 2000b).

When Bédard was imprisoned temporarily for his association with *Le Canadien* newspaper by Governor Craig, James Stuart emerged as the principle leader between 1813 and 1817, leading a personal attack on Craig’s principle supporters in the legislative and executive councils, Jonathan Sewell and James Monk (Kolish 2000).<sup>129</sup> While this party in the lower chamber of the assembly had membership which crossed the social cleavage, the non-Francophone leadership in this party began to decline with the emergence of Louis-Joseph Papineau. Papineau would come to dominate the party as speaker of the assembly. For his part, Stuart would switch parties and become a leading spokesman for the British Party in the assembly after his colleagues voted to extend a salary to Sewell in order to get a salary for Papineau.<sup>130</sup>

By 1826, the Parti Canadien had been renamed the Parti patriote, as Papineau and others became more demanding in terms of reform, embracing elements of republican and American-style reform. Even in its more militant form, there were still some non-Francophones in the party (Wolfred Nelson, Robert Nelson and Edmund Bailey O’Callaghan) though it lost some moderate reformers (like John Neilson). The moderates

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<sup>128</sup> Among its leading members were John Neilson, Daniel Tracey, Edmund Bailey O’Callaghan and Andrew Stuart.

<sup>129</sup> The ‘address’, demanding their impeachment, was rejected by the privy council in London.

<sup>130</sup> Stuart would even support the 1822 proposal to unite the Canadas. The contradictory positions he was forced to take as a member of the British party and of the government provided ample fodder to his opponents in the assembly.

would be known as the Constitutional Party. But in the eyes of the governors and the British government, the Parti Canadien and the Parti patriote were simply the 'French party'.

In Upper Canada, the Family Compact would run candidates who came to be known as Tories and less flatteringly, but more universally, as the Family Compact Party. They would adopt the label Constitutionists, under the direction of Lieutenant-Governor Sir Francis Bond Head, in an effort to portray their opponents, the 'reformers', as disloyal to the British crown and the British constitution. The reform movement was a less cohesive partisan group than had emerged in Lower Canada. William Lyon Mackenzie and John Rolf, like their Patriote friends, advocated for an elected legislative council and a republican model of government. Moderates like Robert Baldwin and Egerton Ryerson were in favour of making the executive responsible to the assembly as it was in the British parliament at Westminster.

In both provinces the policy issues that created a partisan cleavage between the Tories and Reformers included disagreement over: (i) economic priorities, between the commercial interests that wanted the St. Lawrence developed and the agricultural interests that wanted expenditures on roads; (ii) supply, and whether or not the legislature should have full control over the revenues of the province; (iii) government appointments, and whether the leadership in the assembly should have a say; (iv) the civil list, which set the salaries of government officials and was a constant source of conflict between assembly and executive; (v) more generally which chamber should have ascendancy on money matters; (vi) crown land, how it should be used, sold and settled, and by whom; (vii) clergy reserves, how they should be used or sold, and for the benefit of what religions; (viii) education, and the role of churches; (ix) the executive's use of the upper chamber to thwart the will of the lower chamber; and, as a logical extension of disagreement over the foregoing, (x) broad constitutional questions surrounding institutional design and change.

Historians have concluded that these were not actual political parties, but rather movements and loose affiliations. However, they reflect policy disputes and thus the emerging partisan cleavage. It was how politics was done in North America at the time,

which involved pamphleteering under labels chosen to reflect the principle issue or partisan objective of the candidates who ran for public office. Governors routinely involved themselves in electioneering, with the goal of defeating reformers and, on the occasions that they were successful, obtained temporary harmony between the two chambers of the legislature, otherwise only the upper chamber could be counted on to support the executive council.

In the first election after union, there were six ‘parties’ elected to the legislature, including seven members affiliated with the family compact, 24 who supported the governor, 20 from the French party, five *ultra*-reformers and 20 moderate reformers (Scrope 1844, 217). The most cohesive group was the French Party. Yet Governor Thomson, who had now been raised to the peerage as Lord Sydenham, chose to ignore both them and the Family Compact candidates, and form a ministry from only the moderate English parties. To that end he included in his first ministry Robert Baldwin, a reformer, as solicitor general for Canada West, and William Henry Draper, a conservative, as attorney general for Canada West.

Baldwin, a believer in responsible government, entered negotiations with the French Party to form a United Reform Party out of the French Party from Canada East and the Reformers from Canada West. Believing his coalition had the support of a majority in the lower chamber, Baldwin informed Lord Sydenham that the four conservative members of the executive did not have his support. When the governor refused to remove them, Baldwin resigned. Sydenham then appointed Samuel Harrison, another reformer, as provincial secretary alongside the conservative Draper, and this ‘government’ found itself in the minority in the lower chamber of the legislature, forcing Sydenham to fall back on the upper chamber, patronage, the procedural tools of prorogation and dissolution, and tireless work as he alternated between being his own prime minister and being the governor.

Sydenham received a brief respite in the first year of his governorship when through gerrymander, patronage and the use of troops, he was able to get an over-all majority of supporters elected (Metcalf 2000). One of the candidates the governor helped to defeat was

Louis-Hippolyte La Fontaine, who was subsequently given by Baldwin the riding of York to run in, further reinforcing their party allegiance (Monet 2000). Together, La Fontaine and Baldwin would successfully command the support of the majority of the members of the legislature.

The reason historians argue that this was not a political party is that it lacked discipline and would see its supporters frequently shift allegiances, making them more akin to 'loose fish' (Paltiel 1970). That it was the result of a partisan cleavage is without question. It had formed in opposition to the governor and the chosen candidates of the provincial Tory elites. This political movement in favour of reform was able to cross the social cleavage of Canada East and West, and as a result was able to achieve institutional change in the form of responsible government. It would also be the first step in the creation of the Liberal-Conservative Party that would bring Sir John A. Macdonald to power and keep him in power in the first decades after Confederation.

Skelton argues that union did not result in party fusion but rather party alliances (1963, 334). Certainly there was no shortage of labels under which candidates ran in both halves of the province of Canada. In the West, there was the Ministerialist Party or Centre Party, which succeeded Baldwin's moderate Reformers; on the right there were diehard Tories, who opposed responsible government, which succeeded the Family Compact, as well as a Conservative Party led by John A. MacDonald; and on the left there were independents and Clear Grits, the latter led by George Brown. In Canada East, the Ministerialists included Morin, Drummond, Chauveau, Taché and Cartier; on the left were the Rouges, successors to Papineau's Parti patriote in terms of membership and Jeffersonian policy, and the English-speaking Liberals, including Luther Holton, John Young and A.T. Galt; while the right was less active in Canada East, being confined to the odd independent member.

It is true that allegiances shifted frequently by issue and election. But that was the way partisan politics was played in this era, with few institutional or system requirements for party cohesion and with no real carrots and sticks that enabled a party leadership to control its members. The multiple and varied labels were also a by-product of social

cleavages in Canada West and East, which necessitated different party names to be used in each region, where different issues were relevant.

The governors, who involved themselves in partisan politics, had familiarity with British politics, and while the United Kingdom was seeing two dominant parties battle each other, the definitions of these parties were also fluid, as was individual allegiance. The Tory Party emerged out of the Court Party and, in 1834, it had turned into the Conservative Party (Cooke 2010). It split in 1846 on the issue of free trade, with those opposed to free trade taking the term Protectionist or sometimes the older label Tory. For its part, the Whigs were originally also known as the Country Party (in contrast to the king's supporters who were called the Court Party), and it would break into the Grenvillite, Bedfordite, Rockingham and Chathamite factions (Elofson 1996). By 1859, Conservative leader Robert Peel's supporters (known as the Peelites) joined with Whigs and Radicals to form the Liberal Party. William Gladstone would go from High Tory to Peel Conservative to Liberal prime minister. Benjamin Disraeli (once a Radical candidate for parliament) would become a Conservative prime minister, as would Lord Stanley (a former Whig). It is simply not true that political parties did not exist because allegiances shifted.

It is noteworthy that the despatches of the governors throughout this period have frequent complaints about the obsession of the colonists with party politics. For example, the *Despatch* from Stanley to Bagot, on the latter's appointment as Lord Sydenham's successor, recommended that if he had to decide between the political parties in the legislature, he might consider selecting members of the Family Compact Party for his executive council (men like Sir Allan Napier MacNab), "rather than the ultra-liberal party" (May 17, 1842). His successor, Sir Charles (later Lord) Metcalfe chronicles the breakdown in control of the legislative assembly by his two predecessors as being the result of Lord Sydenham "trying to win the party calling themselves Reformers, to crush the party called the Family Compact, and to form a Council of the moderate men of the Reform and Conservative parties"; then the "Conservatives retired to make way for the French Party, and what was considered the extreme Democratic, or Reform party"; Sydenham's attempt to subdue the French party caused them to unite "themselves with the extreme Democratic

party; these were strangely joined by the extreme Conservative party” who, after overthrowing the council, were dropped (as their only common cause was to oppose the executive council); after which the French and Reform parties remain united (*Despatch* from Metcalfe to Stanley, August 5, 1843). Lord Elgin, in proposing that responsible government be formally conceded, expressed concern about how “personal and party interests have overweighing importance” in local politics, something he attributed to the high standard of living, low taxes and lack of genuine grievances (*Despatch* from Elgin to Earl Grey, April 30, 1849).

The conclusion has to be that this was a period where party politics was emerging as a result of multiple divisions on policy and constitutional principles. It would take a shift in the partisan cleavage to coalesce these groups around two competing vehicles. But clearly Canada in the 1800s was experiencing partisan politics.

Halfway through the 19<sup>th</sup> century, with issues like the clergy reserve and the seigneurial system settled, and responsible government in full swing, the issues around which party politics had found some cohesion gave way again to sectional division. The Clear Grits had emerged in the context of the growing population in Canada West, and thus advocated universal male suffrage, representation by population, reduction in government expenditure, and free trade with the United States. While no strong party of the right emerged in Canada East, members like Joseph Cauchon were vocal in opposing the ‘socialism’ of the Rouges and Clear Grits. The grant of responsible government meant that the partisan cleavage between the governor and the assembly had been eliminated, and the cleavage became one of election platforms and ideology.

In 1854, Canada East elected Reformers and Liberals while Canada West voted in the Conservatives. While a coalition government was formed at the time, it was beholden to moderate members who switched allegiance on every vote. Increased factionalism proved ungovernable, with ministries being unable to master the support of the legislature (for a compilation of the ministries during this period see Côté 1860, 12-5). But it also created an incentive to create more effective political vehicles, and for institutional reform.

By the election of 1858, the Bleu movement in Quebec (former Ministerialists who had become French Canadian Tories) had fully emerged in competition to the Rouges. The election of 1861 saw the Liberal Party finally become united, and 29 Liberals were elected from each half of the province of Canada in opposition to 35 Conservatives. Out of party factionalism had emerged a single partisan cleavage that crossed the two halves of the new country of Canada, separating the governing Conservative Party from its opponents. These opponents, the Liberals and Grits from Ontario and Rouges from Quebec would, through Confederation, add Reformers and Liberals of the Atlantic Provinces to create a Liberal Party of Canada.

## II. Institutional Change

Turning to the specific institutional changes that occurred in the province of Canada, beginning with union in 1840, followed by responsible government, which we argue should be dated from when it was first experienced in 1842 and not when it was irreversibly obtained in 1848, and then an elected legislative council in 1856. As will be seen in the next chapter, it is the debate over these ideas and developments in the province of Canada that informed politicians' positions in the Atlantic Provinces.<sup>131</sup>

During this period, as noted above, there was a shift in the social cleavages, first with the French-English East-West cleavage becoming dominant for the united province of Canada and then with the emergence of a new 'Canadian' identity. The partisan cleavage also shifted, first as a movement in opposition to the rule by British governors and the local elite 'compacts', and then in the form of party politics which saw candidates running for and against the government of the day. While these shifts in cleavages were significant in shaping the particular demands for institutional change, change occurred in each case after a partisan group emerged whose leadership included representatives of both sides of the social cleavage.

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<sup>131</sup> The one exception is the emergence of a political party, which occurred first in Prince Edward Island due to circumstances surrounding land ownership unique to that province.

## Unification of the Province of Canada

Lord Durham came to Canada with the belief that perhaps all the British provinces in North America should be united in a federation.<sup>132</sup> He found the Atlantic Provinces were not in favour of some form of federation, so he settled for recommending that the two Canadas be united as a single province and given responsible government.<sup>133</sup> This he felt could be done without altering the royal prerogatives that governed the British constitution, writing as follows:

“I would not impair a single prerogative of the Crown; on the contrary I believe that the interests of these colonies require the protection of prerogatives which have not hitherto been exercised. But the Crown must on the other hand submit to the necessary consequences of representative institutions; and if it has to carry on the government in unison with a representative body, it must consent to carry it on by means of those in whom that representative body has confidence” (Durham 1912a, 279).

Durham’s solution to the dilemma imposed by the Austinian-Dicean construction of British parliamentary supremacy was to suggest that some matters were merely local. Letting the governor accept the advice of Canadians on local matters would in no way interfere with the British government continuing to instruct the governor on matters in which Britain had an interest. Imperial matters he defined as the “constitution or the form of government; the regulation of foreign relations, and of trade with the mother country, the other British colonies, and foreign nations; and the disposal of public lands” (*ibid.*, 280).

He recommended that imperial legislation be immediately introduced for the reunion of Canada (*ibid.*, 324), and argued that the establishment of municipal governments should be included as “an essential part of any durable and complete” wider union (*ibid.*,

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<sup>132</sup> This is suggested by Charles Buller (Durham 1912a, 336), and the idea may have been given to him by the Colonial Secretary, Lord Glenelg (*ibid.*, 309).

<sup>133</sup> He intended that responsible government should be granted only when a majority of the new province was English speaking, given his prejudice against the French who had led the rebellion, his paternalistic belief that the English language would permit French Canadians to better succeed in English North America and his statement that: “Our first duty is to secure the well-being of our colonial countrymen; and if in the hidden decrees of that wisdom by which this world is ruled, it is written that these countries are not forever to remain portions of the Empire, we owe it to our honour to take care that when they separate from us, they shall not be the only countries on the American continent in which the Anglo-Saxon race shall be found unfit to govern itself.” (Durham 1912b, 310)

322). Additionally, the legislation “should contain provisions by which any or all of the other North American colonies may, on the application of the legislature, be, with the consent of the two Canadas or their united legislature, admitted into the union on such terms as may be agreed on between them” (*ibid.*, 323)

The British parliament introduced a Bill for the unification of the two provinces of Upper Canada and Lower Canada in June of 1839, though without responsible government or provisions for municipal governments. Immediate opposition came from the lower chamber in Upper Canada, which caused the British government to postpone consideration of the Bill until Thomson could be sent to North America and installed in office as governor general. The legislature in Lower Canada had been temporarily suspended following the rebellion, illustrative of how the British saw the insurrection in racial terms, or opposition would, undoubtedly, have come from its lower chamber as well.

Thomson was issued three despatches which laid out the British government’s position. First, he was to convince the local population of the merits of “a legislative union of the two provinces; a just regard to the claims of either province in adjusting the terms of the union; the maintenance of the three estates of the provincial legislature; the settlement of a permanent civil list for securing the independence of judges, and to the executive government that freedom of action which is necessary for the public good; and the establishment of a system of local government by representative bodies freely elected in the various cities and rural districts” (*Despatch* from Russell to Thomson, September 7, 1839). Second, still guided by the Austinian-Dicean concept of British parliamentary supremacy, he was instructed to only go so far as summoning councillors and employing in public service “those persons who, by their position and character, have obtained the general confidence and esteem of the inhabitants” (*ibid.*, October 14, 1839). The governor was not to be accountable to the legislature since the power for which a minister in England is responsible is the crown’s, so the governor must only serve the crown of England. Membership in the executive council was at pleasure, councillors would “be called to retire from public service as often as any sufficient motives of public policy may suggest the expediency of that measure”, and the installation of a new governor would be sufficient to

alter the membership in the council so that the governor would have councillors with whom he could work, subject to the future confirmation of the monarch (*ibid.*, October 16, 1839).

Thomson set out to sell the package. In Lower Canada, he opted to use the special council which had been established by James Colbourne for the temporary governance of the province, as he felt creating a new council would leave him vulnerable to allegations that it had been selected to get the outcome he wanted (*Despatch* from Thomson to Russell, November 18, 1839). This council accepted his six resolutions, including agreement for a civil list and for the blending of the public debt of the two provinces. In Upper Canada, which still had its legislature intact, Thomson met with the legislature in December of 1839, and he laid out the case for the resolutions, including the fact that Lower Canada would be effectively absorbing the debt of Upper Canada and, given its capacity to raise more revenue and to control navigation and shipping, Lower Canada would be essential for future development of Upper Canada's resources. As noted in the previous section, Thomson ignored the office holders and Family Compact, as well as the French Party, and forged alliances with the Reformers and moderate Conservatives (*Despatch* from Thomson to Russell, December 24, 1839).

Thomson avoided the issue of responsible government, telling the legislature that he had been commanded to administer the government in accordance with the wishes and interests of the people and to give due deference to the opinions of their representatives. This ambiguous response allowed for some legislators to assume that the old colonial system was dead, and Robert Baldwin shared his belief that responsible government had finally been granted with his constituents in Toronto. Privately, Thomson was telling his friends that he intended to put an end to the idea of responsible government, saying "I cannot get rid of my responsibility to the home government, I will place no responsibility on the council; they are a council for the governor to consult, but no more" (Kennedy 1922, 188).

In Britain, Sir John Pakington, who would become a colonial secretary and secretary of state for war when the Tories came to power, asked Whig Colonial Secretary Lord Russell, whether the Bill for Union was "attempting to unite people dissimilar in law,

dissimilar in language, and dissimilar in manners, an attempt which so high an authority as Mr. Burke had pronounced to be highly absurd” (U.K. *Debates*, HC, May 28, 1840). In response, William Gladstone, who also would become a colonial secretary under the Peel Conservatives before going on to become a Liberal prime minister, argued that the legislation was “backed on the other side of the water by the concurrence, not only of the Special Council of Lower Canada... but also of the Legislative Council of Upper Canada and of the House of Assembly of that province” (*ibid.*). In the House of Lords, the Tories repeatedly raised concerns that this Bill would lead to responsible government and independence, something the Whig government denied by asserting that “it was perfectly well known there that the opinion of this country and this Government was entirely opposed to ‘independent responsible Government’” (Viscount Melbourne, U.K. *Debates*, HL, July 13, 1840). The legislation passed both chambers on party division.

The general structure of government the new constitution established for the Province of Canada was largely unchanged from the model that existed in each of the two provinces prior to union. Executive government rested in the hands of the governor and the persons he appointed to the executive council. The legislature was bicameral, with an upper chamber styled as a legislative council where persons were appointed for life on good behaviour. There were originally 24 members appointed, 12 each from Canada East and Canada West (as was seen in Table 6.1, Canada West had less than 500,000 inhabitants and Canada East had almost 700,000 following union). The lower chamber of the legislative assembly was elected, and here too the number of representatives elected in Canada East and Canada West was to be equal at 42 seats each. The speaker of the legislative council was appointed by the governor, and the speaker of the assembly was to be elected by the members.

*The Union Act, 1840* also ordered that all laws in force in either province continue until altered by the new legislature, and the Church of England and the Roman Catholic Church continue their privileged status with mandated toleration for other religions. The new province would absorb the debts of the two previous provinces, and establish a consolidated revenue fund to pay for the courts, government and pensions for which the

governor would submit a budget in which the two chambers would have to concur. The English form of all laws would take precedence if there were differences in wording, though French could be used by the legislature. The assembly later adopted rules requiring the translation of papers and the reading of motions in both languages.

## **Responsible Government**

Following Baldwin's resignation after having been rebuffed by the governor general over the dismissal of the Conservatives in his first executive council, Sydenham was able to keep the legislature occupied with day-to-day matters of governance and to use the legislative council to keep the lower house under control. Nevertheless, the issue of responsible government was a priority for many in the legislature, and particularly Baldwin, informed as these politicians were by democratic principles that were emerging in other countries, including the principles underlying the Westminster-model of parliamentary government and the changes that had occurred in cabinet government in response to the *Reform Act* in the United Kingdom.

Baldwin moved for the production of the despatches that had been sent to Sydenham concerning responsible government, and they were tabled in the assembly. He then moved six resolutions intended to reconcile the British position, as identified in the despatches, with his idea of responsible government. The resolutions acknowledged that members of the executive council must be responsible to imperial authorities for actions that "constitutionally belong to those authorities" (*Canada Debates LA*, September 3, 1841, res.6), but asserted that "the house has the constitutional right of holding such advisors politically responsible for every act of the provincial government of a local character" (res.5) and thus the men appointed to the executive council "ought always to be men possessed of the public confidence" (res.4). At Sydenham's direction, Samuel Harrison introduced counter-resolutions that were cleverly designed to sound similar in spirit, and these were substituted by the assembly, with Baldwin agreeing, and received the support of all sides. While the spirit of conciliation had been struck, the letter of institutional change had not been met, as the resolutions adopted maintained that "the head of the executive

government of the province, being within the limits of his government the representative of the sovereign, is responsible to the imperial authority alone” (res.2) and only promised that “the chief advisors of the representative of the sovereign, constituting a provincial administration under him, ought to be men possessed of the confidence of the representatives of the people” (res.3). This was billed at the time as the “Magna Carta of responsible government” (Metcalf 2000). It was a concession, in that it was a formal acknowledgement of an obligation on the part of the governor to appoint advisors who had the confidence of the lower chamber, but it was not responsible government as posited by Baldwin. The governor conceded no responsibility to the legislature.

Sydenham’s successor as governor general was Sir Charles Bagot, whose instructions were to preserve the union, avoid party politics and govern according to the wishes and interests of the people. With the ultra-Conservatives willing to support the French party against the moderates in spite of ideological and social differences, and with a complete inability to co-opt French members into his council (those who joined were quickly labelled *les vendus*), Bagot quickly realized that the Sydenham concession that the governor should choose councillors who enjoyed the confidence of the lower chamber was an impossible compromise with a legislature where the Reform and French Party members had on many matters formed a united front.

His frequent despatches to London reflect his desperation. The responses from London were unhelpful, suggesting he should consider appointing the type of men who are in the Family Compact party (*Despatch* from Stanley to Bagot, May 17, 1842). The colonial secretary was getting equally unhelpful advice from his prime minister, who told him to emulate the skill of George III and Louis-Philippe in “combatting a majority in the popular assembly” (Peel to Stanley, August 28, 1842). Bagot was instructed to only consider appointing Francophone councillors when “it is manifest to this country, and manifest to the conservatives and supporters of British influence in Canada generally, that you cannot carry on the government without the French Party, and that you cannot carry on through and by them. Do not mistake me. When I say the French party I mean that party

conducted by its present leaders and headed by men more or less implicated in the late rebellion” (*Despatch* from Stanley to Bagot, September 1, 1842).

Bagot finally turned to La Fontaine and began negotiations. The outcome was the appointment of Baldwin and La Fontaine as attorneys-general for Canada West and East, respectively, the removal of members that Baldwin and La Fontaine did not support from the executive council and their replacement with members acceptable in their stead. A motion expressing the confidence of the lower chamber in the new executive passed with only five opposed. Bagot reported to London:

“I have met the wishes of a large majority of the population of Upper Canada and of the British inhabitants of Lower Canada. I have removed the main ground of discontent and distrust among the French-Canadian population. I have satisfied them that the union is capable of being administered for their happiness and advantage and have consequently disarmed their opposition to it. I have excited among them the strongest feeling of gratitude to the provincial government, and if my policy be approved by H.M.’s government, I shall have removed their chief cause of hostility to British institutions, and have added another security for their devotion to the British crown” (*Despatch* from Bagot to Stanley, September 26, 1842).

The colonial secretary begrudgingly accepted Bagot’s claim that this had been necessary, though he indicated that what would be decisive was whether the British monarch, parliament and public accepted this change, and not the approbation it had received in the colony (*Despatch* from Stanley to Bagot, November 2, 1842). Approval was forthcoming, though Bagot was instructed to remind the legislature of “the propriety and necessity of adopting the Act of Union as a whole, and of declaring their intention to stand by its provisions, including the civil list and every other debateable question—to take it in short as a [fait] accompli, which in the main has secured to them good government and the power of self-government” (*Despatch* from Stanley to Bagot, November 3, 1842). Baldwin likened the change to the glorious revolution (*Canada Debates LA*, September 16, 1842). And Bagot acknowledged that he had essentially conceded responsible government (*Despatch* from Stanley to Bagot, February 3, 1843).

Bagot's successor, Sir Charles Metcalfe, took it upon himself to try to stop any further advance towards responsible government and to preserve the remaining prerogatives of the governor, as he and the British government were still clinging to the belief that a governor's imperial authority was intractable. He knew this would be a challenge, and acknowledged that he expected "a difference with them in their claim that the government shall be administered in subservience to their party views. They expect that the patronage shall be bestowed exclusively on members of their party" (*Despatch* from Metcalfe to Stanley, April 24, 1848).

Metcalfe had his personal secretary, Captain James Higginson, use the intended appointment of an aide-de-camp, a junior officer of no particular importance to government, to canvas La Fontaine on whether he felt this appointment required the input of the council. La Fontaine made detailed records of the conversation, including his interpretation of the Harrison resolutions adopted by the assembly and agreed to by the crown under Lord Sydenham (Hincks 1884, 93). It was La Fontaine's position that members of the executive council had the right to recommend all appointments and, while the governor could refuse their recommendations, the council was collectively responsible to the legislature for all decisions of the government, including these appointments, so, should he refuse to take their advice, they would free themselves of responsibility for his decision by resigning.

Through his despatches to London, it becomes evident that Metcalfe was the last in a long line of the governors who believed he was the head of government, more than he was a representative of the head of state, and thus could involve himself in local elections in defence of his 'party'. Patronage was the tool to ensure party cohesion and, in this era of party formation, he was not simply fighting for the prerogatives of the crown but for the right of the governor to use such appointments to the advantage of what he saw as the governor's side of a growing partisan cleavage. Giving the opposing political party the tools of patronage made no sense to him. It would only make sense in "the hands of a party thoroughly attached to British interests and connexions, there would be a ground of mutual cordiality and confidence which would render real co-operation more probable, concessions

more easy, and even submission more tolerable” (*Despatch* from Metcalfe to Stanley, October 9, 1843).

Metcalfe first came to verbal blows with La Fontaine over the *Secret Societies Act*, which was introduced by the government with Metcalfe’s consent to force the closing of the orders of the Orange Lodge. Metcalfe reserved the legislation for approval of the British government, which then disallowed the legislation as being too broad. La Fontaine felt this legislation was strictly a local matter and should not have been reserved, particularly since the governor had agreed with the council for the introduction of this legislation.

The religious cleavage in Canada West was being fueled along its earlier fault line as well. Baldwin’s legislation to secularize King’s College and establish the University of Toronto, brought former Family Compact leader, Anglican Bishop Strachan, to the fore. Strachan claimed that the “atheistical character of the popular dogma of responsible government” was destroying the province (Church newsletter, reprinted in Kennedy, 1922 #365@242}. In a petition against the proposed change, he likened the situation to the excesses of the French revolution, “patronizing equally within the same institution an unlimited number of sects whose doctrines are absolutely irreconcilable” (Canada Journals, LA, November 6, 1843).

Without any consultation with the executive council, Metcalfe appointed René-Édouard Caron to be speaker of the legislative council.<sup>134</sup> The governor, acting alone in making this appointment, emerged as a criticism of Metcalfe’s tenure in office when what would become known as the ‘Canada crisis’ or ‘Metcalfe crisis’ made it to the floor of the house of commons in England (John Roebuck, U.K. *Debates*, HC, May 30, 1844). But in the province, at that moment, it was the appointment of Francis Powell, a Tory, to the post of clerk of the peace by the governor that forced the resignation of the executive council on

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<sup>134</sup> He did consult with Peter McGill, who was the ranking Family Compact member on the legislative council, and with the speaker of the lower house, John Neilson.

November 26, 1843.<sup>135</sup> Historians have argued about the motives of both the governor and La Fontaine in manufacturing a drama over what was a junior position. This ignored the fact that the clerk of the peace was the provincial appointee who could most directly influence local law enforcement; without local law enforcement, election gangs like those organized by the Orange Order, had free reign (see Kealey 1984).

Only one member of the executive council, Dominick Daly, remained loyal to Metcalfe, as he believed he had a duty to the governor above partisan politics and had few ideological beliefs (Gibbs 2000). Metcalfe called on the conservative leader in Canada West, Draper, to form a provisional government, and he surprisingly was able to recruit Denis-Benjamin Viger as the representative from Canada East. Viger had emerged with John Neilson, after the 1841 election, as an opposition leader to Governor Lord Sydenham in the legislature, he had repeatedly denounced the union because it did not have sufficient representation from Canada East (which had the greater population at the time), he had supported Baldwin's resolutions on responsible government and he even mused about republicanism (Ouellet et LeFort 2000). These three, Daly, Draper and Viger, would constitute the entirety of the executive council or government going into the election, which Metcalfe then called.

As surprising as Viger's appointment, by Metcalfe, was the approval given by Lord Stanley to the appointment, given that Stanley had refused to allow the previous governor, Bagot, to appoint Viger to the legislative council on the ground that he was a traitor.<sup>136</sup> The explanation lies in the desire by the colonial secretary to limit the Harrison resolutions, telling the British house of commons: "Sir Charles Metcalfe went out to Canada to carry out fairly the new colonial system, but equally determined to resist those extravagant demands which were inconsistent with the authority of the Crown and of the true rights of a colonial legislature" (U.K. *Debates*, HC, February 2, 1844). The Tory Prime Minister,

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<sup>135</sup> Bonenfant (2000) suggests that La Fontaine and Baldwin did not choose to object to this appointment because of the "personal qualities of the man".

<sup>136</sup> Citing his involvement in the rebellions, his imprisonment and his refusal to post bail in order to guarantee he would not rebel in the future, he wrote "I cannot consent to confer a mark of distinction on one who was foremost in the ranks of disaffection" (*Despatch* from Stanley to Bagot, April 1, 1842).

Robert Peel, while distancing himself from Metcalfe<sup>137</sup>, repeated what was British colonial policy under the Conservatives, that “the position of an Executive Council towards a Governor was perfectly distinct from the relation of a Minister towards his Sovereign. The very fact of a Governor standing in a double relation as it were, responsible to his Sovereign, at the same time that it was his duty to defer to the Colonial Legislature, at once established that distinction” (U.K. *Debates*, HC, May 30, 1844). Metcalfe was simply following Austinian-Dicean theory of parliamentary supremacy and implementing British colonial policy, as well as trying to put the genie of responsible government back into the bottle.

In Canada, the resulting election was a very bitter war of pamphlets, newspapers and vindictive diatribe on the ‘hustings’, with the governor’s party winning a slight majority of three seats, which in turn elected former Family Compact party member MacNab to the speakership. But this legislative support would be short-lived. Metcalfe spent his remaining time, before he had to depart due to cancer, at odds with the assembly.

Lord Cathcart, a lieutenant general in the British army, had become commander of the British forces in North America in 1843, and as tension with the United States had been mounting over the disputed boundary of Oregon, the British government decided to appoint him the next governor general, thus uniting civilian and military command (Cooke et Hillmer 2000). Cathcart was issued instructions that commended him to follow Metcalfe’s example, maintain the union, stay free of party connections and govern according to the well-understood wishes and interests of the people (*Despatch* from Gladstone to Cathcart, February 3, 1846). The one change was that he was told to assent to laws “which properly belonged to the internal government of the province and which did not involve what was dishonourable and unjust” (*ibid.*).

His appointment was controversial. One member of the assembly suggested his appointment was a move back in history to the time of military governors (Canada *Debates*,

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<sup>137</sup> Peel stressed that no member of the government knew Metcalfe personally, and his appointment was simply due to his good work in India and his capacity to implement the imperial government’s policy in the colony.

LA, March 30, 1846). Cathcart himself offended Baldwin and others in the Reform Party in his speech from the throne by praising Metcalfe (*ibid.*). Perhaps it was this unpleasant reception that discouraged him from following his predecessor's active participation in provincial politics, concentrating instead on what he knew, military defence. His one legislative initiative was the passage of the *Militia Act 1846*.<sup>138</sup> With the signing of the *Oregon Boundary Treaty* on 15 June 15, 1846, two British military regiments were recalled from Canada and the British government began to look for a new governor general.

On June 29, 1846, the Peel government fell over the *Irish Coercion Bill*, though it was the repeal of the *Corn Laws* that had bitterly divided the Whig party.<sup>139</sup> The *Importation Act 1846* ended a series of protectionist measures designed to protect British farming interests, beginning with the *Importation Act 1815*, and marked the end of mercantilism and the birth of free trade as the cornerstone of British economic policy.<sup>140</sup> It was also significant in assisting the Industrial Revolution, as it forced inefficient British farm workers out of agriculture and into the cities where they became cheap labour for industry. Not surprising, this change in British economic policy drew the attention of Marx (1967, v.3). More importantly for our purposes, it left Canadian farmers without favoured trading status.

Whig leader Lord Russell thus replaced Peel as prime minister on June 30, 1846, and Lord Grey became his colonial secretary. Henry Grey, the third Earl Grey, had been under-secretary of state for the colonies when his father, the 2<sup>nd</sup> Earl Grey, had been prime

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<sup>138</sup> This provided for the establishment of a 3000-person militia through compulsory service.

<sup>139</sup> The Coercion Bill was one of many legislative initiatives considered by the British parliament to bring martial law to Ireland, ban secret meetings and membership in military organizations and suspend civil rights in an effort to restore law to Ireland where the protestant-catholic divisions, fueled in this period by the potato famine, had resulted in armed conflict among residents.

<sup>140</sup> The *Importation Act 1815*, introduced following the Napoleonic Wars, had banned the import of any grain (the British produced wheat and oats) unless the price of British grain was at least £4 a quarter. In the 1820s, Britain gave preference to imports from its colonies. In 1828, William Huskisson, president of the Board of Trade, proposed a sliding scale so that the higher the price of British grain, the lower the duty on imports, which was intended to balance protection with inflation of bread prices (one of the artifacts of the Corn Laws was that bread became too expensive for the poor).

minister during the early 1830s.<sup>141</sup> He was an early advocate of Wakefield's political economy model which coupled self-government and locally sustainable economic development with expanded colonial settlement, and he was an advocate of free trade and the end of mercantilism (Grey 1953). He was aware that the British public was tired of military expenditure and loss of life in support of empire, so partisan self-interest came to trump the Austinian-Dicean theory of British parliamentary supremacy.

Grey decided to appoint Lord Elgin, a liberal Conservative in the house of lords, to replace Cathcart as Governor General in North America.<sup>142</sup> Grey was concerned that Cathcart, a military officer, would be ill-equipped to bring harmony between the legislature and the executive council in a colony where there was such a strong social cleavage. In terms of domestic politics, Grey hoped that Elgin's standing in the Conservative Party would keep what were now inevitable institutional changes in the colonies out of British party politics.

Shortly after Lord Elgin arrived in Canada, in January of 1847, Draper attempted to convince La Fontaine to join the conservatives in the ministry, by advancing the idea of an executive council that was supported, not by a majority in the legislature, but by a majority in each half of the legislature (Canada East and Canada West).<sup>143</sup> La Fontaine was unswayed by the idea of double majorities, and Draper resigned and obtained an appointment to the courts. Henry Sherwood, who had emerged by default as the leader of the Conservatives in the West, became attorney general with Daly remaining as the representative from the East (Beer 2000). The government's only attempt at controversial legislation was a Bill to reverse the creation of a non-sectarian University of Toronto in

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<sup>141</sup> It is after his father, the prime minister, that the tea is named, though the reason for the naming is a matter of some dispute.

<sup>142</sup> Queen Victoria had suggested Lord Elgin to Lord Stanley, before the Conservative government fell. As head of the Bruce clan, and thus distantly related to my maternal grandmother after whom I take my first name.

<sup>143</sup> Baldwin suggested to La Fontaine that any attempt to run a government by a double majority would "perpetuate distinctions, initiate animosities, sever the bonds of political sympathy, and sap the foundations of political morality" (a letter found in the Baldwin papers of the Toronto Archives, reprinted in Kennedy 1922).

favour of four sectarian colleges, but this was defeated by the United Reform Party and two defecting Conservatives.

Lord Elgin dissolved the assembly on December 6<sup>th</sup> of that year. He allowed the Tory ministers to meet the House of Assembly following the election, and on March 3 the House expressed its lack of confidence. On March 7, true to his word, Governor Elgin called upon Baldwin and La Fontaine to form a government and on March 11, he appointed their recommended 11 ministers to the executive council.

Creighton (1965) argues that responsible government is a method of government and not an institutional change. It is a system of political relationships and, as such, he argued that it should be judged not on being established but on what substantive policy it creates. For these reasons he, and other historians, have concluded that it was the re-appointment of Baldwin and La Fontaine and the passage of the *Rebellion Losses Act* which marked the birth of responsible government in the province of Canada.

The *Rebellion Losses Act* was a significant piece of legislation. The issue of compensation for rebellion losses and even amnesty had been raised repeatedly since union. Bagot had even offered it unsuccessfully as a way of trying to sustain the Sydenham executive council he inherited, before appointing Baldwin and La Fontaine the first time. Now La Fontaine moved to form a ‘committee of the whole house’ on February 9 to “take into consideration the necessity of establishing the amount of Losses incurred by certain inhabitants in Lower Canada during the political troubles of 1837 and 1838, and of providing for the payment thereof” (Canada *Debates*, LA, January 28, 1849).

It is particularly noteworthy that the attitudes towards compensation had, from the start, been dramatically different in Canada West<sup>144</sup> and Canada East<sup>145</sup>, and this can only

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<sup>144</sup> In Canada West, or Upper Canada, in 1840, a Bill had been passed to compensate parties without inquiring into the loyalty of persons and £40,000 was included in the Bill to cover the claims, but no monies were dispensed since the two chambers of the legislature could not subsequently agree on supply. On March 29, 1845, *An Act to provide for the payment of Claims arising out of the Rebellion and Invasion in Upper Canada, and to appropriate the duties on Tavern Licences to local purposes* was adopted by the legislature and a sum of £38,658 was raised between 1845 and 1849. In 1846, the revenues from wedding licences were also allocated for the same purpose.

<sup>145</sup> In Lower Canada, or Canada East, the Special Council of Lower Canada had agreed to compensate parties who were *loyal to the crown* for the damage to their property. The Draper-Viger government set up a

be explained by the emotion that ‘race’ imbued to the uprisings in Lower Canada. In the provincial legislature, the debate ran from February 13 to 20 and was vitriolic, with even threats of physical violence.<sup>146</sup> Tory Sherwood and Family Compact member MacNab argued that compensating ‘rebels’ was an insult to those who had remained ‘loyal’. Reformers and government ministers Hincks and Blake argued that the Tories were the rebels since they had broken faith with the British constitution, and they referred to the rebellion as a ‘civil war’.

On February 22, Henry John Boulton moved an amendment that persons who had pled guilty or been found guilty of treason should not receive compensation. This was supported by the government, but opposed by Papineau and Pierre-Joseph-Olivier Chauveau who argued that this would amount to recognition that Governor Colborne was justified in executing prisoners in 1839. On February 23, La Fontaine presented a *Bill to provide for the Indemnification of Parties in Lower Canada whose Property was destroyed during the Rebellion in the years 1837 and 1838*, which authorized payments up to £90,000. On March 9<sup>th</sup> the Bill passed the lower house 47 to 18 (MLAs from Canada West voted 17 to 14 and in Canada East 30 to 4), and on March 15<sup>th</sup> the legislative council also approved the bill, 20 to 14. On April 25, 1849, Governor General Elgin assented to the Bill.

In England, the matter was raised in the British parliament. Specifically the government was asked whether (i) “any instructions have been given to the governor general of Canada as to the course which he is to pursue, in the event of its being proposed to him by his advisers to allow them to introduce into the house of assembly any bill giving compensation to any persons known to have been implicated in the rebellions of 1837 or 1838 on account of the damage sustained by them in those rebellions, or in the event of the passing of any such bill through the two houses of the provincial legislature”, (ii)

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commission to address the claims from Lower Canada, which submitted their first report on April 1846. They too had been instructed to distinguish between claims made by persons participating in the rebellion and those who had remained loyal. The commissioners concluded that damages to the property of those who had been loyal would not exceed £100,000, even though the government had estimated damages as over £200,000.

<sup>146</sup> John A. Macdonald almost ended up in a duel with William Blake.

“according to the usage of Canada, if any such bill should have passed through both houses of the legislature, and should have become an act by the governor general's assent without a suspending clause, the money thereby authorized to be paid would be payable forthwith, or before her majesty's servants had had an opportunity of advising her majesty with respect to the allowance or disallowance of such act” and (iii) “any official information had been received by her majesty's government from Canada with regard to these proceedings; and if so, whether they had any objection to place it upon the table of this house” (Gladstone, U.K. *Debates*, HC, March 22, 1849). The former secretary of state for the colonies and future prime minister was told unequivocally that Lord Elgin had not received instructions and had the full confidence of the government, and that the government's position was that “all colonial laws, having passed through their formal stages and received the assent of the crown through her majesty's representative in the colony, come into immediate operation unless they contain a suspending clause” and immediate operation meant as soon as the governor general had assented (Hawes, *ibid.*). No further debate ensued.

In the house of lords, there was a motion that “by an act passed in the parliament of Canada entitled An Act to Provide for the Indemnification of Parties in Lower Canada, no security is afforded against compensation for losses sustained in the rebellion in Canada in 1837 and 1838 being given to persons engaged in the said rebellion; that it is just and necessary, either by recommending a further amending bill to the legislature of Canada or by such other means as may be effectual, to provide security against any compensation for losses sustained in the said rebellion being given to persons engaged in or having aided or abetted the same” (Lord Brougham, U.K. *Debates*, HL, June 19, 1849). Brougham raised the lack of clarity in the idea of ‘responsible government’ as advocated by Lord Durham, stating that:

“I would, for my part, interfere as little as possible with the powers and workings of the colonial assemblies in respect to the making of roads, bridges, and canals, and as to all matters of a like nature; but in matters that touch in the slightest degree the honour of the crown, or the interests of the imperial government, I deny that you can have responsible colonial government. According to that theory, it is said that whatever the majority of a colony may choose to do, their acts are always to bind the minority,

without the power of appeal to the crown. I, for one, say that, if that is to be the rule, gross injustice will be done, frightful cruelty will be exercised” (*ibid.*).

This argument that the crown needs to protect minority interests is a recurring theme in the British debates, but ironically it is only advanced in defence of limiting the French party majority’s control of the government when it has the support of a majority in the lower chamber of the legislature. Brougham’s real objection was that “British loyalists are taxed to pay French rebels for losses which they, the rebels, sustained in a rebellion that was crushed by those loyalists” (*ibid.*). Lord Grey responded:

“I am as utterly unable as I was at the beginning to comprehend what is the great public object, and what is the great public interest, which the noble and learned Lord thinks will be answered by this house assenting to the resolutions he has moved. I have heard no explanations from the noble and learned Lord of how he considers the government of the province could advantageously be carried on after the wishes of the great majority of its representatives had been set at naught by a resolution of this house” (Grey, *ibid.*).

The resolutions were defeated 99 to 96. The argument of majority partisan rule in a democracy trumped the fear of social group domination, even in that deliberative body designed to protect social class and church, the U.K. house of lords.

The final footnote to this event is that ‘loyal’ Canadians took to the street and rioted in the wake of the decision to assent to the Bill, and their rebellion resulted in the burning of the parliament buildings in Montreal. They then marched on Lord Elgin’s residence, but as this was an era before motorized transportation, the emotion and liquor wore off before they reached their destination and their damage was confined to Montreal. One person’s righteous indignation is another person’s rebellion (*Despatch* from Elgin to Grey, April 30, 1849)

### **Elected Legislative Council**

When Baldwin and La Fontaine announced that their ‘great administration’ had done its work in 1851, Francis Hincks and Augustin-Norbert Morin reconstructed the Reform ministry with two ‘clear grits’, Malcolm Cameron and John Rolph. It asked the

legislative assembly to form a committee to draft an address to the queen proposing that the legislative council be elected, which had been part of their election platform. The committee was chaired by Morin, who had obtained the support of the ministry for an elected legislative council of nine-year term councillors, with one-third elected every three years. There was no pecuniary requirement to stand as councillor, but councillors would have to have held lower office, either at the municipal level (reeve and warden) or in the lower house of the legislative assembly (Hincks, *Canada Debates LA*, March 16, 1855).

Morin's model was modified by the committee, and the address to the queen recommended that the British parliament establish a legislative council where Canada East and Canada West would be divided into 30 electoral sections, for a total of 60 members, one-third of which would be elected every two years (Morin, *Canada Debates LA*, June 2, 1853). Twenty members would be elected at first, and then the current life councillors would be compelled to retire in two equal batches in two and four years' time, to facilitate the election of 20 new councillors at each of these milestones. To be elected, one had to be a minimum of 30 years of age, a British subject, in possession of £1,000 of property and been a member of the legislative assemblies or legislative councils of Upper Canada, Lower Canada or the united Province of Canada (one would have to resign from a chamber to run for another). The crown would retain the right to dissolve both chambers, in the event of "the rejection by the said Legislative Council in two successive sessions, and at least at six months interval, of a measure which shall have passed the Legislative Assembly in the same two sessions, nor unless the said measure shall have passed the Legislative Assembly in the second Session by the vote of an absolute majority of the members of the said Legislative Assembly" (*ibid.*). The powers of the two chambers would be unchanged, though the legislative council would be given an additional role of adjudicating impeachments of high public officials upon referral from the lower house. The legislative assembly adopted this address to the queen, which passed 54 to 14. In response, the legislative council adopted its own address opposing any such change. Lord Elgin forwarded both addresses to the British government, and expressed his own concerns.

The issue of an elected upper chamber became the subject of the 1854 provincial election in Canada. Cartier had been invited to join the previous ministry as chief commissioner of public works, but he had refused on the ground that the government did not intend to establish a pecuniary requirement as part of its reform plans for the legislative council. In the end, the government was forced to compromise on this point to get the legislature to support its address to the queen, and a £1,000 property requirement was included. But in the election Cartier came under criticism on the ‘hustings’ for being an aristocrat, with the press reporting that he had pushed for a £2,000 property requirement. George Brown campaigned against the scheme which ran contrary to representation by population, continuing to leave Upper Canada under-represented given its now larger population than Lower Canada.

The 1854 election was the first to evidence the effects of the new emerging cleavage. The Conservatives effectively took over the Reform administration, with Allan MacNab replacing Hincks as the leader in Canada West. John A. Macdonald, George-Étienne Cartier and Robert Spence emerged as new Conservative stars in what was clearly a coalition Conservative and Reform government, with the Conservatives in control of what it claimed was a continuation of the Reform governments of Baldwin-La Fontaine and Hincks-Morin.

The British cabinet asked the British parliament to adopt legislation to give the legislative assembly in Canada the authority to amend its constitution with respect to the legislative council.<sup>147</sup> Not surprising, the strongest objection came from members of the house of lords where reference was made to the demands by Papineau in advance of rebellion for an elected upper chamber and where it was suggested that the proposed change:

“fundamentally destroys the constitution of one of our most important Colonies, and does away with one of the most important safeguards for the monarchical element in that constitution—a safeguard which has been upheld by successive Governments since the year 1791, and was solemnly

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<sup>147</sup> *An Act to empower the Legislature of Canada to alter the Constitution of the Legislative Council for that Province, and for other purposes.*

confirmed, after full reflection and deliberation, by both Houses of Parliament, in settling the constitution of Canada in the year 1840” (Lord Stanley, U.K. *Debates*, HL, June 29, 1854).

The government avoided all discussion on the merits of an elected chamber, and simply called on parliament to “concede to the Parliament of Canada that power which at present belongs to the Imperial Parliament”, the right of the legislature as a whole to set the institutional rules for each chamber in the legislature (Duke of Newcastle, *ibid.*). The Bill did not prescribe an institutional design, it merely handed over the authority to the Canadian legislature to make changes for the legislature in the future and removed the reference to how councillors were appointed from the *The Union Act, 1840*.<sup>148</sup> Concern was raised as to what the elimination of the current council would mean for the clergy reserves, a matter of concern for the Anglican leadership in the house of lords (Lord St. Leonards, *ibid.*). The legislation passed along party lines.

Following the Canadian election, Morin introduced a Bill based on the address adopted by the assembly in the previous parliament but this did not proceed (Canada *Journals*, LA, September 27, 1854).<sup>149</sup> On February 8, 1855, the new government appointed six new legislative councillors.<sup>150</sup> And then, Joseph Edouard Cauchon introduced a new government “Bill to amend the imperial act re-uniting the Provinces of *Upper and Lower Canada*” to make the legislative council elected (Canada *Journals*, LA, March 16, 1855).

The new government Bill would leave in place the councillors who had been appointed for life, and add to them 48 elected councillors, 24 for each of Canada East and West, and once the life councillors ceased to be members they would not be replaced making the entire chamber elected (Cauchon, Canada *Debates*, LA, March 16, 1855). It

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<sup>148</sup> While Canada’s constitutional evolution would suggest that this devolution of authority to the legislature was simply another step on the road to self-government, it should be noted that the question was raised as to whether the British government in turning over this authority did so because it knew that the house of lords would not support an amendment to the *Act of Union, 1840*, making the legislative council elected (Lord St. Leonards, U.K. *Debates*, HL, June 29, 1854).

<sup>149</sup> It was formally discharged on April 13, 1855 (*Journals* LA).

<sup>150</sup> The government claimed that these appointments would ensure the passage of legislation to make the upper chamber elected through the upper house.

proposed that for the elected council one-fourth of the council would be elected every two years. To be elected one would have to meet the property qualification of £1,000, the minimum age of 30 and be a British subject. The speaker would be chosen by the government and sit in cabinet, as had become the practice with the appointed council. There would be no power to dissolve the upper house.

With respect to the elected chamber that would emerge, the intent was to strike a balance between new members and old members at any one time. As all 48 members would be elected in the first instance, they would be familiar with the wishes of the public, and at any time, one-fourth would be fresh from meeting with electors while another quarter would be getting ready to meet the electors, and half of the members would be removed from the shifts in public opinion (Cauchon, *Canada Debates*, LA, March 27, 1855).

“For if that House were to be a mere reflex of the lower chamber, it would be better to abolish it. But if the object of the chamber was to check hasty legislation and give the people time to reflect, in that case it must be so constituted as to attain those objects” (*ibid.*).

The government’s explanation for why it was introducing a Bill for election was that it had “bowed to public opinion” (J.A. MacDonald, *ibid.*). The opposition took issue with the changes to the legislation, from Morin’s first position to the ‘address’ to Morin’s Bill to the government’s new Bill, in what appeared to be a ‘flip’ in policy (if one accepted the pretence that this was a continuation of the previous government). For example, Liberal leader Alexander Mackenzie claimed Spence (who was now postmaster general) had promised his constituents in writing that he would back all policies of the Hincks-Morin administration still before the legislature, including the “change in the constitution of the Legislative Council so as to make that body elected” (*Canada Debates*, LA, March 16, 1855). Mackenzie also pointed out that Cartier and his colleagues from Lower Canada, in 1837, had been in regular communication with him and other reformers in Upper Canada in defence of those without property against the propertied class, yet were now creating a chamber with the principle criterion being wealth.

George Brown pointed out that this was not the same government, but rather an opportunistic coalition between ideological foes (*ibid.*). He told the assembly that when he had debated Spence during the election on the issue of an elected legislative council, Spence had repudiated the government's plans. Brown was concerned that an elected upper chamber would lead to deadlock between the two chambers of the legislature, and that it did not move Canada West to more representation of which the Conservatives who now sat with the government had earlier sided with him over when in opposition. He now read into the record Premier MacNab's speech against the Reform proposal for an elected council in the previous session as follows:

“He believed a Legislative Council appointed by the Crown was the only body which could stand as a check between a corrupt House of Assembly and the Governor General. He opposed an Elective Council, because he believed an elective government must follow, and after that, the whole system of government of the United States, which would lead to annexation, an end which he should much deplore” (*ibid.*).

And, he pointed out, that with respect to the right for a government to dissolve the upper chamber, Cartier had “believed it necessary for the government to keep, or responsible government could not be maintained”, and while Cartier had wanted a property qualification for the upper house, he also wanted one for the lower house, and argued that its removal would mean that “the Upper House would possess all the weight and responsibility” (*ibid.*).

In spite of the divisive debate, which was a continuation of the partisan politics of the recent election and the shifting partisan cleavage in both halves of the province, the house came down united in support of the legislation, with 80 members agreeing in principle and voting to send it to a ‘committee of the whole house’, with only four opposing it in principle (*Canada Journals*, March 28, 1855).<sup>151</sup> At third reading, Brown unsuccessfully tried to have representation by population introduced for the legislative council and to have the power of dissolution included. Brown would try this repeatedly at every stage with each incarnation of this Bill. The Bill passed the lower chamber, 71 to 9

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<sup>151</sup> Brown, Cameron, Larwill and Wilson were opposed.

(*Canada Journals*, LA, May 12, 1855).<sup>152</sup> It was delayed in the legislative council and did not pass before the end of the session.

The Bill was reintroduced by Cauchon in the new session (*Canada Journals*, LA, March 7, 1856). On second reading it again received overwhelming support in principle, by a margin of 83 to 6 (*Canada Journals*, LA, March 14, 1856). Brown again led the small opposition, claiming that it would create “one of the most absolute, arbitrary, Tory bodies known under any system of representative government in the world” (*Canada Debates*, LA, March 14, 1856).

In the upper chamber, Pierre De Boucherville objected to the fact that this was now being pushed by the government, arguing that it should have been a general Bill that originated in the legislative council (*Canada Journals*, LC, April 18, 1856). Ten legislative councillors joined together in the position that the “present basis, as a check equally upon the hasty action of the Popular Branch, as upon the undue influence of the Crown”, an appointed upper chamber was preferable to an elected upper chamber that would give “undue preponderance to the popular element” and lead to “the destruction of Executive responsibility, the adoption of a written constitution, the election of the highest officer of the Crown, and the separation of Canada from the Parent State” (*ibid.*).<sup>153</sup>

A select committee of the upper house was struck to study the Bill on April 18, 1856, chaired by Peter McGill, and, after it reported its amendments, additional amendments were made in the ‘committee of the whole’ on April 24, 1856, and accepted by the lower chamber the same day. On May 16, 1856, the Bill was submitted to the governor general for assent, and he reserved it for the British government. *An Act to change the Constitution of the Legislative Council by rendering the same Elective* received the assent of the queen-in-imperial council on June 24, 1856, and was proclaimed by the governor general of Canada on July 14, 1856.

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<sup>152</sup> The former was defeated 56 to 20 and the latter 58 to 17.

<sup>153</sup> This dissent was signed by P.B. DeBlaquière, John Hamilton, George J. Goodhue, William Walker, C. Widmer, James Gordon, J. Ferrier, R. Matheson, G.S. Boulton and Walter Dickson.

The only significant difference between the Bill proposed by Cauchon in 1855 and that which was adopted by the legislative assembly in 1856 is that the property qualification was raised to £2,000. Property did not have to be in the district for which a candidate ran, only in the province of Canada. On the other hand, eligibility to vote for councillors was the same as for the lower chamber, and this was linked to owning property in the electoral district.

One postscript to the debate in the legislature over this legislation is of note. At the same time that this legislation was passing, the legislative council was voting on a motion to dissolve the province of Canada and combine it with Nova Scotia, Newfoundland, New Brunswick and Prince Edward Island under a single central legislature with ‘municipal’ governments, under lieutenant governors for each of the six divisions, having greater authority for local matters. The lower house was, in turn, voting on a motion to simply divide Upper and Lower Canada again into separate provinces. Both motions were defeated. The need to overcome the new partisan cleavage that had been so divisive during the previous election, which made an elected upper chamber possible, was convincing some that the then-current institutional arrangements in terms of a united province governed by a single legislature was untenable.

### **III. Conclusion**

During this period of institutional change in the united province of Canada, there were shifts in the social cleavage and the partisan cleavage. This is in keeping with our hypothesis that a shift in the social cleavage would be necessary for a partisan group to achieve institutional change that had previously been opposed by a group on one side of the cleavage. With respect to the social cleavage, the union of the two provinces subsumed group identity politics beneath the more pronounced French-English East-West cleavage. As the relative population of the two halves altered, the group that resented union shifted from the French majority to the English majority. Loyalty to Britain diminished, as the struggle for self-government, loss of preferential trade status and military protection, and changing public opinion in England fed a new and growing ‘Canadian’ identity, which

helped to counter the imported social group identity that immigrants brought with them based on their religion and country of origin.

The partisan cleavage shifted, and with it political movements were changed. Union began with a continuation of the divide that had come to dominate Upper and Lower Canadian politics. This pitted the British governors and the local elite ‘compacts’ that surrounded him and controlled power in each of the provinces, against a growing middle class that entered provincial politics through the lower chambers of the assembly. This cleavage would be eliminated by the grant of responsible government. By transferring responsibility for governing to the leaders of the political party that could command a majority in the lower chamber, the seeds were planted for the emergence of a new type of political party. Candidates running for and against those who were temporary custodians of the government, as the ministry of the day, defined the new partisan cleavage. This was not ideologically based, though there were ideological threads running through the various movements in each half of the province. The primary motivation for these ‘parties’ was the desire to form a government under the new rules imposed by responsible government.

In the previous chapter, it was suggested that based on the experience of England and the early experience in Canada, the Westminster-model might result in a standard trajectory of agitation for institutional change. This is different than the claim made by constitutional scholars, like Keith (1928), that representative government and then responsible government were grants of the British crown to encourage colonial settlement and growth, an idea that has its roots in the political economy model advanced by Wakefield. Instead, it suggests that some institutional changes may occur within the British constitutional model, in part, as an artifact of democratic ideas being grafted onto the monarchical system.

Based on the British experience, the next institutional changes after the establishment of representative government were expected to be: (a) the monarch appointing persons to the cabinet who could ensure passage through the lower chamber of ‘supply’ and of a civil list; (b) the legislature insisting that these cabinet ministers be accountable to the legislature, individually, for their departments and, collectively, for the

actions of the executive and for the money that is allocated to them by the legislature; (c) that with collective responsibility, the ‘cabinet’ would insist that the governor take its advice or it would feel compelled to resign, the very threat of which would bring pressure to bear on the governor to accept responsible government. This theory of Westminster-model institutional development would be falsified if the trajectory ran in different directions in difference polities.

What we saw during this period was a re-creation of the development of responsible government in England. Each step occurred as expected, and while Governor Metcalfe attempted to reverse this trajectory, with the full weight of the British government and the support of the British parliament behind him, buttressed by the normative theory of parliamentary supremacy which had become constitutionalized thanks to Austin and Dicey, he was unable to put the genie back into the bottle, even with the might of the British army, patronage and prestige of office, and the added benefit of an American threat to encourage colonists to toe the British line. It is noteworthy that in England, kings and queens a century earlier had equally tried to limit or reverse concessions to the lower chamber they had made.

As will be explored in the next chapter, these stages of development were also copied in the Atlantic Provinces, though at different speeds and times. With respect to Nova Scotia, the government that claims to have received responsible government before Canada, Lord Grey was forced to address similar arguments in support of responsible government from Joseph Howe, in what was a less socially divided province. His response would be swift and unequivocal. Nova Scotia was thus able to progress rapidly from governor’s council, to representative government to responsible government. But the struggle began first in Canada and the ideas, while informed by Jeffersonian and British ideas of democracy, were Canadian. Even the labels used for parties, such as Reform, Tory, Conservative and Liberal, were adopted first in the province of Canada.

While the battle for responsible government began in Canada, the social cleavage in this province prevented both the British government from acknowledging the changes it had accepted and the local governors from respecting the changes they knew needed to be

made. A fair assessment, which was made by Governor Bagot at the time, was that Canada had responsible government with the first Baldwin-La Fontaine ministry. Canadian politicians also were convinced of this fact, even in the face of set-backs under Metcalfe, and began to use labels like ‘cabinet’, ‘ministers’, ‘ministry’, ‘premier’, ‘government’ and ‘opposition’ in their political discourse surrounding the provincial executive.

The appointment of Elgin as governor general for North America, by the Whig Colonial Secretary Lord Grey, reflected the British government’s resignation that the partisan reality of the province of Canada, in spite of their concerns over the social cleavage in the province, required responsible government. Elgin, having taken the lay of the partisan landscape, informed the British government and his provincial Tory executive of his intention to respect the electoral outcome in Canada and let the United Reform Party form a government if it won the next election (*Despatch* from Elgin to Grey, July 13, 1847). The independence of Grey from the Whig ministry, as a Conservative member of the house of lords, allowed for the British government to avoid a partisan battle in its own parliament, which would have been fuelled by prejudices against the French, following the rebellion in the Canadas. In the end, the appointment of the government of La Fontaine and Baldwin was simply a response to the challenge posed by having to govern with (i) a legislature in which a partisan cleavage had emerged over (ii) a province which had a strong social cleavage.

The 1854 election made replacing the appointed upper chamber with an elected legislative council a partisan issue. This reform package reflected shifts in the partisan cleavage which were occurring in the province, with the Conservatives and the Blues emerging to replace the Reformers who had previously come to power in opposition to the British governors. The partisan cleavage would lead to the creation of the Liberal and Conservative parties. This shifting partisan cleavage was also pointing to a deficiency in the institutional arrangements in the province of Canada, beyond the method of selection of the upper chamber, in that it was becoming increasingly difficult for a single party to win both halves of the province. The idea of dividing Canada and separating local from federal

matters was beginning to find ground in both chambers and on both sides of the social cleavage and on both sides of the partisan cleavage.

Lipset and Rokkan (1967) predicted that social cleavages will result in the creation of political parties. As we saw in the previous chapter, while the social cleavage and partisan cleavages aligned there were in fact political parties which reflected social group identity in both provinces. In Upper Canada this would pit the largely Francophone *Canadien* and later *Patriote* Party against the *British* Party. In Upper Canada the reform movement was also initially identified with cultural markers, informed as it was by religious aspirations for the clergy reserves, in opposition to the Anglican Church and the *Family Compact* Party. Even at the outset, the emergence of a partisan movement in opposition to the holders of power was not exclusively defined by the social cleavage in the province, as membership on each side was decidedly mixed. This was not the era in which modern political parties began to emerge.

When a partisan cleavage emerged in the province of Canada that was strong enough to lay the groundwork for what would become political parties in the modern sense, this did not develop along the fault line of the social cleavage, but rather it crossed this social cleavage. It was precisely because of the need to overcome the social cleavage that a partisan cleavage emerged with the principle goal of achieving institutional change.

From the perspective of the partisan cleavage, it went through a two-step transformation. The first was designed to force the ruling elites, who were admittedly representatives of a social cleavage, as identified by Lipset and Rokkan, to accept the transfer of executive power into the hands of legislators who, in turn, appeared to have the support of the population. This was accomplished by a group which could cross the social cleavage. Following the emergence of this democratic principle on government formation, the group that emerged as the first political party was that which could maintain the support of the majority in the legislature and, when examined through the dual lens of partisan and social cleavages, this 'party' was specifically successful, at least in the case of the province of Canada, *because* it could cross the social cleavage. Over time this party's ideological roots shifted from being progressive to conservative, based on the way the issues of the day

were perceived, and it cut across the social cleavage. This is a direct contradiction of Lipset and Rokkan's hypothesis on both points.

The partisan cleavage shifted following responsible government, from being defined by institutional reform to being government and opposition. And the party had become largely conservative in the ideology of the day. This conservative 'government' party which emerged during the era of responsible government equally maintained its support across the social cleavage. So the 'first' political party in Canada was the faux Liberal-Conservative Party and it was not defined by the social cleavage, but by the partisan cleavage.

The emergence of the first 'party' which cut across the social cleavage to achieve 'reform' (in this case responsible government) might be attributed to the structural make-up of this one province's legislature, where representation in the two chambers was equal for each half of the province, thereby forcing political parties to work together to achieve a majority, but the second development suggests that institutional change requires a level of consensus that includes elites from both sides of the social cleavage, a central hypothesis of this dissertation. This idea will be tested in the next chapters for the Atlantic Provinces, the federation of Canada, and the non-British province of Manitoba.

## Chapter 6: Staggered Institutional Development – Britain’s Atlantic Provinces

While the province of Canada offers the first experience with uninterrupted governance by Europeans in what will eventually become the country of Canada, the first British institutions of governance were established in the Atlantic Provinces.<sup>154</sup> These were settler colonies.<sup>155</sup> Each had important economic and military value, and thus became important colonies for Britain during its quest for empire that spanned the globe through the establishment of fortifications and permanent settlements in competition with other imperial powers.

The general approach to researching this chapter has been the same as with respect to the province of Canada, namely to process trace institutional change and thus to (a) map the development of upper chambers, (b) examine the changes which occurred as the colonies moved along what was expected to be a standard trajectory from governor assisted by a nominee council to representative bicameral legislatures and eventually to responsible government and (c) to place these institutional developments in their social and political contexts. It is by placing these institutions in context that we are able to examine how social and partisan groups interact over institutional design and change.

Our initial hypothesis was that social cleavages in these colonies would act to constrain institutional change: the more divisive a social cleavage, the more resistance advocates for change will encounter, thus delaying institutional change along what is now seen as a standard British institutional trajectory. Agitation for change begins with normative ideas advanced by activists, writers and thinkers, which then capture the imagination of a polity’s elites. These ideas are disseminated by publishing and travel, finding their way into the corridors of government. The changes commended by these ideas may be embraced by elites in one particular social group, as was seen in Upper and

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<sup>154</sup> The Canadian government has established, as part of the country’s narrative, Canada’s founding as when Samuel Champlain established a settlement at Quebec City in 1608 on behalf of the French crown.

<sup>155</sup> As noted in the previous two chapters, Quebec was a ceded colony, large sections of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland were ceded by France, and most of Canada was ceded from the indigenous aboriginal populations.

Lower Canada, but substantive change will only occur when a partisan group emerges in a polity that can, alone or in coalition with other partisan groups, appeal to multiple social groups in that polity and, in so doing, effectively bridge the social cleavage. It is believed that bridging the social cleavage is necessary to alleviate suspicion by members of weaker social groups, who will often assume that the intended consequence of any change will be to weaken their relative situation or power within society. This suspicion of other groups' motives is why, it is postulated, that 'out' social groups will usually prefer the *status quo*, even when changes are being advocated that have the potential to increase their relative standing.

The provinces examined in this chapter are Nova Scotia (and Cape Breton), New Brunswick, Prince Edward Island and Newfoundland. The prescribed institutional design for settler colonies was a bicameral legislature with an appointed governor's council, which would act as both an upper chamber for the legislature and as a body which could administer the colony's judicial and executive apparatus; and a lower chamber in the bicameral legislature to be elected by persons who held property in the colony. This 'representative government' was not only prescribed by the prevailing political economic theory in Britain, it was necessary to raise revenue in the colony for the construction and maintenance of public works.

Legally, settlers were only guaranteed the common and statute law of Britain as existed at the time of their migration. But the land companies offered *prospecti* that promised this model of representative government to potential settlers. That such an institution was not established immediately for each of these colonies offers the first evidence of provincial social divisions resulting in a delay in institutional change.

Once representative government was established in each of these colonies, in all the provinces except for Newfoundland, a demand emerged that the upper chamber be elected. This change only occurred in Prince Edward Island, where a property qualification was established to vote for legislative councillors, thus preserving this chamber's representational role on behalf of property owners, as property ownership defined this province's social cleavage.

At some point in all of these provinces, members of the lower chamber began to demand that the governor's council be divided into an executive council and a legislative council, so that the upper chamber was not dominated by the executive. Following this change, the next demand was that the executive become accountable to the lower chamber and not to the governor.

In British constitutional law, responsible government in a colony violates the doctrine of parliamentary supremacy at Westminster. So governors were instructed to oppose its introduction, as British kings and queens had a century before. Since each province followed the same developmental trajectory and obtained responsible government in the end, it is posited that this agitation for 'reform' may be endemic to British style representative institutions. It is also due to the settlers' familiarity with its form, a belief that this would be the most acceptable to the British government, fealty to the British crown and because this idea was being advanced in the neighbouring province of Canada, though none of these explanations (except for fealty to the crown) explain why it had emerged in England a century earlier. In the case of Prince Edward Island, the legislature also followed Canada's lead in making its upper chamber elected.

Having established that the standard trajectory was followed in each province, the question remains as to why it was not followed simultaneously. These were colonies of an 'empire', and an empire is defined by the common governance that is used to manage multiple territories. Institutional structures should have been uniform and imperial policy implementation should have been unequivocal and absolute. Yet it was not. Thus, it is by examining the variations in staggered development that we gain insight into why popular institutional design as well as imperial directives can be constrained by local societal factors.

What emerges is evidence that the colonies with a divisive social cleavage reflected in their legislature found their development along the 'normal' institutional trajectory delayed. In each of these provinces, when change occurred, it was the result of a partisan group emerging that had among its membership leaders of both sides of the social cleavage.

Additionally, a shift in the primary social cleavage, and thus ‘in’ group boundaries, often occurred in advance of a significant change in institutional structure and function.

Political parties emerged slower in these provinces than in the province of Canada, though in each of these provinces the party labels used in Canada came to be used by their politicians, providing further evidence of the portability of ideas. More interestingly, however, was that in the case of New Brunswick, until political parties began to emerge, responsible government could not.

## I. Nova Scotia

In the case of Nova Scotia, the province began with a clearly defined social cleavage that divided French or ‘Acadien’ catholic and English protestant. This cleavage had a unifying effect on the English protestants who embraced the construct of being British. As expected, the Acadians’ representatives repeatedly demanded the *status quo*. This was initially granted by the British officials and would have continued to be granted by the British government if local military officers and governors had not acted illegally and expelled this population. What is interesting and often overlooked is the role of the appointed council, which was used by the governor to provide legitimacy for the expulsion and which, as the body representing the British residents, was convinced by the governor to defend their *status quo*. With the French removed from the province, the province obtained representative government, with an elected lower chamber being added in 1758.

The new social cleavage that emerged after the Acadian expulsion was between the Scottish catholics in Cape Breton and the British protestants on the mainland. As expected, when a partisan group emerged that had representatives from both sides of this social cleavage, institutional change occurred. It obtained responsible government after only a decade of it being a partisan issue, whereas in Canada it had taken two.

In 1719, the *commission* appointing Richard Philipps, governor of Nova Scotia (known by the French as ‘Acadie’), established a governor’s council of twelve, with five

councillors required to be present for quorum.<sup>156</sup> The authority to appoint members of the council was delegated to the governor, and he was authorized to appoint persons of substance in the colony or that he took with him to the colony, something he promptly did upon his arrival. He was issued separate *instructions* to not increase or decrease the size of the council without good cause. This council had all three functions of: advising the governor on the administration of local governance, acting as a legislative body and being a judicial court of appeal. The seat of government during the early period was at Annapolis Royal.

The governor's council in Nova Scotia became one of the most active colonial councils when it came to governance of British interests overseas. It was this council which organized immigration and managed the relationship with the ceded French colonists, the Acadians, and, eventually, it was this council that was used to provide cover for the governor and his co-conspirators in their unauthorized move to expel and confiscate the lands of this large 'out' social group.

The Acadians had been largely ignored by the French crown, given their isolated location. The French employed a feudal land structure, and French mercantilist policy forbade trade with non-French colonies and ports. Yet, the Acadians considered the land they tamed to be their own and traded freely with English and French merchants alike, regardless of which imperial power held temporary dominance over their territory. Some of the land the Acadians claimed was the best in Nova Scotia for agriculture, having been created through the construction of 'aboiteaux' (a form of dyke construction the colonists brought with them from France). Since this was, from the local aboriginal population's perspective, land that did not-exist, the Acadians had strong and friendly relations with the indigenous Mi'kmaq population and there was frequent intermarriage and cross-cultural

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<sup>156</sup> In 1717, Philipps had been informed by letter of his appointment as "Governor of Placentia in Newfoundland and Captain General and Governor in Chief of the Province of Nova Scotia". The *commission* issued in 1719 gave him the title, for Nova Scotia, of "Captain-General and Commander-in-Chief of Nova Scotia or Acadie in America".

exchange.<sup>157</sup> While the Acadians considered themselves neutral in the frequent conflicts between the British and French monarchs and between New France and New England colonists, the same was not true for the Mi'kmaq who had strong economic and military ties to the local French garrisons and who had been proselytised by French missionaries.

The original push of immigration that saw the Acadians flee France was the conflict between Huguenots (French protestants) and Catholics, so their relationship with clerics was not one of subservience, as it was in other parts of New France; the frequent shifts in imperial domination meant that the presence of clergy was intermittent, with laymen often performing the weekly religious ceremonies, especially during times of British ascendancy in the region; and the early Roman Catholic clergy who came to the region were more interested in the glory of saving aboriginal souls than in ministering to the Acadian faithful.

The *Treaty of Utrecht* (1713) turned roughly 2,300 Acadians on the territory of Acadie over to the British, and this French speaking population was given one year to either remove themselves to the territory retained by the French crown or to accept British sovereignty. The symbol for this transfer of allegiance was the oath. Requiring an oath was a common practice for all imperial powers in this era, and the British practice was to require a new oath to be taken whenever a new monarch took the throne. As the religious composition of each colony varied, the oath to be administered was determined by the governor-in-council for each colony. In Nova Scotia, the council did not deal with the question of the oath at the outset, so Acadians were not made to swear an oath in 1714 as required by the treaty, a decision that reinforced the Acadians' belief for several generations that they could remain neutral in the continuing hostilities between the British and French (Bumsted 1992, 70).

What the governor's council did was to deal with the Acadians as a collective. Individual communities were instructed to select deputies to appear on their behalf before the council. This was not a formal representative body for the Acadians, as under British

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<sup>157</sup> By creating land where there previously had been only marsh, the Acadians were not in conflict with the aboriginal population over land disputes the way other European settlers were in North America, since the Mi'kmaq did not consider the land reclaimed as having been previously theirs.

law Catholics could not hold office or vote. But while unofficial, the selection of deputies added to the Acadian's sense of possessing independent communities. So well beyond the linguistic and cultural ties that sometimes bind individuals in a society and cause them to become a social group distinct from others, the Acadian communities emerged as one side of a distinct cleavage that defined Nova Scotia society. The Acadian sense of identity was further constructed upon "individualism, in which the head of family fished and farmed for himself and his dependents, and collectivism, in which farmers worked together to sustain and extend the *aboiteaux* that won rich land for them from the sea" (Laxer 2007).

When George II ascended the throne in 1727, the taking of a new oath put the question of the Acadians again before the council in a more serious manner. The deputies of the Acadians had taken the position that their communities would take an oath of allegiance to the king and to the British government, but wanted to be exempted from having to take up arms against the French or the Mi'kmaq in the event of war. The council believed that property ownership, which the Acadians were entitled to under the British law, requires one to defend the land. Governor Philipps seemingly broke the impasse between the council and the deputies in 1729, by going community to community and having each Acadian male, 15 years of age or older, sign the oath prescribed by the council, and, in return, he would write in the margin of the oath or give verbal assurances to the community that they would not have to take up arms. The oath read "I sincerely promise and swear in the faith of a Christian that I will be entirely faithful and will truly obey His Majesty King George the Second, whom I recognize as the sovereign lord of Nova Scotia and of Acadie. So help me God" (Ross et Deveau 1992, 57).

Acadians were not entirely relegated to the margins. Abbé Jean-Louis Le Loutre of Louisbourg, who had come in 1737 to convert Mi'kmaq to Catholicism and repeatedly tried to get the Acadians to side with the French crown whom he served, threatened Acadians who had taken positions in the Nova Scotia government's administration with excommunication. Similarly a priest in Minas denied the sacraments to an Acadian who had taken a government commission (Plank 2001, 99). But there were no petitions by the

Acadians for formal representation. This social group wanted only what it thought was the *status quo*.

The War of Austrian Succession broke out in 1774, and the Mi'kmaq joined forces with the French to seize the British fort at Canso. In response, the government of Massachusetts declared war against the Mi'kmaq in 1745, and offered rewards for scalps. Deputies of the Acadians in eastern Nova Scotia were able to convince the council in Nova Scotia to exempt all Acadians of Mi'kmaq ancestry from the bounty policy by pointing out that they had taken an oath of allegiance to the British monarch (*ibid.*, 111). It is noteworthy that Governor William Shirley of Massachusetts first expressed his opinion that the Acadians should be removed from the territory during this conflict.

British policy was simply to dilute the catholic population in all of its territories and this would have been true for Acadie even if there had not been regular attacks by French and Mi'kmaq warriors, making Acadians' loyalty constantly suspect. To begin the dilution, an unprecedented relocation program was launched, with the government offering to pay the relocation expenses for over 2,500 people. This population transfer included ex-soldiers and trades people, mostly from the northeast of London, though among these were settlers of Irish descent (McCreath et Leefe 1990, 196-203). These settlers arrived with Governor Edward Cornwallis, who set about building a new capital at a strategic harbour that would become Halifax.

The *commission* appointing Cornwallis as governor on May 6, 1749 changed the method of appointment for the governor's council from one of delegated authority to one of appointment by the king, with the governor authorized to make 'provisional' appointments, a change that would become key to dissolving this upper chamber in the 1920s.<sup>158</sup> The governor was authorized to provisionally appoint such men as he felt were 'fitting and discreet' to form a council of 12. Having learned from the problems with the governor's councils in what would become the United States of America, the governor was also empowered to provisionally appoint additional councillors up to nine, if fewer than nine

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<sup>158</sup> Cornwallis' formal title was 'Captain-General and Governor-in-Chief'.

should cease to reside in the province; unless, of course, the king appointed additional councillors in the meantime. In other words, all appointments would have to be confirmed by the king in England; the council would be 12, though the governor would always be assured of having at least nine councillors resident in the colony.

Life was hard in the province and many settlers left, so the British government in 1749 found a second source of settlers, and that was protestant settlers from Europe, specifically German, Swiss and even some French Huguenots.<sup>159</sup> They were offered free passage and support for a year. While most of these settlers remained in Halifax, some established communities outside of the capital and the German descendants, in and around Lunenburg, trace their origins to this initial wave of migration.

Conflict with the Mi'kmaq was fairly constant between 1749 and 1755 in what is variously called Father Le Loutre's War, the Micmac War, the Indian War and the Anglo-Micmac War. This was a period of cold war between the English and French in Nova Scotia, with both sides building forts and enhancing fortifications. The establishment of Halifax was a strategic move by the British as a staging ground that could counter Louisbourg in Île Royale (what would become Cape Breton). Of course the problem with Halifax is that it was built on land claimed by the Mi'kmaq. The French fort of Beauséjour was another such strategic construction, at the head of the Bay of Fundy between what is now the boarder of New Brunswick and Nova Scotia, and its complication was that this was a region populated by Acadians and thus raised further doubts about their loyalty as supply lines and troop movements were at risk of being spied upon and betrayed.

There were 24 recorded conflicts during Father Le Loutre's War, of which 13 were raids on Halifax (Patterson 1994). Abbé Le Loutre led the Mi'kmaq and French attacks, with Lieutenant Colonel Charles Lawrence leading the British troops, and John Gorham commanding the New England Rangers.<sup>160</sup> Following in the wake of this cold war build-up, came a hot war, the French and Indian War, which, in turn, became the Seven Years

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<sup>159</sup> Campey (2010, 83) suggests that this was due to public opinion in Britain being opposed to the relocation of labour that could be used for the military or the economy to the colonies.

<sup>160</sup> Gorham was a member of the governor's council from 1749 to 1751.

War when France and England went to war in Europe. Succeeding Cornwallis as governor in 1752 was Peregrine Hopson. Shortly after his appointment, Lieutenant Colonel Lawrence was assigned the job of settling protestant colonists in Lunenburg. In appreciation, Hopson recommended that Lawrence be appointed to the council, and then made him president. When Hopson developed severe eye trouble, he temporarily surrendered the governorship to Charles Lawrence and returned to England in 1753.

It was under Lawrence, and the council, that the principle cleavage in the colony would be irreversibly altered. Not surprisingly, Lawrence saw military matters as his principle priority, and worked at length with the other governors and generals in North America, most especially Massachusetts Governor Shirley, for a common military settlement strategy. Instrumental was the decision by Lawrence and Shirley to capture Fort Beauséjour, an exercise carried out with troops and ships from Massachusetts as well as the British troops in Nova Scotia under the command of Lieutenant Colonel Robert Monckton.

Even before his appointment as acting governor, Lawrence had become convinced that the Acadians were an obstacle to “make Nova Scotia a secure and flourishing outpost of the British Empire in North America” and that the best solution was expulsion (Griffiths 1992, 86). However, the decision for expulsion was undertaken by and with the advice and consent of the governor’s council in 1755.<sup>161</sup> For his part, Governor Shirley was also an early advocate of expulsion, and while his views changed back and forth between assimilation and expulsion, New England puritanism (a fervent anti-catholic devotion which had led to the Salem witch trials), the ongoing conflict between Massachusetts and aboriginal people, the short-term goal of agricultural land for New England colonists and the long-term goal of continental expansion resulted in his becoming the most fierce and influential advocate of expulsion. Massachusetts would provide the ships, Monckton would do his duty as a soldier and carry out the deportation and Lawrence would use the council to give it the cloak of legality.

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<sup>161</sup> In 1755, the governor’s council consisted of five persons: Benjamin Green, John Collier, William Cotterell, John Rous and Jonathan Belcher.

There are more than 200 books and articles in print concerning the deportation (for a good bibliography, see Harbec 1988), and within this literature there is disagreement over whether or not the bulk of responsibility for the grand *dérangement* lies with the British government, Governor Lawrence, Governor Shirley, Admirals Boscawen and Mostyn, Colonel Robert Monckton, the French and Mi'kmaq and their intermediary Abbé Le Loutre, or the circumstances of war. Surprisingly little consideration is given to the role of the Nova Scotia governor's council, since it is wrongly assumed by historians that in this era an appointed council would be merely a cadre of the governor's own men.

The analogy of the governor's councils to the royal council of the Tudor kings, which has been made several times in this dissertation, is worth repeating. Appointed ruling councils, even ones whose membership can be easily removed, have the capacity to oppose. The very reason deliberative bodies are created in non-democratic polities is because they provide insulation for unpopular or even unconstitutional action; of which the corollary is that collectively they have the capacity to thwart ill-advised decisions. Individual members will have varying degrees of independence, depending on the terms of their appointment, their own standing in the community, their relationship to the ruler, and their personal capital. Thus the role of the council in an event such as this is an interesting one, made even more so because Nova Scotia's governor's council had, prior to this point, an effective relationship with the deputies chosen by the Acadians, and it had repeatedly shown the capacity to bridge the province's cleavage even in the face of armed hostility. Yet the council would end up providing the cover for the expulsion of roughly 13,000 Acadians.

The British military demanded that the Acadians surrender their weapons and their boats, fearing "a potential fifth column" (Bumsted 1992, 70). In response, 15 deputies selected by the Acadian community of Minas (what is now the Grand Pré region) had come to Halifax to deliver a 'memorial' (i.e. a petition) on behalf of the residents of Minas, Pisquid and the river Canard, asking to keep their possessions. A meeting was held between the council and the deputies and the petition was examined point by point. The minutes of the meeting at the governor's house on July 3, 1755 have the council concluding

that the petition was “an Insult upon His Majesty’s Authority” (Atkinson et Thomas 1993, 247).

During the meeting, Lawrence proposed that the deputies present take an oath, without reservation. In a subsequent *despatch* to the Board of Trade dated July 18, 1755, Lawrence reports that when asked to take the oath “they endeavoured, as much as possible to evade it, and at least desired to return home and consult with the rest of the Inhabitants, that they might either accept or refuse the Oath in a body; but they were informed that we expected every man upon this occasion to answer for himself, and as we would not use any compulsion or surprise, we gave them twenty-four hours time to deliver in their answer; and, if they should then refuse, they must expect to be driven out of the country” (NS Sessional Papers, re: Removal of Acadians, vol. 2, 259). The Acadians were simply advocating for the *status quo*, including their collective right to decision-making and their right to consult as deputies. However, these rights were nowhere established in law, since the selection of deputies was an informal practice. So the next day when asked unequivocally to take the oath, they had no choice but to refuse, and were arrested. Lawrence reports that upon being arrested they offered to take the oath and it was declined to them on the grounds that they were no longer British subjects and instructions were sent to their communities to send new deputies (*ibid.*, 260).<sup>162</sup>

On July 25, 1755, one week later, the council met with 30 deputies selected from the Acadian communities of Minas and Annapolis Royal, who had brought another memorial, this one signed by the 207 inhabitants. The memorial agreed to the surrender of all firearms, stressing that they would never have used them against his majesty’s government, attesting the loyalty to the British king and Nova Scotia government of all who signed, and asserting that some in the community had even risked their lives for the British crown by providing intelligence on French activities. The memorial instructed the deputies to “do or

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<sup>162</sup> Despatches and council minutes related to the expulsion have been assembled under the authority of the Nova Scotia legislature in its sessional papers under the title “Papers Relating to the Forcible Removal of the Acadian French from Nova Scotia, 1755-1768”.

say nothing contrary to His Majesty's Council" but also instructed them to contract no new oath. The petitioners wrote:

"We are resolved to adhere to that which we have taken, and to which we have been faithful as far as circumstances required it; for the enemies of His Majesty have urged us to take up arms against the government, but we have taken care not to do so" (*ibid.*, 261).

The council proceeded to question the deputies about the nature of their loyalty and what intelligence had been provided and found these claims unsubstantiated or, at least, found the deputies unable to provide evidence of where information had been provided to the government in a manner where it saved lives.

Lawrence and Shirley had proposed to the British government that the Acadians' land be forfeited in favour of New Englanders, but neither received positive responses, even from the Board of Trade which was the most favourably inclined body towards provincial development and expansion. Lawrence had no authority to expel the Acadians on his own and he acknowledged as much to the Board of Trade in London, asking them to give him the authority (Mahaffie 1995, 248). In January 1755, the Board of Trade would only go so far as to agree that New Englanders would make good settlers, if, following the capture of French military installations, the Acadians fled to Cape Breton Island, St. John's Island (now PEI) or Canada, and suggested that Lawrence consult with the chief justice of Nova Scotia on what would be legal with respect to forfeiture of land, stressing that land should only be confiscated by legal means.

On July 28, the council met again, this time with the chief justice and Admiral Boscawen present, and formally concluded that since "it had been before determined to send all the French Inhabitants out of the Province if they refused to Take the Oaths, nothing now remained to be considered but what Measures should be Taken to send them away, and where they should be sent to" (NS Sessional Papers, re: Removal of Acadians, vol. 2, 265). That this decision was not in keeping with British policy was made clear in a *despatch* from the colonial secretary to Lawrence:

"It cannot therefore, be too much recommended to you, to use the greatest Caution and Prudence in your conduct towards these Neutrals, and to assure such of them, as may be trusted, especially upon their taking the Oaths to His

Majesty, and His Government, That they remain in the quiet possession of Their Settlements, under proper Regulations” (*Despatch* from Robinson to Lawrence, August 13, 1755).

Yet no punishment was given for the action, with Monckton who organized the logistics of deportation being elevated to lieutenant-governor and Lawrence being confirmed as governor.

The one point on which most Acadian scholars agree is that the taking of oaths was designed to trap the Acadians. It should be pointed out that this was also a trap laid for the council. The council had no room to manoeuvre with respect to the oath given the fact that the deputies of the Acadians, while chosen by the residents, had no formal authority to represent their communities, and the oath in law was an obligation of every subject of the king, to be taken in the manner that had been set by the governor-in-council. Phillips’ clever addition of addenda in the margin was designed to placate the Acadians but it did not alter the oath in law. The Acadians wanted the *status quo*, but the *status quo* did not exist in law, only in practice. Lawrence, backed by Shirley, had no desire to alter the *status quo* in law, or to continue Philipps’ practice of letting the Acadians at worst believe and at best be exempt from the obligation of property owners to take up arms on behalf of the king.

With the Acadians and the cleavage they represented removed, the council proceeded to establish a full assembly, with an elected lower chamber. The council, as far back as 1719, just five years after its first convening, had considered the establishment of an elected assembly. Yet at the urging of the governor, it put this off until 1758.

To replace the Acadians, eight thousand immigrants were brought in from New England, and land that had been tamed by the Acadian settlers became their fertile farm lands and fishing communities between 1757 and 1762 (Bumsted 1992, 140-4). While the rest of Nova Scotia would be harder to settle and would see many immigrants leave rather than try to fell trees and till soil, the composition of the province is to this day reflective of waves of immigration such as this.

Clarke (1960, 320-7) has mapped out how communities in Nova Scotia emerged through its early waves of immigration and how communities emerged clustered by country of origin and religion. While these communities have been diluted over time as the

population has grown, there continued to be strong compositional similarity along identity markers of religion and country of origin for much of rural Nova Scotia well into the 20th century. Comparing ship manifests to census data, he and other cultural geographers have been able to trace the origins of settlements to specific ports of departure in the British Isles, and in the process identify the specific pushes and pulls that drove each wave of migration. While this literature errs on the side of being deterministic, even going so far as to suggest that the success and failure of various North American communities can be traced to the ethno-religious work ethic that the ‘planters, paupers and pioneers’ brought with them from their European and British communities of origin (e.g. Campey 2010), it does reflect early group identity markers. Here too, caution should be taken in reading too much into this literature with respect to group boundaries. Group boundaries are fluid, both in terms of where the boundary is drawn and its relevance at any particular time. Identity markers can be imposed by others or adopted by self, but when it comes to power, it is the principle social cleavage in a society that will often come to dominate all other identity markers. In the case of Nova Scotia in the 18th century, the imperial power cleavage that pitted the English against the Acadians also helped to define all group boundaries in the province.

The usual incentives that exist for immigrants to integrate into a society were present in Nova Scotia. That is why many Germans Huguenots embraced the Church of England after immigrating to Lunenburg County, as a way of shifting their boundary closer into line with the English elites. But the English elites themselves, while Anglican in practice, were not faith driven beyond being anti-catholic, because the sect of the Anglican Church that found its way to this province was not doctrinaire in the way it was in Massachusetts.<sup>163</sup> The Anglican Church in Nova Scotia, while it was in law the establishment church, was funded and administered from London and thus had no

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<sup>163</sup> For a good analysis of the Anglican Church’s struggle with the ideas of the reformation see MacCulloch (2004). He has a good chapter on how the more Protestant sects made it into some North American colonies and not others (*ibid.*, ch.12). Campey discussed how the lack of evangelizing in Nova Scotia, and a permanent source of off-shore funding, made the Anglican Church and its elite members an almost sedentary social group in this province (2010)

evangelical dimension.<sup>164</sup> Most significantly, the construct of being ‘British’, designed by the crown for the settlement of Ireland, had been embraced by the Scots following union with England in 1707. Where the province of Upper Canada saw the elite English deny to the Scottish and Irish immigrants to that province a shared ‘British’ social identity, the handful of English elites in Nova Scotia who took advantage of land grants in the province “drew little distinction themselves between being English and being British” (Campey 2010, 20). The dominant cleavage between Acadian and non-Acadian helped to reinforce a sense of being British. Of course once the Acadians were removed, new waves of Scottish settlers who arrived in Cape Breton would not have the benefit of an Acadian-British social cleavage and they would become the new ‘out’ social group.

In 1763, the year the *Treaty of Paris* was signed, John Pownall, Secretary of the Board of Trade, gave a speech in London commending the Nova Scotian example and suggesting that all ceded colonies should be governed by only a governor’s council, since this was the “freest from a Republican Mixture and the most conformable to the British Constitution” (reprinted in Madden et Fieldhouse 1985, 189). The lesson had at its heart the expulsion of the Acadians, which is not a formula easily replicated in other ‘ceded’ territories, such as Quebec, where the conquered formed a majority. But the other lesson Pownall was more interested in was that the ‘British’ protestant population could be transformed into a single ethnic group, namely this new construct of British, which drew its identity from such things as loyalty to empire and the king, and to a British political and legal system. Or, at least, this was the conclusion that Pownall and most historians and constitutional scholars who reflect on this time have drawn from this moment in the history of one of Britain’s earliest and still ‘loyal’ provinces.

Following the American War of Independence, some 19,000 ‘United Empire Loyalists’ settlers, who had resided in the 13 British colonies to the south, were relocated to Nova Scotia. These were mostly civilians, and they were granted 100 acres for each head

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<sup>164</sup> As Campey (2010, 24) notes: “Anglican missionaries, appointed by the London-based Society for the Propagation of the Gospel, did not see it as their job to offer a cultural lifeline in the way that Roman Catholic priests did for the Irish or Presbyterian missionaries did for the Scots”.

of family and 50 additional acres for every person in the family. This influx of people swelled the population of peninsular Nova Scotia fivefold (Buckner et Reid 1994, 194-209). Most importantly, it reinforced the new sense of cultural identity, that of being ‘British’ and part of a larger ‘British Empire’.

Expecting loyalist settlement in the north of Nova Scotia, Cape Breton Island was separated as a colony in 1784, and the acquisition of land for settlement (which had been banned by the crown) was authorized. Its first great seal was issued in 1785 in the name of King George III for the *Insulae Promontorii Britanniae* or Island of Cape Breton (Swan 1977, 134).<sup>165</sup> But only 400 loyalists moved to the Island, of whom only about 200 were still resident in 1786 (Campey 2010, 64). Drawing from these loyalists, a governor’s council was established but no provision was made for an assembly given the sparse population, including some Acadians, on this territory.

In 1792, the so called ‘Year of the Sheep’, a forced expulsion of Scots occurred as part of the Highland Clearances, or *Fuadach nan Gàidheal*, which translates as “the expulsion of the Gael” (Prebble 1963). This resulted in a large influx of ex-pat Scots to Cape Breton Island, mostly of the Roman Catholic faith. As the population became larger, and more prosperous, petitions were sent to London demanding an assembly, but these were ignored and, in 1820, with the population nearing 20,000, the colony of Cape Breton Island was merged back into the province of Nova Scotia, thereby diluting the relative influence of Scottish and Acadian Roman Catholics.

Only a handful of speculators had been granted land under Cape Breton’s system of tenure, so nearly all residents were tenants or tenant farmers, leasing land from the crown or from these landowners. To reconcile this situation with Nova Scotia electoral law, which required land ownership in order to vote, the governor’s council decided to give the

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<sup>165</sup> Colonies which were land bound were labeled provinces and colonies which were water bound were labeled islands on their great seals, but has been noted earlier, these labels were used as synonyms initially to identify the crown’s sovereignty over a specific geographic regions or territory.

vote to tenants on crown land, a decision that was subsequently ratified by the Nova Scotia assembly (Massicotte *et al.* 2007, 15).<sup>166</sup>

While in 1801, a United Kingdom had been created out of Great Britain and Ireland, and the British identity was extended across the U.K., the catholic-protestant division continued to be marked in each of the three former kingdoms to varying degrees. On Canada's side of the Atlantic, catholic religion, which was thriving in Cape Breton, created a new cleavage between the Island and mainland Nova Scotia.

Catholics in Nova Scotia had been given the right to vote in 1789, which through an act of the legislature overturned a 1757 council ban on voting by "popish recusants" (Miller 1993). Now that Cape Breton had been reunited with the mainland, the first catholic was elected in 1823 and Nova Scotia had to deal with the thorny issue of oaths, something it did by allowing the catholic assemblyman to take only the oath of loyalty to the monarch.<sup>167</sup>

The rapid expansion of the U.S. and shifts in economic influence as the west emerged as new territory for Canada's expansion worked as a counterweight to manufacture a common Nova Scotian identity that could overtake the religious and ethnic divide, though it would never entirely overcome the regional-class cleavage reinforced by Cape Breton's island boundaries. From 1815 to 1838, it is estimated that 39,235 immigrants arrived in Nova Scotia from Britain, of which five percent were English, 56 percent were Scots and 33 percent were Irish.

As noted in the previous two chapters, Robert Baldwin, William Baldwin, and Marshall Spring Bidwell had begun to campaign in earnest for responsible government in Upper Canada as far back as 1828 and had dubbed those who controlled the governor's council in Upper Canada a 'Family Compact', to illustrate the close relationships between council members; and similar agitation was occurring in Lower Canada over their Château Clique. A British parliamentary committee had looked into the demands for reform

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<sup>166</sup> Elsewhere in Nova Scotia, crown land leaseholders would not obtain the right to vote until 1851, some 30 years later.

<sup>167</sup> The Nova Scotia legislature passed an act removing all state oaths in 1827, but this was reserved by the governor for the British government's approval and it rejected it on the ground that it was unconstitutional. The *Roman Catholic Emancipation Act 1829*, passed by the British parliament, removed the requirement for oaths.

emanating from the Canadas in 1828, and based on the questions it raised over the inadequacy of those province's colonial institutions, the colonial secretary took it upon himself to write to the lieutenant-governor of Nova Scotia (and also to the lieutenant-governor of New Brunswick) in 1830, and suggest that it might be advisable to make the governor's council more independent in their respective provinces. Specifically, he proposed that there should be more members who were not government officials and that the puisne judges should be removed. This was not a change the lieutenant governor and his council in Nova Scotia were amenable to making.

By 1835, Joseph Howe, a son of a loyalist and owner and editor of the *Novascotian*<sup>168</sup>, was using his paper to make allegations against Nova Scotia's council. He was charged with seditious libel at the behest of the governor's council after he had published two letters signed 'The People'<sup>169</sup>, condemning the magistrates who ran Halifax and served on the council for accepting bribes, siphoning profits from public institutions and misappropriating over £1,000 of public money a year. For most historians, the trial is seen as "a discourse on the need for a free press" (Adams et Bawtree 2004, 20). But it is also the opening salvo in a campaign for institutional change that has its origins in the ideas being advanced further west in Canada.

Howe was elected to the legislative assembly the following year and popular support for Howe and his campaign for institutional 'reform' saw the emergence of a political party in 'opposition' to ministers entrenched in the governor's council, most of whom did not hold elected office. Thus the 1836 election can be seen as the creation of a partisan cleavage, with the election polarizing into a contest between reformers and those who supported the *status quo*, who came to be known as the Tories. The similarity in labels to those which had emerged in Canada is not coincidental.

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<sup>168</sup> In the interest of full disclosure, my great-great-grand uncle, Angus Morrison Gidney, was editor and publisher of the *Novascotian* and the *Morning Chronicle* during some of this period, and fought alongside Howe in several of these causes (see Hicks 2005, Ch.11). He was also a descendant of United Empire Loyalists, both military and civilian.

<sup>169</sup> They were actually written by his friend, George Thompson.

Elected to the assembly for Halifax, Howe became the *de facto* leader of the reformers.<sup>170</sup> In 1837 he introduced 12 resolutions in the assembly that, if adopted, would have formed an address to the crown requesting either “an Elective Legislative Council” or by such other re-construction of the Local Government, as shall yield satisfaction to the People” (resolution 1). The idea of an elected upper chamber was one he had appropriated from Lower Canada, where Louis-Joseph Papineau had proposed this change in 1834 in his 92 resolutions. At the very least, Howe argued that councillors should not serve for life, as this led to “treating with indifference the wishes of the People, and the representations of the Commons”, but rather at pleasure which is how they are in law appointed (resolution 11). Howe was not proposing responsible government, even though his reference to the house of assembly as the ‘commons’ drew an analogy with the parliament at Westminster.

As with all the other provinces in North America, the council was at regular loggerheads with the elected assembly, as the council was controlled by a few families and business associates, which included the chief justice and the Anglican bishop. Tory minister James B. Uniacke was Howe’s fiercest and most eloquent opponent. When the council threatened to refuse the supply Bill, Howe withdrew his resolutions, but only after they had secured a majority in the assembly and thus could take the form of an address from the house of assembly to the king.

The British government initially refused to separate the governor’s council into a legislative council and an executive council, or to accept the principle that “some members of the popular branch” should sit in the governor’s council (*Despatch* from Glenelg to Campbell, April 30, 1837). Having had a change of heart with respect to separating the governor’s council, given the problems in Nova Scotia and clear public support for Howe’s proposals, the colonial secretary finally agreed to the change with the caveat: “Her majesty’s government must oppose a respectful but at the same time a firm declaration that

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<sup>170</sup> This label of ‘reform’ or ‘reformer’, which emerged in Canada as the label of the opponents to the traditional supporters of the crown and the *status quo*, would later be subsumed by the Grit label (which emerged in England for similar reasons), with ‘tory’ being the label used to identify the crown’s party. The Grit movement is now part of the antecedent claims of the Liberal Party (federal and provincial), though political parties only emerged in Canadian politics in the 19th century and only came to be organized through electoral rules in the 20th.

it is inconsistent with a due advertence to the essential distinctions between a metropolitan and a colonial government and is therefore inadvisable” for an executive council to be accountable to the elected legislature (*Despatch* from Glenelg to Campbell, July 6, 1837). Separate legislative and executive councils ‘yes’; responsible government ‘no’. The *commission* appointing John Lambton, Earl of Durham, as Governor General for each of the provinces in North America would allow for the summoning of the two bodies.

Acting precipitously, the lieutenant-governor, Sir Colin Campbell, went ahead and temporarily appointed many of the same Tory officials, who had previously dominated the provincial government, to the executive council and the legislative council. He subsequently had to adjust their number when he learned of the numbers of councillors permitted under Durham’s *commission*. And some of these appointments had to be altered again when the colonial office objected to them being too blatant. Howe and the reformers would come to refer to these groups of permanent office holders as an ‘Official Compact’, in reference to the ‘Family Compact’ label in Upper Canada.

Durham had been sent to Canada to consider what to do in the wake of the rebellions, and he recommended the establishment of ‘responsible government’, an idea that Howe would quickly embrace and which would move him away from his earlier advocacy of an elected upper chamber. It is noteworthy that Durham visited the maritime provinces during his tenure as governor general as he prepared his report, and he met with Colin Campbell and William Young in Nova Scotia, as well as John Harvey in New Brunswick and Charles Fitzroy in P.E.I., among others.

Howe wrote four letters to the Whig colonial secretary, Lord John Russell, on September 18, 1839, to endorse the spirit of the *Durham Report*, and ask that responsible government be considered for Nova Scotia. The last of these letters advocated an appointed upper chamber, which is a reverse of his earlier suggestion that the upper chamber should be elected. Howe concludes that the defect in the upper chamber would be remedied by responsible government making the executive accountable to the lower chamber with a mandate from the people. An appointed legislative council, with appointments for life, would provide a moderating influence on both the lower chamber and on the executive.

In 1840, the reformers, under Joseph Howe, won a majority in the general election. The lieutenant governor, Sir Colin Campbell, had sided with the official compact from 1836 on, and had found himself in constant conflict with the assembly which even passed a motion asking for his removal. So Charles Edward Poulett Thomson, who would be made Lord Sydenham later that year, travelled to Halifax in his capacity as governor general of British North America to resolve the matter. He proposed, over Campbell's objections, that Joseph Howe become part of the executive council and some of the Tory members of the executive council were removed so membership could be divided between the two now widely recognized political parties.<sup>171</sup> This approximation of a coalition government was not determined by the assembly but rather a governor, trying to make legislative peace.

Howe became speaker of the legislative assembly in the 16th general assembly of Nova Scotia. Three years later, the new lieutenant-governor called a general election and Attorney-General James William Johnstone, a Tory member of the executive council alongside Howe, resigned his seat in the legislative council to run for the assembly. Johnstone was able to win election and become the *de facto* government leader in that chamber, having the support of independent members. Reformer William Young became speaker of the legislative assembly.

The following election, in 1847, was the first to be conducted after adoption of the *Simultaneous Polling Act*, which required that elections be held throughout the province over the course of several days, rather than whenever the government thought advantageous.<sup>172</sup> This election would result in responsible government. Johnstone was unable to win a majority for his favoured candidates and was subjected to a vote of 'no confidence' in the legislative assembly and resigned. The lieutenant-governor then asked

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<sup>171</sup> Those who supported the crown were called Tories, which is an appellation appropriated from England, though these government councillors did not identify themselves as a political party. It is only through the emergence of a reform movement that two political parties could be seen to be contesting elections.

<sup>172</sup> Elections in Nova Scotia, and most Canadian colonies, were held over the course of weeks and not days. This allowed a government to hold elections first in ridings where it knew it could win, in advance of ridings which were seen to be susceptible to influence based on the electoral outcome of neighbouring ridings. In this way it could manufacture momentum towards a majority win. While Nova Scotia was the first to move to reduce, if not eliminate, this practice, it continued to be used in Canada well after Confederation and was instrumental in maintaining Sir John A. Macdonald as Canadian prime minister for the early years.

Uniacke, the former Tory minister who had defended the official compact against Howe's early calls for reform, but who had crossed the floor to run as a reformer, to submit a proposal for a new executive council, in which he was appointed attorney-general.<sup>173</sup> Both Uniacke and Young owed their personal elections to the legislature to the catholic vote on Cape Breton Island.

Nova Scotia is now acknowledged to be the first colony in British empire to obtain responsible government in 1848, though I have argued in the previous chapter that Canada's first experience with responsible government should be its commemorative date. The reason Nova Scotia obtained responsible government when it did was because of the emergence of a partisan cleavage over the issue of institutional change; and the political party that was able to achieve change was the one that had within its membership representatives of different social groups, including both sides of the dominant social cleavage in the province.<sup>174</sup>

## II. New Brunswick

New Brunswick's development towards responsible government provided some unexpected results. The province was given representative government at its creation. But due to a restricted electoral franchise, the legislature was socially homogeneous. The fact that it did not get responsible government until 1854, the second last province to obtain it, was not due to the fact that the province was much more socially divided than Nova Scotia, though it was since its social cleavage was between French or Acadian catholic and British protestant. It was due to the lack of a partisan cleavage. It was only when political parties began to emerge that responsible government had to be conceded by the governor.

New Brunswick was created out of Nova Scotia in 1784 to accommodate the influx of United Empire Loyalists following the American War of Independence and it was given

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<sup>173</sup> Attorney- General, in the provinces, was usually considered the most senior government position and the holder of that office is now seen with the benefit of institutional hindsight to be the 'premier', 'prime' or first minister.

<sup>174</sup> Howe returned to a position of leadership in this party once Uniacke's health began to decline and he is today seen popularly as the person who delivered responsible government to the province.

both an appointed governor's council and an elected assembly, by royal prerogative. The *commission* appointing Thomas Carleton as 'captain-general and governor-in-chief' of this new province authorized the establishment of these two bodies. There was no maximum number set for the council, only that if there were less than nine at any time (including if councillors were to leave the province), the governor could appoint interim councillors, subject to approval by the king, five being required for quorum. The king made the formal appointment of councillors, which meant the colonial office had a veto on appointments. In practice, the number appointed was 12 councillors.<sup>175</sup> In short, the same structure as existed in Nova Scotia was adopted for the province which was created out of its territory. The first council was summoned in 1784 and the first election for the lower chamber, which was referred to generally as the 'assembly', was held in the fall of the next year. The first councillors were appointed by Thomas Carleton and drew heavily from recently arrived New York United Empire Loyalists. The balance was appointed by 1786 when the council began to perform its legislative duties.

The council acted as an executive, legislative and judicial council, just as it did in the predecessor province of Nova Scotia at this time. These were loyalist persons of property. The positions did not carry with them, *ex post facto*, an income, so it is unclear why MacNutt (1965, 51) concludes that the council gave "leading Loyalists, without the benefit of permanent office that yielded an income", gainful employment.

The first speech from the throne occurred in 1786, when Thomas Carleton, now demoted to lieutenant-governor with the arrival in Canada of his brother Guy Carleton, ennobled Lord Dorchester, as governor of all the British provinces.<sup>176</sup> In the speech the

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<sup>175</sup> Subsequent gubernatorial *commissions* and *instructions* would formally fix the maximum at 12, though this number was rarely filled.

<sup>176</sup> Much time and space is wasted in Canada's pre-colonial scholarship on whether or not Guy Carleton was in charge of all of the British colonies, with both English and French scholars trying to trace the emergence of a uniquely Canadian 'governor general' to coincide with the diminution of British control or Canadian authorship of the *Constitution Act, 1867*, and of course English Canadian scholarship seems to take exception to the idea Carleton could govern English Canada from *Palace St. Louis* in Quebec City. There can be no question that Dorchester was made governor of all the provinces. In the British hierarchy, governors had lieutenant-governors who could assume their powers when they were out of province, smaller provinces had this so that a nearby more experienced governor could take over, and this became the norm for Canada (in the

lieutenant-governor tasked the assembly with crafting “a Bill providing for the Election of Members to serve in General Assembly, and for regulating all such elections as well as determining the qualifications of Electors” and with approving land grants (N.B. *Journals*, LC, January 9, 1786). The council he tasked with preparing laws, both civil and criminal, noting that “as the assistance of the Judges will be required in forming or reviewing them, they will of course, I suppose, originate with you” (*ibid.*).

The voting franchise for the first assembly included all white males over 21 years of age who had lived in the province for at least three months, provided they take the oath of allegiance, which resulted in a challenge by the losing candidate in Westmorland alleging that he had been defeated by the Acadian vote (Massicotte *et al.* 2007, 17). The assembly unseated the member elected in Westmorland, replacing him with his opponent, and five years later established one of the most restrictive election laws in British North America, with the requirement for white males over 21 to have £25 of debt free property in the riding (or £50 if voting in a riding in which one did not live) and the taking of three oaths, including the renunciation of the popish religion.

In British North America prior to the conquest of Quebec, it had been standard to require four oaths to be taken in order to hold public office, and these oaths could also be the requirement to vote. These included an oath of allegiance to the king;<sup>177</sup> the oath of supremacy denouncing papal authority;<sup>178</sup> an oath of abjuration repudiating the rights of the

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absence of a governor and lieutenant-governor, a temporary administrator would take over). Lord Dorchester not only had lieutenant-governors for the provinces where he was not present, but he had a lieutenant governor for both Upper and Lower Canada, even though his presence and constant attention in Lower Canada made the role seemingly redundant. It is true that Guy Carleton liked the title ‘governor general’, but this was over ‘captain-general and governor-in-chief’, which was the traditional British title. Many formal titles and styles the British took from the French, like field marshal and its symbols of rank (see Hicks 2002) and it was natural for Carleton to want to use a title that the French colonists in Canada would respect.

<sup>177</sup> The first of these oaths taken and signed by the Chief Justice William Pepperrell and other 13 court officers in Massachusetts circa 1730 reads: “I, A.B., do sincerely promise and swear, that I will be faithful and bear true allegiance to His Majesty King George the Second. So help me God.”

<sup>178</sup> *Ibid.* for supremacy: “I, A.B., do swear that I do from my heart, abhor, detest and abjure as impious and heretical, that damnable doctrine and position, that princes excommunicated, or deprived by the Pope or any authority of the See of Rome, may be deposed or murdered by their subjects, or any other whatsoever; and I do declare that no foreign prince, person, prelate, state or potentate, hath or ought to have any jurisdiction, power, superiority, preeminence or authority, ecclesiastical or spiritual, within the realm of Great Britain. So help me God.”

Stuarts to the Throne,<sup>179</sup> and an oath repudiating transubstantiation.<sup>180</sup> The New Brunswick legislature instituted the requirement that voters take the first three of these oaths and while the most prohibitive to catholics, being the repudiation of the transubstantiation, was not required, the situation in New Brunswick stands in marked contrast to Great Britain, which, in 1778, replaced the three oaths for public office holders with a simplified oath of allegiance so as to no longer prevent catholics from holding office (*Papists Act 1778*).<sup>181</sup>

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<sup>179</sup> *Ibid.* for abjuration: “I, A.B, do truly and sincerely acknowledge, profess, testify and declare in my conscience, before God and the world, that our sovereign lord King *George* the Second, is lawful and rightful King of this realm, and all his other Majesties dominions and countries there-unto belong; and I do solemnly and sincerely declare, that I do believe in my conscience, that the person pretended to be the Prince of *Wales* during the life of the late King *James*, and since his decease pretending to be, and taking upon himself the style and title of King of *England*, by the name of *James* the Third, or of *Scotland*, by the name of *James* the Eighth, or the style and title of King of *Great Britain*, hath not any right or title whatsoever to the Crown of this realm, or any other dominions there-to belonging; and I do renounce, refute and abjure any allegiance or obedience to him. And I do swear, that I will bear faith and true allegiance to His Majesty King *George* the Second, and Him will defend to the utmost of my power against all traitorous conspiracies and attempts whatsoever which shall be made against his Person, Crown, or Dignity; and I will do my utmost endeavor to disclose and make known to His Majesty and his successors, all treasons and traitorous conspiracies which I shall know to be against Him, or any of them; and I do faithfully promise to the utmost of my power to support, maintain and defend the succession of the Crown, against him the said *James*, and all other persons whatsoever; which succession by an Act, intituled, *An Act of the further Limitation of the Crown, and better securing the Rights and Liberties of the Subjects*, is and stands limited to the Princess *Sophia*, Electress and Dutchess Dowager of *Hannover*, and the heirs of her body, being Protestants. And all these things I do plainly and sincerely acknowledge and swear, according to these express words by me spoken, and according to the plain and common sense and understanding of the same words, without any equivocation, mental evasion, or secret reservation whatsoever. And I do make this recognition, acknowledgement, adjuration, renunciation and promise, heartily, willingly and truly, upon the true faith of a Christian. So help me God.”

<sup>180</sup> *Ibid.* for transubstantiation: I, A.B., do solemnly and sincerely in the presence of God, profess, testify and declare, that I do believe that in the sacrament of the Lord’s Supper there is not any transubstantiation of the elements of *bread and wine* into the *body and blood* of Christ, at or after the consecration thereof by any person whatsoever: And that the invocation or adoration of the *Virgin Mary*, or any other Saint, and the sacrifice of the *Mass*, as they are now used in the Church of *Rome*, are superstitious and idolatrous. And I do solemnly and in the presence of God, profess, testify and declare, that I do make this declaration and every part thereof, in the plain and ordinary sense of the words read unto me, as they are commonly understood by *English Protestants*, without any evasion, equivocation or mental reservation whatsoever; and without any dispensation already granted me for this purpose by the *Pope*, or any authority or person whatsoever; or without thinking that I am or can be acquired before God or man, or absolved of this declaration or any part thereof, although the *Pope* or any other person or persons or powers whatsoever should dispense with or annul the same, or declare that it was null and void from the beginning. So help me God.”

<sup>181</sup> The British oath for public office holders read: “I, A.B., do hereby declare, that I do profess the Roman Catholic religion. I, A.B., do swear, that I do abjure, condemn, and detest, as unchristian and impious, the principle that it is lawful to murder, destroy, or any ways injure any person whatsoever, for or under the pretence of being a heretic; and I do declare solemnly before God, that I believe, that no act in itself unjust, immoral, or wicked, can ever be justified or excused by or under pretence or colour, that it was done either for the good of the church, or in obedience to any ecclesiastical power whatsoever. I also declare, that it is not an

The adoption of this requirement is both a holdover from these loyalists' time in the 13 former colonies to the south and a mechanism to exclude Acadians from democratic participation.

Around 15,000 loyalists had settled in New Brunswick and these were mostly former soldiers who were granted land according to their rank, with 100 acres given to privates and 1,000 acres to officers. Just over 60 percent of New Brunswick loyalists came from New York and New Jersey and a small number (13 percent of the total) came from Connecticut, meaning that the settlers of New Brunswick were far more heterogeneous than Nova Scotia and much more socially stratified, given the apportionment of land to military rank. During the late 18th and early 19th centuries, some of the deported Acadians found their way back and joined others who had avoided the deportation by hiding in the woods of the eastern and northern shores, but few Acadians owned property so, even when the mandatory three oaths were eliminated in 1810, there was not an immediate change in representation. Additional immigration waves included Scots, Irish and English immigrants in the early 19th century, including a large influx of Irish to Saint John and Miramichi region, following the potato famine in 1845.

As Campey (2010, 116) illustrates by mapping the 1871 census data, the province has a decided cleavage between the north and the south due to the early loyalist English settlement. While his interest is in the settlement of migrants of English (as opposed to Scottish, Irish and French) origin, this reflects the principle cleavage in the colony and that

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article of the Catholic faith, neither am I thereby required to believe or profess that the pope is infallible, or that I am bound to obey any order in its own nature immoral, though the Pope or any ecclesiastical power should issue or direct such order, but on the contrary, I hold that it would be sinful in me to pay any respect or obedience thereto. I further declare, that I do not believe that any sin whatsoever, committed by me, can be forgiven at the mere will of any Pope, or of my priest, or of any person or persons whatsoever, but that sincere sorrow for past sins, a firm and sincere resolution to avoid future guilt and to atone to God, are previous and indispensable requisites to establish a well-founded expectation of forgiveness, and that any person who receives absolution without these previous requisites, so far from obtaining thereby any remission of his sins, incurs the additional guilt of violating a sacrament; and I do swear that I will defend to the utmost of my power the settlement and arrangement of property in this country, as established by the laws now in being; I do hereby disclaim, disavow and solemnly abjure any intention to subvert the present church establishment for the purpose of substituting a Catholic establishment in its stead; and I do solemnly swear, that I will not exercise any privilege to which I am or may become entitled, to disturb and weaken the Protestant religion and Protestant government in this kingdom. So help me God!"

is between Francophone Acadian communities in the north and the English-speaking communities in the south. This spatial cultural divide continues to dominate New Brunswick's culture, language and politics to this day. Not only were the Acadians isolated through electoral law and by conscious choice in the early years of this province, but the land-to-rank apportionment and strict electoral rules meant that the composition of the assembly was, in terms of representation, drawn from the same socio-economic elites as the council.

The one difference between the council and the assembly was that the assembly included elites from across the province, whereas the council was composed of a more localized elite given its dual role as being a committee of public office holders and the legislative upper chamber. In 1830, the secretary to the colonial office wrote to the acting administrator of the province, in the absence of a lieutenant-governor, suggesting that the council should have more members who are not office holders and that judges should be removed from the council (*Despatch* from Goderich to Black, December 7, 1830). Thus began a series of despatches, with Black taking the position that "persons possessing qualifications highly to recommend them for such a situation are not numerous at present" and that if the judges were removed that it would be sufficient to simply replace their number (*Despatch* from Black to Goderich, March 1, 1831). Judges William Botsford and Ward Chipman tendered their resignation from the council, noting that politicians in the province had instilled in the population a belief that members of the council such as themselves "hold our places in the Council for purposes of private interest in the way of influence and patronage, and that we combine in our persons powers legislative, executive, and judicial in a manner altogether unconstitutional" (*Despatch* from Botsford and Chipman, March 31, 1831).

Lieutenant-Governor Archibald Campbell arrived in the fall of that year, and was instructed to fill the vacancies so as to ensure "the representation of different parts of the Province" (*Despatch* from Goderich to Campbell, October 29, 1831). Of the eleven councillors, five were from Fredericton. Again, despatches concerning the appropriateness of judges serving on the council and the availability of qualified candidates criss-crossed

the Atlantic. Campbell offered the council's argument for its retention in its current form as a means to restrain the impulses of the popular assembly (*Despatch* from Campbell to Goderich, January 16, 1832). He raised the spectre of the council being dominated by merchants, argued that the council's composition had to be such that it could protect the executive from the legislative assembly and he defended the concentration of councillors geographically due to poor transportation and the need to have them close by when the assembly was in session (*ibid.*).

As noted in the previous sections, having dealt with the questions raised by the parliamentary report on the Canadas in 1830, the colonial secretary had written to the lieutenant-governors of both Nova Scotia and New Brunswick to suggest the advisability of making their councils more independent by appointing a greater number who were not government officials. Two years later, a *commission* was issued separating the governor's council into an executive council and a legislative council. In a subsequent despatch to the lieutenant-governor of New Brunswick, the colonial secretary proposed that the separate legislative council "consist of gentlemen independent of, and unconnected with, the Executive Government" (*Despatch* from Goderich to Campbell, May 1, 1832). Having the Anglican bishop on the council served no "practical utility" and while having judges on the council had been important in the early stages of colonial development, it raised doubts about the body's independence.<sup>182</sup> In spite of the colonial secretary's recommendations, six persons carried over to the legislative council from the previous council, including the chief justice and the bishop of Nova Scotia, and four new persons were added.

A delegation from New Brunswick travelled to London in 1836 to ask for the same offer that had been made to the Canadas, namely legislative control of all crown revenues in exchange for a civil list, and reform of the crown lands department (they made no demands for responsible government). The colonial office in London agreed. However, Lieutenant Governor Campbell felt the colonial office was making too many concessions to the assembly, and he used a separate pretext to dissolve the legislature and call an election.

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<sup>182</sup> Where judges are now seen as independent of the crown, the fact that they received a salary from the crown made them the choicest patronage appointments in colonial times.

The election did not bring him an assembly any better disposed to his governing with the executive council, and he resigned.

When John Harvey became lieutenant-governor in 1837, he found a province that was not going through the popular agitation for institutional change that was apparent in other provinces and that Campbell had alluded to in his despatches. While he found an assembly at odds with the council, the reason for this disagreement was because Campbell had supported the one faction of powerful lumber families who had long dominated the governors' council and controlled the patronage of the province, and he had ensconced them and their supporters in the new legislative council.

Where other provinces were having disputes over accountability and financial control, rooted in normative arguments surrounding democracy and constitutional law, that pitted assembly against council, the main dispute over money Bills between the two chambers was over the fact that appropriations Bills (which by law must originate in the lower chamber) did not include salaries for legislative councillors in the upper chamber, and inversely that projects carried out by the government favoured the areas of the province from which the legislative councillors all hailed.

Harvey made a number of reforms as soon as he arrived, including the surrender of crown revenues in exchange for a civil list, thus giving the legislature control over the province's finances. In addition to the leaders of the faction that controlled the council, he appointed to the executive council persons who had the support of the assembly, including Assembly Speaker Charles Simons, and he expanded the legislative council to include people from the elites of communities that had long been excluded. MacNutt (1965) suggests that this makes New Brunswick the first province in Canada to obtain responsible government. Buckner (2000) defends this assertion by pointing out that in England, responsible government had long been understood to be the appointment to the cabinet of leading members from both chambers of parliament who had the capacity to get legislation, particularly money Bills, through their respective chambers and who would, in turn, be accountable to the legislature for the crown's spending of this money. But to be true to responsible government, power has to be vested in the council, and it still rested with the

governor, and the council had to be removable through the loss of confidence of the assembly, and this body was neither. This was simply a governor being advised by a coalition of leading men in the legislature, which is one common step each province and England took on the road to responsible government.

Others suggest that responsible government came to New Brunswick in 1848 with the arrival of Lieutenant-Governor Edmund Walker Head (Gibson 2000). In that year the assembly adopted a resolution endorsing the principle of responsible government. Head appointed leaders of the legislative assembly to the executive council and he arrived with the knowledge that the colonial office's now supported responsible government for the North American provinces. But with no political parties in the province, in practice Head's governmental appointments were no different than Harvey's. Further, he saw all decisions as ultimately his and the council could do nothing without his approval; and he took decisions, including the appointment of a chief judge, in opposition to the advice he received from the executive council.

Not surprisingly the legislative council and assembly continued to be at odds, as the legislature was the battlefield between factions of the elites in the province. In 1850, the assembly adopted a resolution, 26 votes to 5, calling for the legislative council to become elected (N.B. *Journals*, HA, February 1, 1838). Head forwarded this to London as a proposal endorsed by the assembly and added his tacit support, but when the following year he included this idea in the Throne Speech, the legislative council had the opportunity to express an opinion on it and defeated it 10 to 8. In retaliation, the assembly delayed passage of the supply Bill which provided pay for legislative councillors (who in the 19<sup>th</sup> century had begun to receive remuneration). The most that could be said is that Head was more supportive of the faction of lumber barons who controlled the assembly over the faction which controlled the legislative council. Significant change with a singular socio-economic elite controlling both chambers was the last thing the bicameral legislature had an interest in undertaking. The attempt to make the upper chamber elected was simply reflective of the leading faction in the assembly, assuming it could come to dominate both chambers if the same rules of the electoral game were applied to the upper house.

Responsible government arrived in 1854. Charles Fisher, as a member of the executive council, had previously argued that responsible government did not require partisan politics and that New Brunswick, with only 200,000 people, could not sustain partisan divisions. He returned to the legislature at the head of a ‘liberal’ party that organized itself in opposition to the province’s ‘official compact’. Using the reciprocity treaty that was tabled by the executive in the assembly, following the election, Fisher moved an amendment stating “that your Constitutional Advisers have not conducted the Government of the Province in the true spirit of our Colonial Constitution”, and he had a sufficient majority to pass it, 27 to 12 (N.B. *Debates*, HA, October 28, 1854). Fisher was then called upon by Lieutenant-Governor Manners-Sutton to form a new government. This was responsible government in that the leader of the party with a majority in the lower chamber was being asked to form a government. However, Fisher’s aversion to political parties and the homogeneity of membership in both chambers meant that he drew for his cabinet representatives from other factions, most notably the president of the legislative council.<sup>183</sup>

Interestingly, where other provinces saw the appellation ‘reform’ as the early label for opposition to the *status quo* and the elite compacts, which controlled power in their colony, in New Brunswick, the appellation ‘liberal’ emerged as the identifier for persons who advocated change. This is due to the province’s elite’s initial rejection of party politics and its attempt to manage change through coalitions between those who supported and benefited from the *status quo* (conservatives) and those who advocated change (who were characterized as more liberal). Lieutenant-governors Harvey and Heard contributed to this by referring to the addition of persons from opposing factions as adding ‘liberal’ members to the council so as to curry favour with the opposition. Thus, when party politics arrived in New Brunswick, it was not through the emergence of a ‘Reform Party’, as in the other provinces, it was through the emergence of a ‘Liberal Party’.

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<sup>183</sup> The modern conception of responsible party government, whereby the leader of the party which wins a majority forms a government out of his own party members in the legislature, only emerged in New Brunswick, as in other provinces, when partisan politics became firmly entrenched.

Fisher did undertake some reforms. He convinced the Anglican bishop to resign from the council and introduced legislation preventing any person who conducted business with the government from being elected to the assembly or holding a seat in the upper chamber (Wallace 2000).

The assembly expanded the electoral franchise in 1855 to add persons who earned an annual income plus debt free assets of over £100 in addition to persons of at least £35 in property, which continued the tradition of this province having some of the most restrictive electoral rules until well after Confederation (Massicotte *et al.* 2007, 16). As a result, the representatives in the assembly, to which the government was responsible, continued to be persons with property and wealth, and the addition of moneyed persons from the city merely reflected the electoral interests of the partisan party which coalesced around one of the elite factions as a mechanism through which to obtain political power.

New Brunswick, a province governed by the Anglophone economic elite, achieved modest institutional change through a partisan cleavage, but did so much later than Nova Scotia. The leading members of the assembly and the government were familiar with the normative ideas surrounding institutional design that were advanced in other provinces, like Nova Scotia and Canada. They corresponded and met with Howe and Lord Durham. They adopted some and rejected some of the language of reform that had spread through the other provinces. Yet they resisted change because each faction that had influence shared a common goal of keeping other social groups from gaining power. This left them prone to manipulation by governors who could simply use power-sharing between the factions to stall institutional change.

### **III. Prince Edward Island**

Prince Edward Island is unique in that it was able to transform its council from an appointed body into an elected one. It did this by establishing a property qualification for voters, thereby maintaining this chamber's role. Property ownership defined the principle cleavage in the province. It was hypothesized that for change to occur it would have to not significantly alter the social group representation in the institution or the overall structure of

governance and that was the case. As with the other provinces, this change, and the change to responsible government, was driven by a partisan group that had representatives from both sides of the social cleavage.

Britain acquired l'Île Saint-Jean through the *Treaty of Paris* in 1763 and immediately King George was lobbied by the British nobility for the land. For example, John Perceval, Earl of Egmont, asked for the entire island and promised to divide it into 50 sections, 40 of which would be given to men of substance who would become provincial lords and who would be obliged to divide their land into 20 manors of 2,000 acres each and each of these manor lords would be required to further divide the land with a feudal structure of 'rents' (Egmont 1763).<sup>184</sup>

Instead the British government decided to use the land to reward persons who had played a significant role in the Seven Years War. The Island was divided into 64 lots, a list of such deserving individuals was assembled, and a lottery was held.<sup>185</sup> The crown would keep the rights to a five hundred foot belt of land above the high tide mark for the use of the fisheries, one lot for governmental purposes and reserved lands for the clergy to build churches and schools.<sup>186</sup> The British landowners were required to pay for local governance on the island through 'quit rent' (a form of feudal tax that was paid in cash instead of service and goods), and this would go toward the construction of roads and other public works (like jails) and the salaries of officials (like judges).<sup>187</sup> They were also expected to settle one protestant settler for every 110 acres, and the protestant settlers were to come from outside of Great Britain so as not to diminish the protestant majority in the mother country.

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<sup>184</sup> Lord Egmont also committed to building a fortified castle on the island for its defence and for the protection of the settlers. The island would have had forty market towns and four hundred villages under this proposal. After turning down his offer and adopting the lottery instead, Egmont was offered one entire parish, but declined the offer.

<sup>185</sup> Approximately 1.4 million acres were given away in a single day.

<sup>186</sup> The 67 lots that made up PEI were grouped into fourteen parishes (and this in turn was grouped into the three counties of Prince, Queens and Kings).

<sup>187</sup> The more valuable the land the higher the quit rent, at least in theory. In practice, few absentee landowners paid quit rents on their lots. Even if they had been forced to by the British government, the lots left undeveloped were considered less valuable, creating added disincentives to both development and revenue collection on the part of the crown.

The Island of St. John was officially separated from Nova Scotia in 1769, in response to petitions by many of the landlords, and given its own governor, with the first appointee being Walter Patterson, one of the landlords.<sup>188</sup> Patterson was given *instructions* to establish a nominee council with the standard functions of assisting the governor with his executive and judicial functions and an elected assembly which would share legislative authority with the council. As is well known by now, a bicameral legislature, with an elected lower house and appointed upper house was the standard colonial design for the British at this time, and seen as a safe institutional design by the Board of Trade for a colony that was being established by pre-determined land grants to loyal British protestant favourites. Since voting was tied to land ownership and each of the first 64 had been instructed to settle colonists in a feudal tenure system which would prevent even these early settlers, mostly indentured servants, from any aspiration beyond working the land to pay off their transport, governance would remain in the hands of affluent land owners, protestant to a man. Nevertheless, it would take until 1773 for even this ‘safe’ legislative assembly to be summoned.

The main reason for the delay in the governor holding an election for a legislative assembly was that most of the British landowners failed to settle the land. It turns out that land speculation was the intent of a fair number of lottery participants, even if this land had been granted them in return for service in the war. Over one-quarter of all lots changed hands at least one time in the first ten years. It was also difficult to attract settlement, since there were opportunities elsewhere in North America to acquire land with full title.

The handful of lottery winners that did develop their lots ignored the rule concerning migration, with the result being that the largest migration to the Island in its early years, from 1769 to the beginning of the American Revolution in 1775, was Scottish Roman Catholics, followed by English and Scottish protestants. They were brought in groups by the few large landowners who tried to settle and develop their lots, and thus they

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<sup>188</sup> The name of the Island was changed to Prince Edward Island in 1799. An earlier attempt by the assembly to change the name to New Ireland, in its session of 1780, was overturned by the colonial office on the grounds that they intended to establish a New Ireland on the mainland.

were settled in homogeneous cultural and religious communities. Some Acadians had escaped deportation by living in cabins in the woods, but they remained in isolation, and the indigenous Mi'kmaq population was equally marginalized. Clarke (1959, 59) has mapped the early settlement on the Island and it shows approximately 669 Acadians, 1,814 Highland Scots, 310 Lowland Scots and 1,579 others of mainly English extraction (though some of these came by way of other North American colonies).

Scottish Presbyterianism was decidedly anti-catholic and Calvinist puritanical. So the cultural division between Highland and Lowland Scot at this time was intense, as were divisions between Acadians and English, though life on the Island was essentially subsistence living. Most people were bonded to the landowners through an obligation of four years' service in return for their passage and promise of cheap rents. Their communities were isolated and some operated singularly in the French or Gaelic language.

The American Revolution introduced an influx of English-speaking settlers from the 13 colonies of the south, but not in the numbers that the rest of Canada experienced as the feudal system of land tenancy made the island even less attractive to people who had previously migrated to North America with the intention of owning their own land. Of the five hundred Loyalists that came to the island, several hundred left when the landlords refused to honour their commitment to sell these loyalists the land they cleared or when they realized some of the land they were promised was disputed in terms of ownership, with the remainder becoming mostly tradesmen, merchants and professionals (Baldwin 2009, 50).<sup>189</sup> Not reflected in the 1789 census is approximately 10 percent of the Island which was Irish. Many of these came from catholic Southern Ireland via Newfoundland, and while their migration to Newfoundland was initially due to natural migratory 'push-pull' of Irish poverty and new world economic opportunity, Newfoundland adopted the practice of forcibly deporting their unemployed to PEI where there was a need for labour in the winter (O'Grady 2004, 50).

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<sup>189</sup> Much of the land offered turned out to be disputed and some landlords simply had no intention of honouring their commitments.

Patterson's *commission* had called for a council of 12, which was the standard configuration as granted for New Brunswick and Nova Scotia, and designated the first three, including the lieutenant-governor and chief justice. Patterson chose four other persons in September 1770, and notified the British government in a *despatch* that he could not find any more than seven.<sup>190</sup> The governor-in-council, in turn, decided that the elected lower chamber should be comprised of only 18 persons, with all male protestants who were 21 years of age or older on voting day, July 4, 1773. The election was conducted "by taking the voices of the whole people collectively, as belonging to one county, and waiving all kinds of qualifications, except their being Protestants and residents: it is impossible to have any other terms, owing to the unequal distribution of the inhabitants over the Island, and the small number of freeholders there among them" (*Despatch* from Patterson to Dartmouth, February 17, 1773).

The ethnic social groups on the island were distinct and bitterly prejudiced against each other. This is reflected in the accounts of the early elections on the island. As polling was done in Charlottetown until 1787 and ran for several days, the supporters of each candidate would take turns marching to the polling station, usually from a tavern, brandishing signs and singing. Voting in all of the colonies was not done by secret ballot in this era, so voters were often offered rum in exchange for support. The burgeoning gangs of drunken supporters would often degenerate into ethnic or religious brawls when they encountered one another. This was not confined to the 18<sup>th</sup> century. The election of 1847 had two reports that "mobs of Irish and Scottish tenants attacked one another with clubs, fists, and feet. When the electoral officials attempted to assist the victims, they were also beaten. At least three people were killed, and the blood of countless others stained the freshly fallen snow" (Baldwin 2009).

Prince Edward Island was not unique for its ethnic and religious divisions or for its electoral violence, but the poverty and feudal land structure compounded the tension between social groups. Land ownership created a class cleavage that impacted directly on

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<sup>190</sup> The first council comprised: Thomas Desbrisay, Lieutenant-Governor; William Allanbey, Chief Justice; David Higgins; Phillips Callbeck; Thomas Wright; John Russel Spence and Patrick Fergus.

the politics of the Island. Absentee landlords were not only failing to settle and develop their land, they were failing to pay the quick rents, which were also lower on property that was undeveloped. This created an immediate challenge for the council in that it had insufficient funds to pay salaries, let alone undertake public works. Patterson travelled to London to work with the landlords, and while he was not successful in getting them to settle their arrears, a petition signed by the proprietors was submitted to the British cabinet (April 10, 1777) and this resulted in the British parliament allocating £3,000 that year, an amount that became annual, to offset the salaries of the island's officials.

There was tension between the assembly and council in Prince Edward Island, but this was the by-product of its class divisions. P.E.I. is the first province to have political party politics, and that occurred in the 1784 election (MacKinnon 1951). Jack Stewart appropriated the language of the Whigs in England to run with a slate for election to the assembly against Governor Patterson's chosen candidates, by dubbing his opponents the 'Court Party'.<sup>191</sup> His own slate of candidates became known as the 'Country Party', which reflected their base of electoral support among rural voters. The persons elected for the Country Party were drawn from elites, albeit those who were inexperienced or not currently in favour, and Stewart himself was the son of the chief justice. Patterson dissolved the assembly after Stewart was elected speaker. He also began the practice of having the nine councillors who had responsibility for the executive government meeting as an executive council, with the full 12 members meeting as the legislative council.

One could make the case that this initial foray into party politics was agrarian based; it could also be argued that this was nothing more than the cult of personalities, given the small number of elites and the bitter rivalry between Patterson and the chief justice. Stewart went on to draft a report on the failure of proprietors to develop their land in 1792, and this started the escheat movement. The goal of this movement, which was driven by

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<sup>191</sup> For a good examination of the development of English liberal thought and discourse, including the emergence of the Whig Party, see Robbins (Robbins 2004)

elites, was to see land that was undeveloped by absentee landlords taken back by the crown and given to local landlords who would develop and settle the land.<sup>192</sup>

In 1830 William Cooper was elected to the legislature and set about creating the Escheat Party. England had adopted the *Roman Catholic Relief Act* in 1829, ending the barriers to catholics sitting in parliament, and the colonial secretary had instructed each of the colonies to follow suit. Prince Edward Island's *Catholic Emancipation Act* gave the right to vote to Roman Catholics on the Island, and also followed Britain's example and raised the property qualification so the poorest tenants could still not vote. Nevertheless, many catholics received the franchise and the concept of escheat was redefined by Cooper as not a mechanism to replace absentee landlords with new owners, but to enable them to acquire the land on which they had settled or to acquire land in undeveloped lots.

With a political party in the assembly, the issue of reform of the governor's council quickly came up in the assembly. In 1834, the assembly passed a motion asking that the governor's council be formally divided into an executive council and a legislative council. This was refused.

Cooper had been a land agent, though one who had been reportedly sympathetic to tenants, and he campaigned on the need for an escheat court, which would research which landlords had failed to settle tenants or pay their quit rents to the government and seize the land of those in breach for distribution to tenants. In the 1836 election, the Escheat Party won 18 of the 24 seats in the assembly.

In 1838, one year after it had been done in New Brunswick, the British government replaced the governor's council with a separate executive council and legislative council. This was a modest change, in that the executive officers had been meeting separately from the full council, but it had been refused only four years earlier and would open the door for

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<sup>192</sup> Escheat is a common law doctrine that land should not be left in limbo and ownerless. Under feudal land tenure, the unused land would revert upwards to the feudal lord, and ultimately the crown. Escheat was usually used in instances where an individual would die without heirs, in which case the crown would take the land for a year and a day and then it would revert to the lord on whose estates this land was situated. Ultimately, at the top of feudal tenure is the crown itself, and in the case of Prince Edward Island, the land was granted by the crown (though the situation would have been different if Lord Egmont had been granted the entire island as he had originally proposed).

the governor to appoint members of the lower chamber to the executive council and thus try to regain control of the legislature.<sup>193</sup>

That year, the assembly sent Cooper to England to lobby for an escheat court. Both Stewart and Cooper were undone by their respective governors, Patterson in the first instance and Lieutenant-Governor Sir Charles Fitzroy in the second, who through despatches were able to convince the colonial office that these men simply represented “extremely ignorant and illiterate farmers of the poorer classes” (Baldwin 2009). The upper class proprietors who held land in Prince Edward Island had privileged access to the higher echelons of the British government and were able to stop any attempt to alter land title.

George Coles was elected to the assembly in 1842 for the rural constituency of New London as an independent, though he was known to oppose the Escheat Party and voted often as a Tory in his first period in office (Robertson 2000). His criticism of escheat was that it was not practical and that Britain would never agree, but his independence from the Tories, voting against them as he saw fit, resulted in his being seen as part of a growing ‘reform’ movement that desired institutional change over a quick solution to the land question. As a reformer, he was invited by the lieutenant-governor, Sir Henry Huntley, in 1847 to join the executive council.

When the next lieutenant-governor, Sir Donald Campbell, arrived in 1849, Cole found himself at odds with the establishment and resigned from the executive council. That same year, the British government announced it would not be paying for the civic list any longer, as it felt the Island was affluent enough to support its own officials. This became the impetus for the establishment of the Reform Party, which would take up the cause of the reform movements that had arisen in the other colonies, and demand responsible government for Prince Edward Island.

Coles found an ally in Edward Whelan, the editor of the semi-weekly Charlotte Town paper, the *Palladium*. Like Howe of Nova Scotia, Whelan found himself in court for

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<sup>193</sup> The colonial secretary had asked the outgoing lieutenant-governor, Fitzroy, for his recommendation on this matter the year before and, while he had originally opposed this change, this time he lent his support.

libel and, like Howe, for him membership in the assembly was a way of advancing the ideas which he had espoused in print. Whelan was able to swing the Irish tenants behind the more moderate reformers and away from both the Escheat Party and the Tories, and in 1850, “Cole and Whelan’s Reform Party won eighteen of the twenty-four seats in the assembly” (Baldwin 2009). Lieutenant-Governor Sir Alexander Bannerman arrived on the Island the following year with *instructions* to accept responsible government with the Reform Party at the helm, and Cole became the province’s first premier.

So while the class cleavage may have led to the first emergence of party politics in this colony, it was through a political party that could bridge the cleavage that responsible government was achieved. One of the first accomplishments of the now Liberal government was the establishment of a free public school system, which was financed through the levying of taxes on households in each school’s area. Over 150 schools were built, including a dozen for Acadians (Whitcomb 2010).

Reading the Bible was broadly supported as part of the curriculum in the era in question, but when it was proposed that instruction would accompany the reading, the Roman Catholic Church objected to what it saw as the advancement of protestant ideas. In 1855, a new Normal School was opened and the superintendent announced there would be prayers and religious education, and the catholic-protestant divisions were brought to the fore in island politics. The Conservatives were able to use the religious issue to rally the protestant majority and defeat the Liberals in 1858. In the end, as Whitcomb (2010) reports, the only solution on the education question that was acceptable to both religious communities, protestant and catholic, was a return to the *status quo*.

While religious divisions were significant, the primary cleavage in the province was class, and the land question dominated the politics of the island for most of its history and would only be resolved after Confederation. In fact, it was the reason Prince Edward Island did not join Confederation in 1867 and would be the reason it did join in 1873.<sup>194</sup>

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<sup>194</sup> In 1867, the provincial government had asked that Canada provide funding so it could purchase land from absentee landlords, but the Canadian government was unwilling to sweeten its offer. The construction of a railway that was unsupportable by the provincial government would provide the urgency for union, and the

While propelled into office by the religious education issue, the Conservatives claimed that they could solve the land question, given their capacity to bridge the divide between wealthy landowners and tenants. They opposed the reform of responsible government that the Liberals had obtained, and under their leader, Edward Palmer, they proposed a move to “non-departmentalism” which excluded paid officials from serving in either the assembly or the legislative council (Whitcomb 2010). This was within Palmer’s constitutional purview, and while it was opposed by the lieutenant-governor and a number of members of his own party, this experiment in limited responsible government where only the premier was responsible to the legislature for every department of government ran until 1864, whereupon it was quietly discarded.

This change is significant for our study of the legislative council in that it reduced the incentive for people to serve in either chamber. It was also the first in a reform initiative which was informed by the move in the province of Canada to an elected upper chamber which began in 1856. The first change was that the assembly was to be increased to four dual member constituencies in each county from three, something easily accomplished that year as redistribution in the lower chamber was accepted to be the purview of that chamber, even if the legislation had to go through both legislative chambers and receive royal assent.<sup>195</sup> This act put a property qualification on candidates, that they own property worth at least £50, and restated the franchise that to vote one need only be a male over the age of 21 in possession of property worth at least 40s in the riding for at least 12 months.<sup>196</sup>

The change proposed for the upper chamber was to make this chamber elective, with half the number of councillors as assemblymen, specifically six dual-member districts with an additional councillor from Charlottetown, and they would be elected for fixed terms

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Canadian offer would be sufficient to set the stage for the acquisition and distribution of this undeveloped property.

<sup>195</sup> *An Act to increase the number of Members to serve in the General Assembly and to consolidate and amend the Laws relating to Elections, 1856.*

<sup>196</sup> You could cast ballots in more than one riding, providing you met the property qualification, and the property could be co-tenancy, so male children could vote, provided the value of the property subdivided met the minimum threshold of 40s.

of eight years, staggered so half the councillors were elected every four years (*Despatch* from Dundas to Newcastle, July 22, 1861). To serve as a councillor one would have to be at least 30 years of age and possess at least £600 of land in the district in which one was elected. The change would be grandfathered so as not to impact on the current councillors.

The response of the British government to the proposal was: (i) the proposed change had been done in Canada and elsewhere so was constitutionally sound;<sup>197</sup> (ii) the fixed terms and staggered election would preserve the role of the chamber as a check on “any popular or governmental influence”; (iii) the current councillors could be immediately removed as they had only been given the trust of the crown which could be withdrawn; and (iv) electors should be the holders of property rather than the councillors, as an upper chamber is to “represent not only the settled principles, and what on a large scale is called the traditionary policy of the country, but also, to a certain extent, its property, experience and education” (*Despatch* from Newcastle to Dundas, February 4, 1862). In support of this last point, the colonial secretary wrote:

“Speaking broadly, a well chosen constituency will choose a good representative, and any limitation upon its choice can only operate by occasionally preventing them from choosing the best. An ill-chosen constituency, on the contrary, will tend to choose an indifferent representative. But this tendency will not be controlled by any property qualification, which can never be so stringent as to prevent their finding within the prescribed limits some man as they may desire” (*ibid.*).

The *despatch* from the colonial secretary was laid before each chamber, and the assembly reworked its Bill to reflect his input, setting the property qualification to vote for a councillor at £100 of property, councillors would have to be at least 30 years and resident in the province for five years. Whelan was the strongest opponent of the legislation, and tried to delay consideration (*P.E.I. Journals*, HA, April 3, 1862). This is not surprising as his political career had been launched by the Irish tenants, in opposition to the property owners. For his part, Coles attempted unsuccessfully to lower the property qualification to £50 and reduce the residency requirement for councillors to three years (*ibid.*). As he had

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<sup>197</sup> In addition to Canada, it had been done in Victoria, South Australia and Tasmania.

won election from this broader constituency, his motives were, undoubtedly, partisan. And the legislative council, for its part, sought to delay the coming into force of the legislation (P.E.I. *Journals*, LC, April 11, 1862). This was simply self-preservation, though they knew the writing was on the wall and the despatch from the colonial secretary had removed any normative claims they could make based on bicameral theory. The disagreement between the two chambers was resolved through several conferences, and the Bill was given royal assent (P.E.I. *Journals*, HA, April 17, 1862).<sup>198</sup> Thus Prince Edward Island had two elected chambers when it joined Confederation in 1873.

The idea of this change came from the province of Canada. Support for this change crossed party lines, and was close to unanimous, with opposition interestingly enough coming from the leadership of both parties. The resulting change preserved the social cleavage in Prince Edward Island society that the earlier council configuration had originally reflected, with the propertied class and tenants each having a chamber to represent their interest.

#### **IV. Newfoundland**

Newfoundland was a province equally divided between catholics and protestants. It was only able to get representative government in 1832 when the demand for an elected lower chamber was no longer a demand of a single social group, the Irish catholics, but instead driven by a partisan movement in support of reform that included protestant merchants and catholic leaders. This group had emerged when the issue of tax in support of local government had created a partisan cleavage. This would be a temporary alliance and the province would revert to its social division as its social and partisan cleavages returned to being aligned.

Newfoundland would be the last province to obtain responsible government in 1855, and this would only occur after a partisan group emerged that had representatives from both sides of the social cleavage. The government's solution to the social divide would be to

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<sup>198</sup> The legislation was entitled *An Act to change the Constitution of the Legislative Council, by rendering the same Elective*.

double all government positions and services so catholics and protestants were equally represented and equally served at every level of government. This would be financially crippling for a province with limited capacity to raise revenue due to the province's reliance on seasonal fisheries and, in 1933, the government would be placed in a form of receivership by the British, which would manage the province's affairs through a commission until it joined Canada in 1949.

In 1634, King Charles I by Royal Charter established admiralty law for the fishing fleets that were by then regularly visiting the West Coast of Newfoundland (the text of the 'Western Charter' can be found in Matthews 1975). Five years later, by letters patent, the "whole Continent Island or Region commonly called Newfoundland" was granted to four men – the Marquis of Hamilton, the Earl of Pembroke and Montgomery, the Earl of Holland and Sir David Kirke – who were created as the Company of Adventurers to Newfoundland.<sup>199</sup> This was a grant for the purposes of economic exploitation of the abundant fisheries found around this island, rather than for colonization or settlement, and the island was ruled by proprietary governors until 1728, at which point military governors were appointed instead.

Under both proprietary and military governors there was a concerted effort to limit the local population, and the seasonal workers were mostly Irish fishermen brought in via fishing fleets, so 'justice' continued to be administered pursuant to the 'Western Charter' by fishing admirals (Bannister 1997).<sup>200</sup> Codified in the *King William's Act 1699*, this was designed to ensure that new fishermen were brought from the British Isles each year, and to advantage those fishermen over any local inhabitants. This laid the groundwork for naval governorship of the island.

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<sup>199</sup> Sir David Kirke was the driving force behind this company. In 1629, he had led an expedition that forced the surrender of Quebec where he remained until it was restored to the French in 1632. Kirke was knighted that year and his plans for Newfoundland, which he had seen during his expeditions, were approved two years later.

<sup>200</sup> The fishing 'admirals' were the captains of the fishing, and sometimes naval, ships, with the admiral being the captain of the first ship which arrived in the harbour during the season (the vice-admiral the captain of the second ship, etc.).

The first military governor was Captain Harry Osborne of the H.M.S. Squirrel, and along with his *commission* came *instructions* for the appointment of a sheriff and a justice of the peace (Page 1860, 18). The military presence steadily increased due to competing interests over this land, by first the Spanish and then the French, who in the mid-1700s began establishing small settlements, placing this territory from the French king's perspective under the governor of New France. Most of the French claims to Terre-Neuve were abandoned by the *Treaty of Paris* (1763), though fishing rights in this area and the right to come ashore to collect lumber were central points of conflict. The treaties that settled these conflicts between the French and English were the *Treaty of Utrecht* (1713), through *The Paris Peace Treaty* (1783) and the *Treaty of Paris* (1814) up to the Anglo-French 'Entente cordiale' of 1904, whereupon the last French governed area on the island, the so-called 'French shore', was ceded to Newfoundland.

While it was normal in settler colonies for government to be created and altered through royal prerogative, the British parliament became involved with Newfoundland due to problems with the administration of justice on the Island, and a court of common pleas was established by statute in 1789, followed by a civil court in 1791.<sup>201</sup> Along with this more formal legal system, limited education was introduced in 1803 when sundry schools were established in some communities (Page 1860, 22). Nevertheless, the British government's policy towards Newfoundland continued until the beginning of the 19th century to be that of discouraging settlement.

Keith (1928, 8) uses the coincidence of the British government policy of discouraging local settlement and the lack of local representative government in Newfoundland to support his thesis that representative institutions were a policy mechanism of the imperial government to encourage settlement. However, little was known about Newfoundland at the office of the colonial secretary in London, falling as it did under the navy, and so no active steps were taken by the colonial office to grant local

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<sup>201</sup> The challenges posed by custom and admiralty law, and reforming the diverse legal process at the local level, is reviewed more fully by the Law Reform Commission of Newfoundland (1989).

institutions of governance as had become the practice in other British North American provinces (Page 1860, 25).

Under British colonial policy and the terms of the original grant, Newfoundland was founded as a 'plantation', so the level of interest in this territory was commensurate with the amount of produce and profit it generated for the mother country. Furthermore, there was a strategic advantage to discouraging local development, as British fishermen would frequently be drafted into the royal navy during times of war. It is only with the *Treaty of Paris* (1814) and the ultimate end of the Napoleonic Wars that the British felt confident that hostilities with the French and the Americans had sufficiently ended to permit the colony to be transferred from military governance under the royal navy to civilian governance. In 1819, the British government authorized the granting of a great seal for use in the administration of the colony and reference to this seal and to the appointment of an attorney-general can be found in a *royal warrant* issued in 1820 (Swan 1977, 87), all evidence that the British fully intended to transfer government into civilian hands. In 1824, key vestiges of naval law were replaced with British common law (*Fisheries, Judicature and Marriage Acts*) and the *Judicature Act* abolished the surrogate courts (Commission 1989, 25-35).

In 1825, a *royal charter* was issued to the colony placing it firmly under the colonial office and a new great seal was issued on September 1, 1827 (Swan 1977, 87). The first civilian governor was Sir Thomas Cochrane and his *commission* established a governor's council, composed of the chief justice, two assistant judges and the commander of the army garrison.

Page (1860, 26) suggests that the emergence of local institutions of governance in the province was the result of a civilian governor being appointed who could advocate on behalf of the residents, something he claims occurred with Cochrane's appointment. It is true that Cochrane was an advocate of catholic emancipation and established the first governor's council. He even proposed three catholics to sit on the council (*Despatch* from Cochrane to Bathurst, October 11, 1829). He also proposed that the oaths be eliminated, as had been done for Quebec. But he opposed representative government. So the

establishment of the governor's council was not the result of his advocacy, but reflects British policy and while this policy should have seen the establishment of an elected lower chamber as well, the divisions in the province between catholic and protestant, exacerbated by poverty, would delay the creation of this body until 1832.

The British colonial secretary had rejected Cochrane's proposal of including catholics on his first council, but in 1829, the *Roman Catholic Relief Act* eliminated the final prohibition on catholics serving in the British parliament. Having spent time in the province, his initial generosity towards catholics had soured. He made no moves to appoint catholics to the council. When the British law officers informed him that the elimination of the oaths did not apply to colonies, he was reportedly heavy handed with catholics who organized a meeting on the question (Greene 1999). Nevertheless, the meeting succeeded in passing resolutions to petition the British parliament and Patrick Morris was chosen at a subsequent meeting to take the resolutions to London; where in 1830 the emancipation was extended to Newfoundland.

In Newfoundland, local histories all make reference to the agitation for reform that came from religious minority communities, such as the Irish catholics, the emergence of a local free press and the outspoken leaders, such as William Carson and Patrick Morris, leading the crusade (Project 2000, civil). Certainly agitation for representative institutions came originally from the Irish catholic settlers. But their demands were ignored.

When the governor's council imposed a tax, a partisan issue emerged that crossed the province's social cleavage. The protestant merchant class teamed up with catholic reformers to demand a representative assembly. That this was seen as a bi-social (catholic and protestant) movement in support of institutional reform is reflected in the way the debate was framed in the local media and in the British parliamentary debates (see Project 2000). Finally, in 1832, an additional elected assembly was created by royal prerogative, which was to consist of 15 members, and catholics were free to vote and to hold office.

Newfoundland and Labrador had a population of about 19,000 at the start of the 19th century. The largest concentrations were at Conception Bay and St. John's and in these communities the Irish were in the majority. With the Napoleonic Wars raging in

Europe from 1803 to 1815, the colony had an almost total monopoly of the international salt fish trade, England having been cut off from Europe.<sup>202</sup> This created a pull factor in immigration, as the island had the capacity to absorb a great number of immigrants. The push factors of poor harvests, the failure of local industries, and overpopulation combined with the well-established shipping routes to and from ports in England and Ireland, resulted in the population swelling, reaching approximately 220,000 people living in more than 1,000 settlements scattered across the island by the end of the century. Throughout this growth there were three large identifiable groups: Anglicans, Methodists and Roman Catholics.

The population of Newfoundland quadrupled from 19,000 in 1803 to 75,000 in 1836. However, the division between protestants and catholics, who were also English and Irish, respectively, in terms of birth or descent, remained equally balanced in terms of total population (Mannion et Handcock 1993). English settlers dispersed across Newfoundland and Labrador, whereas most Irish immigrants settled at Conception Bay and St. John's on the Avalon Peninsula. There were of course other ethnic groups, but the predominant cleavage was Irish catholic/English protestant.

There had been local unrest and demands for reform as far back as the era of proprietor governors, and the other British colonies in Atlantic Canada had all received representative government by this time. Newfoundland was denied the institutions granted to other colonies in the first instance because responsibility for this island rested for so long with the navy and thus was out of the influence of the colonial office where various models for colonial institutional design were being advanced. However this was remedied in advance of large waves of settlement. So the delays rest on the colonial side.

The initial foray into representative government was not entirely successful and the reformers in the assembly found themselves at constant odds with Governor Cochrane. So two years later, in 1834, the council and assembly were amalgamated so as to lessen the legislative influence of some of the elected assemblymen by the addition of appointed

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<sup>202</sup> Fish exports doubled during this period.

members of the council. This was equally unworkable, and the assembly and council were separated again in 1847.

In 1855, Newfoundland became the last to achieve responsible government. As with the other Canadian provinces, this was achieved by a Reform Party that was able to muster support across the social cleavage. At the behest of the reformers, the assembly had passed a resolution asking for responsible government in 1851, but the colonial secretary rejected the proposal on the grounds that the colony was too socially divided, and lacked economic and political capacity.

Philip Little led the Reform Party to a majority in the 1853 election, having received the endorsement for responsible government from the catholic bishop, and making inroads into the protestant community by championing funding for Methodist schools (Higgins 2009). Little was sent to London to plead the case with the colonial secretary, and the British government agreed on the condition that the assembly be increased in size.

The Reform Party remained in power until 1861, when the governor dismissed them and installed the Conservatives, who were then able to win a majority in the election which divided catholics and protestants. The newly elected Conservative premier Frederic Carter tried to bridge the social cleavage by “instituting a system whereby seats in the Assembly, Executive Council positions, government offices, judicial appointments and public monies were shared between the major denominations - Roman Catholic, Anglican and Methodist - on a proportional basis” (Webb 2001). The principle was extended to education, in 1874, the government dividing its grant for education between the three churches. While criticized as inefficient and wasteful, the compromise prevented sectarian warfare.

Under the *letters patent* of March 28, 1876, the legislative council was to consist of members nominated and appointed by the king. Up to 15 members could be provisionally appointed by the governor, though the appointment would need to be subsequently confirmed by the king. Every member served at pleasure.

Newfoundland's failure to enter Confederation with Canada was also affected by its principle cleavage. Catholics were decidedly opposed to union, though the Confederate

and Anti-Confederate parties (which temporarily replaced the Conservatives and Liberals as they had come to be known) each enjoyed protestant and catholic support.

In the 16th Assembly, provision was made whereby money Bills had to originate in the Assembly wherein it claimed sole right to enact such legislation and argued that such bills ought not to be changed by the legislative council. In 1917, the *Legislature Act* was adopted whereby a money Bill sent up to the legislative council one month before the end of a session that is not adopted by the council or any money Bill sent up in three consecutive sessions and not passed in the same form by the council could be given royal assent without the council's concurrence. This limitation on the council's authority was based on the *British Parliament Act 1911*, which similarly limited the house of lords capacity to block money Bills. As will be seen in Chapter 9, the idea of suspensive veto made its way into the Canadian provinces as well.

In 1933, the council and assembly were suspended because of the province's lack of financial capacity, and the government was placed under a British royal commission, composed of the governor, three commissioners from Newfoundland and three from the United Kingdom. It remained so administered until 1949, when Newfoundlanders voted in a referendum to join Canada as a way of settling its debt and restoring responsible government.

## V. Conclusion

The dates that institutional change began to be demanded and was achieved is contained in Table 6.1. The date that responsible government first appeared is used here as we were interested not in what the British governors were willing to concede but what groups were able to obtain and whether or not this was obtained in the first instance by a partisan group or a social group. In each province in each case, the change was obtained by a partisan group. The ideas for specific institutional reform came from neighbouring Canada. It was there that the idea of responsible government first emerged and that the idea of an elected chamber was first demanded and actually achieved. Only Prince Edward

Island changed its upper chamber to an elected body and it did this by preserving the representational role of this chamber.

Table 6.1: Dates of Institutional Change in British Provinces

	<b>Appointed Council Established</b>	<b>Elected Lower Chamber Added</b>	<b>Demand for Responsible Government</b>	<b>Demand for Council to be Elected</b>	<b>Responsible Government First Appears</b>	<b>Responsible Government Suspended</b>	<b>Council Elected</b>
Canada	1663/1763	1791	1828	1834	1842	1843-1848	1856
N.S.	1719	1758	1837	1837	1848	N/A	N/A
N.B.	1784	1785	1848	1840	1854	N/A	N/A
P.E.I.	1770	1773	1849	1856	1851	1858-1864	1862
Nfld.	1827	1832	1851	N/A	1855	1933-1949	N/A

The evidence from the Atlantic British provinces, as with the province of Canada, shows that partisan cleavages drive institutional change. Partisan groups will be successful in achieving their preferred changes to institutions if they can bridge the dominant social cleavage. Shifts in group identity and thus in the cleavage itself can be a precursor to change. These two factors explain Nova Scotia's relatively rapid slide down the evolutionary trajectory. At the other end, Newfoundland stalled repeatedly along the institutional trajectory while waiting for a cross-social consensus in favour of institutional change.

It has long been argued that the rise in importance of the lower chamber to dominance over the executive was due to the legitimacy conferred on this body by election. But this was an era where bicameral theory still included restraint on the temporary impulses of the lower chamber and of government officials. The shift to responsible government which made the government accountable to the lower chamber was as much about the capacity of that chamber to claim to represent multiple social groups, which provided its own legitimacy over the legislative councils that were seen as representing very limited interests.

The developments in these provinces stands in contrast to what Cox (1987) found with respect to the United Kingdom. There he saw the changes to the franchise brought

about by the *Reform Act(s)* as leading to the rise in importance of political parties given the need to fight wider and more competitive elections. Political parties and national campaigns required party discipline, which in turn created a party leadership centred in the commons, which inevitably led to government being responsible to the lower chamber. In England, political parties had existed in the form of Whigs and Tories since the time of the Stuarts and both the commons and lords were divided along party lines. The *Reform Act(s)* transformed the lower chamber from an offshoot of the house of lords to a body which reflected the *other* side of England's dominant social cleavage, that of class. In contrast, the electoral franchise in Canada's provinces was already as wide as that in Britain after the *Reform Act(s)*. The emergence of political parties was the result of a desire to bring about institutional change. The ascendancy of the lower chamber was due to the normative claim of legitimacy through election, the capacity of this chamber to channel the interests of multiple societal groups into political parties and to raise taxes from the growing merchant class.

This evidence is also in contrast to what Lipset and Rokkan (1967) found with respect to political parties. They concluded in their examination of the emergence of political parties in Western Europe that an 'opposition' party to the establishment would emerge from the 'out' group as defined by the country's dominant social cleavage. But this occurred only in Newfoundland where social groups divided along party lines, with the Reform Party being supported by Catholics and the Tory party being supported by Protestants. In Prince Edward Island the cleavage over property ownership and class resulted in the emergence of a political party, the Escheat Party, and this party did not last. In all provinces, Reform or Liberal parties emerged as the 'opposition' parties with the primary purpose of achieving institutional change.

Political parties are at their core coalitions, in so far as people rarely share identical policy goals. The choice of who to include in the coalition is the result of the prejudices and diplomatic skills of its leadership. The evidence from these British provinces is the bigger the change, the broader the coalition – with formal institutions of representation requiring the bridging of the society's social cleavage so as to maintain social harmony and

build cross group trust. Once created, a political party must continue to operate within the institution of governance that it has helped to shape and which helped to define its initial approach to coalition formation. Parties become shifting coalitions of social groups with different electoral systems changing the incentives by which the leadership of a political party must adjust to changes in the cleavage, shifting group identities and partisan objectives.

## Chapter 7: Confederation as Institutional Change

This chapter examines Confederation in 1867 and the resultant creation of a Canadian upper chamber, named the 'senate', the abolition of the upper chamber in Ontario and its retention for Quebec. The expectation is that there are not one but two dominant cleavages in a polity, one social (based on identity markers such as culture, language, religion and class) and one partisan (based on ideology, in this era party identification or shared policy interest). It is posited that thinking of political behaviour as being both social and partisan offers a fertile insight into the choices actors make.

Our hypothesis is that while a social group may advocate change, a social cleavage will inevitably lead to the other group resisting change. What has been found so far in the research for this dissertation project is that change is achieved by a partisan group that can bridge the social cleavage by having, among its legislative membership, leaders of both sides of the social cleavage.

The institutional arrangements adopted at Confederation were based on the institutions that had been in place in the united province of Canada prior to Confederation, though the creation of a federation was a departure from the traditional British approach which was unitary. At this time, the united province of Canada had a social cleavage between the French in the East and the English in the West. One of the reasons it is preferable to examine partisan politics in this era via the cleavage is because candidates ran for office under different labels in each half of the province and alliances often shifted between issues and with elections. Nevertheless, there had been a clear partisan cleavage in the province of Canada and that was over government formation after the adoption of responsible government, with a governing party and an opposition emerging. The governing party had given itself the label Liberal-Conservative and it repeatedly made claims to being non-partisan, but this was strategic. It was a partisan vehicle to achieve the policy goals of the members of the executive council or the cabinet at the time. The person who most effectively made these claims was Sir John A. Macdonald, who would emerge as the leader of this party and become Canada's first prime minister.

Eventually the social divide between East and West resulted in the governing Liberal-Conservative Party winning the most seats in the East and the opposition winning the most seats in the West. As resentment over policy heightened the tension, the number one priority became institutional reform. As it had in the battle for responsible government, this emerged to define the social cleavage. The result was a new alliance between the leadership of what had been the majority party in the West, the Liberals/Clear Grits, and the Liberal-Conservatives which was dominant in the East. It called itself the 'Great Coalition' but this again was strategic. This was a new government party on one side of a partisan cleavage that had been created with the goal of achieving institutional change. It was just as solid and temporary as any previous government had been in this era.

The Confederation deal was negotiated in the cabinet. It was then sold to the other provinces and championed by this government in the legislature and in the province. It was also opposed in both halves of the province. In the West it was opposed by English Clear Grit politicians on the grounds that it did not create a unicameral legislature with representation by population, of which the West had the larger population. In the East it was opposed by French 'Rouges' politicians because, with the addition of 24 members of the upper chamber from the Maritime provinces, they felt their province should have their province's representation in that chamber increased.

In New Brunswick and Nova Scotia, the Confederation deal once agreed to by their respective governments would equally come to shift their partisan cleavages from being defined by provincial government formation to a battle over Confederation, with Pro- and Anti-Confederation parties emerging. It would take several elections after Confederation before the partisan cleavages in these provinces returned to a battle between the provincial government and an opposition. This would later occur in Prince Edward Island and Newfoundland, as well, when their governments decided to join the federation. These two provinces would not join Confederation at the time due to their strong social cleavages, with tenants opposing Confederation in P.E.I. and Catholics doing the same in Newfoundland.

This chapter is divided into four parts. In the first part, the Confederation negotiations and the resulting deal with a federal union under a bicameral parliament with an appointed upper chamber will be examined. In the second section the details of the Senate are reviewed, and the impact of the *Constitution Act, 1867* on the provincial legislative councils are considered. In the third part, how the cleavages shifted in Canada following Confederation are discussed, as this sets the stage for the following chapter. In the final section, the few changes that have been made to the Senate since are reported.

## I. Bridging the Social Cleavage

Federal systems allow for political power to be separated between two levels of government. Thus different groups can be joined without surrendering their local identity and self-determination to the larger whole. Alternately to union, as was the case for the province of Canada, a society can be divided geographically by social groups (what the Fathers of Confederation called ‘sectional interests’), and responsibility for matters that impact on the social can be assigned to the local political jurisdiction, while allowing matters of common interest to be managed collectively.

In the struggle for responsible government, the notion of separating matters that were ‘local’ from ‘imperial’ had been central to the debate. Additionally, the United States had created a federal system and, while it was going through a civil war at the time, it offered a model from which to work.

The idea of distinguishing what was ‘local’ from ‘provincial’ had already begun in the province of Canada during the two decades of considering how to reconcile legislation that had previously been adopted in Lower Canada and Upper Canada. So it was not much of a transition to begin separating ‘local’ from ‘national’, to use the language of the era, what later comes to be called provincial and federal.

In the province of Canada, social group conflict emerged over legislative politics when (i) legislation had to do with the ‘racial’ (what we would now call cultural) identity of one group and (ii) when a majority of legislators on the ‘other’ side of the social cleavage

would impose legislation that was seen to be threatening to the identity of the opposing half.

The institutional model adopted for the new federation of Canada was a modification of the arrangements at the time of the union of the two provinces. It uses the Westminster bicameral model of responsible government. The decision to make the upper chamber elected in 1856 in the province of Canada was reversed. While it had been an elected chamber, the members of this chamber ran in one of 24 districts in each half of the province, and this number of 24 for each half (which returned to being separate provinces) was maintained for the appointed upper chamber for both Ontario and Quebec, with the additional requirement that members appointed for Quebec would each have to own property in a different district using these boundaries. The same would be true for the upper chamber in Quebec's provincial legislature. This was to ensure that the English in Quebec had representation both provincially and federally. This reflects the restraint on change exerted by members of a social group trying to protect their relative influence in a new political structure.

The belief among legislators from Upper Canada was that most things would be federal. In the final deal on what would be left to the provinces, they *believed* that they had limited the number of 'local' matters assigned to the province, in order to prevent the federal-provincial tension that had led to the U.S. civil war. As education and health care were still largely private, the state's role was seen as regulatory, just as it was for private property. To the French legislators from Lower Canada, these were matters central to social identity. To both the French and English members of the cabinet, the key to their goal of nation building was the power to tax, to borrow money, to sell crown lands, to exploit resources and to build an intercontinental transportation system, and these were to be federal jurisdiction.

The restraint on wholesale change was due to the social cleavage in the province of Canada exerted by the French members of the legislature, as the deal was negotiated first among the ministers in the government. If John A. Macdonald and George Brown would have had their way they would have established a unitary and not a federal system for the

entire country. Brown, additionally, saw the upper chamber as an unnecessary conservative restraint on popular will. Ontario, thus, would start Confederation without a second chamber. Influential members of its upper chamber would be simply transferred to the federal senate. Similarly members of the upper chamber from Nova Scotia and New Brunswick would be offered seats in the senate. It would be up to provincial legislatures whether or not to abolish the second chamber at the provincial level.

The temporary realignment of party politics under the label ‘Great Coalition’ created a single group that had as its partisan objective the federating of the British provinces of North America and the settlement of North-West Territories. Within that partisan group were the political leaders of both sides of the social cleavage, most notably Brown and Macdonald for the English in the West, George-Étienne Cartier and Étienne-Pascal Taché for the French in the East, and Alexander Galt for the English minority in the East. At the cabinet table these representatives could act for their sectional interests and then, more importantly, they could sell the deal to their respective social groups.

### **Negotiating Confederation**

Following *The Union Act, 1840*, the Baldwin-La Fontaine coalition of Reformers had been able to bridge the English-French West-East cleavage. This was succeeded by Macdonald and Cartier putting together the Liberal-Conservative Party, which was a union of the Francophone ‘Bleus’ of Canada East and Anglophone Tories, Conservatives and moderate Reformers from both halves. As this was the first government in the era of responsible government, it defined the new emerging partisan cleavage in the province, with ‘Rouges’ running against this party in Canada East and the Clear Grits and Reformers running against them in Canada West.

While a partisan cleavage was emerging through the new electoral dynamics created by responsible government, the new social cleavage of the province was having a direct impact on provincial politics within the legislature. At the time of union both Upper Canada and Lower Canada had their own laws, including a different legal system; and they had unique institutions, which were faith-based in Roman Catholicism in the East and

Anglicanism in the West. So while the province was united under one legislature, that legislature had to routinely pass laws that impacted on only one-half of the province. This meant that a majority of legislators from Upper Canada could impose a law on Lower Canada over the objections of the majority of legislators from Lower Canada, and *vice versa*. This was an era where liberal values had found followers, as they had with the Whigs in the United Kingdom, so policies like public education became driven ideologically in opposition to certain social groups' religious beliefs. Laws concerning education, such as the establishment of sectarian schools in the East or catholic schools in the West, or land tenure, given the seigneurial system of Quebec, were thus divisive.

It is thus not surprising that different ideas for institutional change were frequently advanced by party factions in the legislative assembly of the province of Canada almost as soon as union occurred. In Canada East, the Rouges tried to revive the reform agenda of the Parti patriote as advanced by Papineau.<sup>203</sup> As these American ideas had little support in other factions, this party abandoned these policies under the leadership of Antoine-Aimé Dorion, who in 1856 proposed that the province be transformed into a small federation, where local matters would be decided by the sectional majority for each half of the province and matters of interest to the whole province would be handled by a general parliament, which could have representation by population (Riendeau 2000, 133).

In Canada West, the Clear Grits had begun advocating representation by population as soon as the census of 1851-52 showed the population of Upper Canada was larger than that of Lower Canada (Careless 1967). Their early reform agenda, like the Rouges in Canada East, was rooted in Jeffersonian democracy as filtered through the positions taken by William Lyon Mackenzie. Reformer George Brown in 1856 began to argue in his paper, the *Globe*, that the lands under the control of the Hudson Bay Company should be annexed by Canada, and he called for the reunification of the reform movement behind this cause. In 1857, he brought together 150 Reformers, Clear Grits and Liberals to adopt a united Liberal Reform platform, which in addition to annexation of the North-West, called

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<sup>203</sup> This led them to (counter intuitively) align with Montreal's English-speaking business elite in support of a 'manifesto' in 1849 calling for the annexation of Canada by the United States.

for representation by population, province-wide non-sectarian education and free trade (Careless 2000).

While Brown was a unifying force for the Liberals in Canada West, he was a divisive force in Canada East, being a virulent anti-cleric who continued to speak in racial terms that pitted English against French, even though this social cleavage was being weakened through the emergence of a new Canadian identity. In terms of the province's new solid partisan cleavage, the Rouges were not successful in making much of a dent against the Liberal-Conservatives in Canada East, but the Liberal Reformers were able to take a majority of the seats in Canada West. The Liberal Reformers and Rouges were unable to work together due to their strong social identity and a lack of respect for each other (Cornell 1967).

During the session of 1858, Alexander Galt tabled resolutions in the assembly in favour of a federal union of Canada West, Canada East, the Atlantic Provinces, and the North-West (land held by the Hudson's Bay Company). In pitching his vision, Galt argued that the union would:

“promote their several and united interests by preserving to each province the uncontrolled management of its peculiar institutions and of those internal affairs respecting which differences of opinion might arise with other members of the confederation, while it will increase that identity of feeling which pervades the possessions of the British crown in North America; and by the adoption of a uniform policy for the development of the vast and varied resources of these immense territories will greatly add to their national power and consideration” (Skelton 1963, 219).

The defeat of the Liberal-Conservative ministry under Macdonald and Cartier on the issue of where the capital of the province should be situated meant that the resolutions were not put to a vote.<sup>204</sup> Brown and Dorion attempted to form a Rouges-Liberal Reformer ministry,

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<sup>204</sup> After the Montreal parliament buildings had been burned following the adoption of the Rebellion Losses Act in 1849, the capital alternated between Quebec City (1853-1856; 1859-1866) and Toronto (1849-1852; 1856-1858), but instead of bridging understanding, this added to the divide since legislators from one half of the province would sometimes be absent when the legislature met in the other half. In 1857, the government turned to Queen Victoria to choose a capital and she chose Ottawa, but the government was severely criticized for involving the queen in what was so clearly a divisive debate that had split the province along its social cleavage.

but this was defeated two days later.<sup>205</sup> The governor general, Sir Edmund Head, then approached Alexander Galt and asked him to form a new Liberal-Conservative government as the leader from Canada East.

Galt declined the governor general's offer, and recommended Cartier be called upon in his stead, which returned the Macdonald-Cartier ministry to office (Kesteman 2000).<sup>206</sup> Galt's condition for facilitating and then joining this new Macdonald-Cartier ministry was that they adopt his plan for Confederation as government policy. Subsequently, Cartier, Galt and John Ross, the provincial secretary, were sent to London where they presented a memorial to Colonial Secretary Sir Edward Bulwer Lytton. The institutional structure it proposed for the federal government was a governor general, a senate elected on a territorial basis of representation, and a lower house based on representation by population.<sup>207</sup> The Maritime Provinces were in London, coincidentally, at the same time requesting financial assistance for an interprovincial railway. Funding for a railway was declined on the grounds that money was needed more urgently for other priorities of the British government (*Despatch* from Lytton to Head, December 24, 1858). The Canadian

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<sup>205</sup> The *Independence of Parliament Act* required that if a person accepts an appointment of government office, they resign their seat in the legislature and stand in a by-election to ensure their constituents were willing to forgo having their representative on the government payroll. Brown's ministry had resigned their seats to run in by-elections and thus had insufficient votes to defeat a motion of non-confidence. He asked Governor General Head to dissolve the legislature, but the governor refused. The same fate would happen to Arthur Meighan's government during the 'King-Byng Thing' pursuant to *An Act further securing the independence of Parliament* which had been adopted in the first Parliament of Canada.

<sup>206</sup> The Macdonald-Cartier government may not have been able to survive a non-confidence vote either if they were out campaigning, but Macdonald came up with a way to keep the government in office. Where the *Independence of Parliament Act* required a person to resign when appointed to a ministry, they did not have to resign if they had been a minister during the previous month (i.e. they were simply taking a new ministerial appointment). Macdonald had the governor appoint the cabinet to all new positions, and then they all resigned and were re-appointed to their previous ministerial posts. This event is known as the 'double shuffle'.

<sup>207</sup> Federal powers would include customs, excise, trade, postal services, militia, banking, currency, weights and measures, national public works, public lands and debts, criminal justice, unincorporated and native lands. Revenue from public lands would go to the province, which would also receive federal financial support. The constitution would remain an Act of the imperial legislature, which could repair deficiencies, and sovereign power would not be given to provincial legislatures. The scheme was designed, it claimed, to correct the deficiencies in the federation in the United States, and focus "local government and legislation upon questions of provincial interests" (Skelton 1963, 242).

idea of a federal union of all British possessions in North America also received little support in London.

In 1862, the Macdonald-Cartier government failed to get a Militia Bill adopted, and resigned. Sandfield Macdonald, a reformer, tried to form a government by committing to follow a 'double majority' voting rule. This is mistakenly taken to be his "requiring majorities for government measures from both halves of the province" (Careless 1988, 1773). While the idea of a double majority from the two halves of the provincial legislature had come up before, what Sandfield Macdonald was proposing in this instance was that for 'local' matters (i.e. a matter only of concern to one half of the province), in addition to meeting the constitutional requirement that it be passed by both the upper and lower chamber of the legislature and receive royal assent, the government would ensure that the measure had received the support of a majority of legislators that had been elected from the half of the province that the measure concerned. While his ministry was able to hang on until 1864, this commitment did not last as long. In fact, his most divisive piece of legislation, which was a separate Roman Catholic school system for Upper Canada, was only passed with the Canada East legislators voting down the majority of legislators in Canada West. This had the benefit, however, of illustrating to all the lack of weight of non-constitutionalized division of powers (constitutionally defined powers being one *sine qua non* of federalism).

With the defeat of the Dorion-Sandfield Macdonald government, the Liberal-Conservatives returned to power in 1864, only to be defeated in three months. Realizing the legislature was at an impasse, Liberal Reformer Brown suggested to friends that the time might be right to settle once and for all the institutional divide between Canada West and East and make constitutional redesign a political objective. This suggestion was passed on to John A. Macdonald and Cartier, whereupon a series of meetings were held. A deal memorandum was prepared and approved by the governor general and the executive council, and Brown distributed it to his supporters. Thus the 'Great Coalition' was born, with Étienne-Paschal Taché, a respected former Reform premier and appointed legislative councillor, as premier from Canada East, and Conservative John A. Madonald as premier in

the West, with Brown and two others from the Liberal Reformers joining them in the ministry.<sup>208</sup> This Great Coalition had as a single policy priority and that was to achieve institutional change, and as such it remained in place as the government of the province of Canada until Confederation. Once its policy objective was completed, Brown departed, though not everyone else did and the Liberal-Conservative Party became the government party once again for Canada, and for the new province of Quebec.

The Maritime Provinces were meeting in Charlottetown on September 1, 1864 to consider Nova Scotia's proposal for a Maritime Union. They agreed to let the Canadians come and present their proposal for a federation of all of the British provinces of North America.<sup>209</sup> After the Canadian presentation, they considered the question of 'maritime union' amongst themselves, and quickly discovered it was only supported by Nova Scotia, as delegates from Prince Edward Island and New Brunswick were not willing to surrender their local legislature and government, and the legislators from New Brunswick were sceptical of the financial benefits for their province being joined with the more populous Nova Scotia. Federation was the only option where "strength, influence, and width would be satisfied with a central government, and local sentiment would not be outraged by the destruction of local institutions" (Kennedy 1922)

On October 10, 1864, delegations from these provinces met again at Quebec City. Taché was chosen to chair the meeting, and Nova Scotia, New Brunswick, Prince Edward Island, Canada East and Canada West were given one vote each. Macdonald set forth the foundational principles which included a strong federal government, a bicameral parliament consisting of a 'legislative council' and a 'house of commons'. The legislative council would have three equal regions: Canada East, Canada West and the Maritimes. Macdonald claimed to be open-minded with respect to the way legislative councillors were to be

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<sup>208</sup> Taché had been premier from 1855 to 1857, the first half with MacNab and the second half with John A. Macdonald. It was during this second ministry that Taché and Macdonald were able to turn their coalition into what could be considered a political party (Désilets 2000b).

<sup>209</sup> Galt outlined the financial aspects, Brown the organization and structure of the federal legislature, and Macdonald addressed the general framework of federal and local government.

selected, but this was a frequent claim by Macdonald who preferred to let people talk themselves out while he lobbied behind the scene to get the option he wanted.

Once agreement in principle had been obtained, the Canadian delegates were asked to prepare resolutions, which were then considered by the delegates acting for the most part in “a committee of the whole”. After resolutions were adopted, delegates from a province could caucus and items could be reconsidered. This was all designed to give the delegates from other provinces a comfort level that all things were on the table and they were not being sold a bill of goods. In total, the delegates met for 18 days, and the resulting 72 resolutions became the basis for the *British North America Act*, which has since been renamed the *Constitution Act, 1867*.

Georges-Étienne Cartier spoke about how the addition of a Maritime division to Canada’s French and English divisions would change the battle between the two sides of the social divide, essentially shifting it from a social cleavage to a partisan cleavage since with only two sides divided by social identity:

“one a weak and the other a strong party – the weaker could not be overcome; but if three parties were concerned, the stronger would not have the same advantage; as when it was seen by the third that there was too much strength on one side the third would club with the weaker combatant to resist the big fighter” (Waite 1865, 40).

George Brown called on members to overcome both the social and partisan cleavage and consider the new enterprise “without partisanship and free from personal feeling” (*ibid.*, 78). And Macdonald, while noting that he and other residents of Upper Canada would have preferred a strong unitary state, acknowledged that this would have never been accepted by the people of Lower Canada who, due to their different language, nationality and religion, would feel threatened.

As for the other parties to Confederation, New Brunswick had a strong cleavage between its linguistic and religious communities. The province had two elections where Confederation was the principle issue. In the first election, held in June of 1865, Acadian and Irish catholics were able to muster sufficient opposition to the Pro-Confederation Party that the Anti-Confederation party won the election (Andrew 1996). Prior to the second

election, raids by American ‘Fenians’, which was a pro-Republic Irish group, weakened the cohesion between the two groups. The partisan playing-field shifted as well between the two elections, as the United States Congress made it clear it would not enter into reciprocity with the province. When the Anti-Confederation Party resigned over the lieutenant-governor accepting a resolution from the provincial upper chamber in support of Confederation, the new Pro-Confederation Party government faced the electorate in May of 1866 and won a decisive victory.

Nova Scotia had the weakest social cleavage, which had been shifted to a mainland/Cape Breton division that both political parties effectively bridged. But it also had the strongest partisan cleavage. Knowing the vote would break on partisan lines, Nova Scotia’s premier Charles Tupper held off on introducing the resolutions until he had a clear indication of developments in New Brunswick. He then used the opposition’s complaint over the failure to create the Maritime Union, to force a vote that would divide the legislature on partisan grounds. The motion to pursue the non-starter of Maritime Union failed, thus leaving the only available option for union, which would provide possibilities to reverse the economic downturn and facilitate economic growth, the one of joining Canada and New Brunswick in a federation.<sup>210</sup>

Prince Edward Island’s dominant social cleavage, a class cleavage exacerbated by a lack of property, ensured it did not join at the time as the original federation proposal lacked any mechanism to bridge that cleavage by settling the ‘land question’ (this would be remedied so as to permit their union in 1873). Similarly, Newfoundland was too divided between Irish catholic and protestant British to entertain any consideration of institutional questions, as evidenced by its inability to manage its own self-government. This would continue to be true until its financial situation forced its leadership to accept the inevitability of union, and even then the two sides of the social cleavage would insist on constitutionalizing the social *détente* with constitutional guarantees for denominational school boards to preserve the *status quo*. The numerous concessions designed to

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<sup>210</sup> Kennedy (1922, 312) refers to the debate as “one of the most bitter in British American history”.

accommodate social groups in each of these provinces makes the Canadian *Constitution* an interesting reflection of how social and partisan interests compete.

The delegates met again in London, England, in November of 1866 to finalize the wording of the *Constitution*. They would go through six drafts, though stay close to the original 72 resolutions. The Bill would then pass the British parliament with little interest on the part of their legislators: the right of Canada to manage its legislative arrangements having been well established; Whig domination of the U.K. parliament having also been established; the presence of the Canadian delegates ensured effective lobbying; and British self-interest in reducing financial and military obligation in the empire combining to make a compelling domestic economic and political case.<sup>211</sup>

In the legislature of the province of Canada, opposition to the package came from the Rouges and Clear Grits. The former argued that the lower chamber should not have representation by population and the latter argued that the upper chamber should have more representatives from their province.

## II. Federal and Provincial Upper Chambers

With respect to the proposed federal legislative council (it would be renamed a 'senate' in London), Macdonald's strong opposition to election as a method of selection emerged very quickly at Quebec City, in spite of his initial assurance that he was open to the suggestions of the other delegates. Brown was even more strongly opposed to election, though two of Brown's liberal colleagues, Oliver Mowat and William McDougall, favoured election. The motion for election was rejected.

In terms of numbers, the delegates from Prince Edward Island objected to the Maritimes being a single division, and they objected to the idea of the province having fewer seats than the two other provinces in the Maritime division, if one were to be created, but their delegates were voted down on every vote and motion to reconsider. Concern was

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<sup>211</sup> This case was made all the more compelling in the context of the military juggernaut created for the U.S. civil war and the official policy of U.S. territorial expansion throughout North America, which threatened to cost the British ownership of all unsettled territory in North America.

raised that the federal government appointing legislative councillors would create a chamber that was dominated by the governing political party, but Macdonald assured them that the first appointments would be from the legislative councils in each of the provinces and would be drawn from both the government and opposition parties.

The 72 resolutions adopted in Quebec City reflect the upper chamber in place in the province of Canada and were, in the end, the design proposed by the Canadian delegation. They set the numbers of legislative councillors at 24 for Upper Canada, 24 for Lower Canada and 24 for the Maritime Provinces; the later division subdivided by 10 each for New Brunswick and Nova Scotia and 4 for P.E.I (res.8). When Newfoundland joined it would also receive 4 seats (res.9), and the North-West Territory, British Columbia and Vancouver would have their representation determined through negotiations, to be later ratified by the Canadian parliament and the provincial legislature (res.10).

Members of the legislative council would be appointed by the governor general for life, though a vacancy would occur if a councillor missed two consecutive sessions (res.11). The speaker would be chosen by the government (res.15). Councillors had to be British subjects, over the age of 30 and have real property in the net amount of \$4,000, though in the case of P.E.I. and Newfoundland it would be sufficient to simply have a net worth of \$4,000 (res.12).<sup>212</sup> In the case of Lower Canada, each councillor would have to reside or meet their property qualification in one of the existing 24 electoral divisions of Canada East (res.16).

The first councillors appointed to the federal legislative council were to come from the current members of the provincial legislative councils, with the exception of those from P.E.I., as nominated by the local government, and “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” (res.14).<sup>213</sup> The provinces were each to be given the power to establish the composition of their own ‘local’

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<sup>212</sup> In P.E.I. much of the land was still owned by absentee landlords. In the case of Newfoundland, the population was mostly engaged in fishing or commercial pursuits, not agriculture, and much of the public land had not even been surveyed at the time, so was not available to be sold.

<sup>213</sup> Prince Edward Island had an elected legislative council by then.

legislatures, so they could abolish their provincial upper chambers if they so wished (res.41 & 42).

The idea of appointing existing legislative councillors to reflect the current divisions in the province is very significant. It was designed to reassure both government and opposition parties in each province that they would have permanent representation in the federal upper chamber, at least during the Fathers' of Confederation lifetime, irrespective of shifts in their parties' political popularity; and it was designed to reassure legislative councillors that they would have a say in the new federation. In fact, there was a clear enticement for provincial legislative councillors to vote for Confederation since there could be a lifelong position in the new federal parliament as a reward, and as there was no requirement to give up one's seat in the provincial legislative council, councillors could serve in both legislatures.<sup>214</sup>

The number of councillors is also significant, given that the Canadian provincial legislative council already was set at 24 each for Canada East and West and there were 12 each in the legislative councils of Nova Scotia and New Brunswick. The proportions in the senate reflect the proportions agreed to in the province of Canada for its provincial legislative council during the public debate, between 1854 and 1856, on creating an elected upper chamber. Additionally, while respecting the numbers agreed to in the province of Canada and the commitment to the delegates from all political parties and provinces to create a chamber with partisan diversity, it gave the Canadian government latitude in choosing councillors since 48 would come from Canada where there were still life councillors in that province's upper chamber, alongside the elected councillors.

In examining the entire package of constitutional agreements arrived at in Quebec City, the vast majority of scholars have concluded that the upper chamber was well considered by the Fathers of Confederation and reflected a compromise by virtue of the arrangements and the fact that so much time was spent in Quebec City debating the upper

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<sup>214</sup> There was also no requirement that one give up their seat in the lower chamber of the province to sit in the House of Commons, so for those who believed that the centre of gravity should be local in the union there would be provincial representation in the new federal parliament at the outset.

chamber (Creighton 1970; MacKay 1963; Ross 1914; Mallory 1984; Franks 1987). This wisdom has been recently challenged by Moore (1997), who suggests that the length of time spent discussing the upper chamber could simply be due to it being the first item on the agenda and therefore might reflect the delegates from the Maritime Provinces testing the resolve of the Canadian delegates, noting that subsequent issues which were arguably more important to the Maritime Provinces were dealt with surprisingly fast. An examination of the institutional arrangements adopted for the upper chamber through the lens of the social cleavage supports this position.

The compromises contained in the upper chamber are undoubtedly compromises made among the ministry in the Great Coalition. Where Cartier saw the 24 seats in the legislative council as a necessary protection for the French Canadians at the federal level, Galt, an Anglophone from the Eastern Townships, saw the 24 electoral divisions both provincially and federally as a necessary protection for Anglophones in Lower Canada. A council appointed by the federal government would reverse what Macdonald saw as a mistake that the partisan politics of 1856 had forced on him, when he had to accept an elected upper chamber, and while the first appointments would come largely from the provincial legislative council, there would be sufficient councillors from the province of Canada to ensure that the chamber would be workable for the government that he was confident he would form. And Taché of course was a councillor himself, and knew first-hand the merits of an appointed upper chamber to facilitate bringing talented people, who could not win seats in the lower chamber, into cabinet.<sup>215</sup>

In moving the resolutions in the legislative assembly of the province of Canada, John A. Macdonald defended the three equal divisions of the upper chamber in language which was common at the time, namely out of respect for ‘sectional interests’ (*Canada Debates*, LA, February 6, 1865). The Maritimes, he claimed, had a single sectional interest (the three provinces had at one time been all part of Nova Scotia), as did Upper Canada (Anglo, agricultural and far away from the sea), and Lower Canada had a dominant

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<sup>215</sup> This is how he became a legislative councillor in Canada East, so as to join Baldwin and La Fontaine in 1848.

Francophone sectional interest given its “institutions and laws which she jealously guards against absorption by any larger, more numerous, or stronger power”.<sup>216</sup> Macdonald believed that Newfoundland had a distinct sectional interest from the Maritimes, since it was an economy based entirely on coastal fishing, which is why he argued it should receive separate seats from the Maritimes. As for the interests in the West, he acknowledged that they were largely unknown by Canadians, which is why he claimed they would need to be determined through negotiation, but it was clear to him that they would not have the same interests as the other regions of Canada. Fixed equal numbers was fair to each sectional interest, and it would have the added benefit of preventing a government from swamping the upper chamber with its own members.

The current elective upper chamber of the province of Canada, Macdonald suggested, had not failed (pointing out in typical Macdonald fashion that it was he who had introduced the Bill to make it elected). It had simply not lived up to expectations. While the first candidates for election had been exceptional, the quality had diminished due to the expense of mounting campaigns across such large ridings. It was the lower house that was seen as the way to public office and eventual membership in the cabinet, and to a lifetime of public service. While it had not happened in the province of Canada, having elections for the upper chamber might embolden its members in the future to oppose the lower chamber out of temporary political interest, instead of being a chamber of revision and of ‘sober second-thought’.

Brown also argued that election had failed to attract candidates who were well known or had the resources to run in constituencies that were 10 times the size of those for the lower house (*Canada Debates*, LA, February 8, 1865).<sup>217</sup> In terms of his surrender of representation by population as the formula for both chambers, he stated:

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<sup>216</sup> Macdonald likened the three sections in Canada to a state in the U.S. This analogy would be lost on Canadians currently, but in this era, the three Maritime Provinces were small, had once been a single province and had met with the purpose of exploring what the largest of the three, Nova Scotia, saw as reunification.

<sup>217</sup> All references to legislative council candidates not being able to incur the cost resulted in laughter in the chamber.

“Our Lower Canadian friends have agreed to give us representation by population in the Lower House, on the express condition that they shall have equality in the Upper House. On no other condition could we have advanced a step; and, for my part, I am quite willing they should have it” (*ibid.*).

While Brown acknowledged that the upper chamber had not become obstructionist following the shift to election, he argued that it was the presence of so many life councillors that had been a moderating influence, and that an elected federal upper chamber would likely lead to deadlock. And while an appointed chamber could also lead to deadlock, he did not support moving away from the fixed number of members to allow for an unlimited number of appointments to the upper chamber since “the limitation in numbers in the Upper House lies at the base of the whole compact on which this scheme rests” (*ibid.*). Having shorter fixed terms, instead of life appointments, would also make the body too similar to the popular view of the day, which was already represented in the lower chamber.

In anticipation of Confederation, the legislature of the province of Canada in 1866 adopted *An Act to postpone for a limited time the issuing of writs for the next election of members of the Legislative Council*. If Confederation did not occur, elections would be held the following year, but if it did occur, then the province of Canada would cease to exist and its legislature would be closed and new ones established in Quebec City and Toronto, long rival cities for the seat of the Canadian legislature.

In London, the British cabinet raised concerns over the fixed number of members of the upper chamber, what was now to be called the ‘senate’ to differentiate it from provincial legislative councils.<sup>218</sup> Since ‘senators’ were to be appointed for life, the British officials pointed out that a time might arise where the lower chamber and the upper chamber would be in a permanent deadlock and there needed to be a mechanism to break that deadlock.<sup>219</sup> The delegates were unwilling to budge on the decision to have three equal divisions in the senate, as this provided protection to Canada East, so provision was made

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<sup>218</sup> The decision of the name of the new federation was in the first draft of resolutions left to the decision of the queen. In later drafts it appeared as a kingdom of Canada. In the fifth draft it appeared as “One United Dominion under the name Kingdom of Canada”. In the final draft, which was how it was adopted, it appeared as “One Dominion under the Name of Canada” (*Constitution Act, 1867, s.3*).

<sup>219</sup> This concern had been raised by them before and dismissed by the Canadian delegates as undermining the principle of equality of region.

to summon additional senators in equal numbers of four or eight each for all three divisions simultaneous. At the insistence of the delegates from Canada East, and over the objections of the British government, the monarch would have to agree to let this clause be used by the Canadian government, as these delegates believed this would prevent a government relying on this clause to pass a single unpopular or ill-conceived piece of legislation.<sup>220</sup>

The resulting *Constitution Act, 1867* gives the Senate equal power to the house of commons and to the queen, as the three parts of the Canadian parliament. By constitutional convention, the queen had already relinquished her power in the United Kingdom of withholding her assent to legislation at the time the Act was adopted. As for the senate, the Act states that “Bills for appropriating any Part of the Public Revenue, or for Imposing any Tax or Impost shall originate in the House of Commons” (s.53) which is also reflective of the constitutional convention that had developed surrounding the British parliament and is similar in wording to a provision in *The Union Act, 1840*, which had governed the legislature in the province of Canada. This only prevents senators from introducing such legislation and from increasing the amounts in money Bills, but it does not prevent the upper chamber from reducing amounts or defeating such legislation.<sup>221</sup> As Prince Edward Island opted not to join Confederation at the time, Nova Scotia and New Brunswick were each given 12 seats in the first federal senate, the same number as they had legislative councillors in the provinces.

As the provinces of Ontario and Quebec did not exist prior to Confederation (the provinces of Upper Canada and Lower Canada being extinguished through the *Act of Union, 1840*), they also had to be created through the *Constitution Act, 1867*. Provisions were made to extend all laws that were applicable to Lower Canada and Canada East, and

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<sup>220</sup> The British officials also disagreed with placing a cap on the number of additional senators who could be appointed in order to break a deadlock at eight for each region.

<sup>221</sup> Driedger (1968) argues that this clause could have been intended to prevent any changes to money Bills since the house of commons was where the people sent their representatives and that in British law representation was necessary for the levying of taxes. This misses the point that like the house of lords in England, legislative councils in Canada originated as representative institutions, just designed to represent a different segment of society than the commons. It also ignores the constitutional convention that money Bills require a ‘royal recommendation’ (i.e. the endorsement of the government), even if introduced in the house of commons, so the people’s representatives are also prevented from levying a tax.

Upper Canada and Canada West, prior to Confederation, would be continued and to empower the legislatures for the new provinces to exercise provincial jurisdiction and set the dates of the first election in each province.<sup>222</sup>

In the case of Ontario there would be a unicameral legislature (*ibid.*, s.69), which would initially have 82 members elected in a single chamber to be called the legislative assembly (*ibid.*, s.70). The Liberals from Upper Canada had long objected to the legislative council. The majority of the politicians in this province had been fighting for representation by population, and there was a belief among its Liberal and Reform members that upper chambers were inherently conservative bodies. Brown was also of the opinion that there were no social divisions based on language in the province of Ontario, as evidenced by his arguments on federal senators not needing a property requirement based on districts the way Quebec's senators would (*Canada Debates*, LA, February 8, 1865). The Conservative Party, led in Canada West by John A. Macdonald, saw the exercise of Confederation as being one of creating a strong federal government, and believed that only limited local matters had been left in the control of provincial legislatures. Thus the consensus was that there was no need for a bicameral check on local government and a waste of resources which were for the provinces, in this era, severely limited.<sup>223</sup>

As for Nova Scotia and New Brunswick, the *Constitution Act, 1867* states that: "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" (*Constitution Act, 1867*, s.88). A similar provision was included in the instrument admitting the other provinces. The provincial legislature would

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<sup>222</sup> Provision was also made to strike a new great seal for the two provinces based on the great seal of Upper Canada for Ontario and of Lower Canada for Quebec (*Constitution Act, 1867*, s.136). This was not done by the British, who created new great seals for all four provinces, causing one of the first federal-provincial dramas in the new country as these provinces all lost proud symbols of their historic identity. This offers evidence that some delegates to the Confederation talks thought Canada was to be a compact of provinces (Hicks 2010c).

<sup>223</sup> Most of government revenues in this period came from customs and excise taxes, which were assigned to the federal government.

be free to abolish their upper chambers at the local level if they chose to follow Ontario's example.

In Quebec, there would be a bicameral legislature. The upper chamber would go back to being appointed, but would retain the 24 electoral divisions for the property qualification. The reason for maintaining electoral divisions was to ensure that the English minority in the province would have additional representation in the upper chamber, where local matters that impacted on social identity would be legislated.<sup>224</sup>

So the model for the federal upper chamber and the upper chamber in Quebec was based on the upper chamber in the province of Canada. The equality of seats that the French in Canada East had been given to protect them from domination by Canada West, was retained at the federal level with the expectation that the Maritime Provinces' senators would side with the minority in Quebec often, due to their own minority status. And the electoral divisions that provided representation for the Anglophones in that province were maintained at both the federal and provincial levels. While the establishment of a federal system was a significant change in government, it was seen by the leadership of the minority groups, Cartier on behalf of the French in Canada and Alexander Galt on behalf of the English in Quebec, as not altering the representation their group had in these institutions.

### **III. Post-Confederation Shifts in Canada's Cleavages**

The Confederation deal was caused by a shift in the partisan cleavage in the province of Canada. The cleavage would shift again due to the new political arena of a federal parliament.

As noted in the previous chapters, during the era of representative government, where settlers were able to elect representatives to the lower chamber, and governors and local elites managed government, a partisan cleavage emerged in every province between

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<sup>224</sup> In support of the latter point, he criticizes the U.S. requirement at the time that candidates must live in their constituency.

those who supported the governor and those who wanted ‘reform’ of the system; specifically advocating that elected officials should take responsibility for management of government.<sup>225</sup> When responsible government was achieved, the cleavage would invariably shift to be a partisan divide between those elected officials temporarily in power and those who oppose them. For most historians this is seen as an era of factionalism, absent political parties, since there were frequent shifts in allegiances, irrespective of ideology (Creighton 1965; Riendeau 2000). But as has been noted before, this was the way politics was played during this period, including in the United Kingdom, something easily accommodated by thinking in terms of a partisan cleavage rather than party labels.

Even after Confederation, for the first decades of the ‘Dominion’ of Canada, patronage and electoral manipulation that had driven politics in the provinces of Canada continued to be the rule and not the exception at all levels of government. Sir John A. Macdonald, who was made interim prime minister by the governor general, Lord Monck, would continue his claim of leading a government that was non-partisan. He would use cabinet appointments to bring foes, like Nova Scotia’s Joseph Howe, into his administration. But his most loyal supporters would occupy the most senior posts, and in terms of party platform, his government was relatively cohesive even when it was the Grand Coalition before Confederation, as it was centred on building a single nation ‘from sea to sea’, through the acquisition of the North-West Territories and the building of the railroad, policies that in principle were shared by Liberal-Conservatives and Liberal Reformers. While it returned to the moniker of Liberal-Conservative after Confederation, it would drop the pretence of being a Liberal-Conservative union once Macdonald left as leader, and simply refer to itself as a Conservative Party.<sup>226</sup>

George Brown’s partnership with Macdonald and Cartier dissolved immediately after Confederation, when he could not win election to the house of commons in 1867,

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<sup>225</sup> Those whose ideas of democracy was informed by American ideas advocated that the government officials should be accountable to the people in direct election; while those who were influenced by British ideas advocated that the officials should be responsible to the legislature. In all provinces, the British-model triumphed.

<sup>226</sup> This occurred when Mackenzie Bowles became the first Conservative prime minister in 1894.

Alexander Mackenzie emerged as the ‘leader of the opposition’, a position that is central to the Westminster-model, and this opposition would have at its core Brown’s Ontario based Liberal Reformers. Mackenzie lacked the style of a Macdonald or Brown, and without a cohesive platform or policy, the Liberals could only be seen to be an opposition to the government, even after Mackenzie replaced Macdonald as prime minister in 1873 (Creighton 1970).

The government had awarded the contract to build a railroad to the Montreal-based Canadian Pacific. Allegations emerged that the Conservatives had received \$300,000 from this company for its re-election campaign, with Macdonald and Cartier receiving the lion’s share. Macdonald resigned and pursuant to the conventions of the constitution now in place, the governor general asked Mackenzie to form a government, which he did. He also had the governor general call an election in 1874, which the Liberals won.

The Liberals did not have much of a platform and there was internal party division. Facing an economic depression, they moved away from Macdonald’s plan to build a railway to the Pacific so as to encourage settlement, opting instead to only build rail lines where settlement already existed (Waite 1971). Even though they differed on process, railway expansion was central to both parties’ priorities since it was appealing in Ontario where farmers, commercial interests and potential settlers had been long focussed on the North-West. When unable to get a free trade agreement with the United States, the Liberal government fell back on cutting expenses and raising tariffs (Masters 1983).

The Liberals were able to reform the electoral process through the secret ballot, election expense reporting, standardized election dates and practices and even the closing of taverns on election day and universal male suffrage without a property qualification (Massicotte *et al.* 2007).<sup>227</sup> In 1875, the justice minister, was able to get the governor general’s power of disallowance placed under the authority of parliament. This new partisan cleavage was beginning to drive institutional change. As will be seen in the next

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<sup>227</sup> Aboriginals were still banned from voting, even with this removal of a property qualification.

chapter, it would have an impact on the abolition of the upper chamber in the province of Manitoba.

Macdonald would return to power in 1878 through a more tightly woven platform dubbed the ‘national policy’, which included a protective tariff to encourage industrial development, completion of the transcontinental railway and settlement of the west (Creighton 1970).

By the end of the 19<sup>th</sup> century two main political parties had been defined around the partisan cleavage primed by the need to form a government within the Westminster-model of responsible government. This was true at both the federal level and was also emerging at the provincial level where the Pro- and Anti-Confederation parties had disappeared, being replaced by government and opposition parties.

With respect to the social cleavage, the English-French cleavage would become the dominant cleavage for the new country. The change made by Confederation is that this cleavage was given a geographic boundary. The political representation provided through a provincial legislature and government for the predominantly Francophone province of Quebec, has made Quebec and the ‘rest of Canada’ the social dividing line in the federation.

#### **IV. Changes to the Senate**

Just seven years after confederation, the Canadian house of commons considered a motion by a member of parliament, who would go on to be minister of justice, to reform the senate (Canada *Debates*, HC, April 13, 1874). In this proposal, there would be six senators from each province. Senators would be chosen by the political parties in the lower chamber of a provincial legislature, with the percent of seats allocated to each political party equal to their percentage of seats in the provincial assembly. While he made the point of noting that all the authors of the *Constitution* had agreed to reopen debate over the senate, the truth is that they agreed to in the spirit of conciliation through debate that they had exercised during the Confederation talks. Nevertheless, re-opening this debate marked the first of an ongoing debate about senate reform in Canada, of which method of selection and of the

number of members from each province, having been central and which continues to this day in much the same form.

The only changes that have been made to the senate are that senators are no longer appointed for life and must retire at age 75, which was grandfathered at the time it was introduced so did not impact on the senate as it was then constituted (*Constitution Act, 1965*), and the number of seats assigned to the territories and provinces have been modestly altered. Table 7.1 shows the seats in the senate that had been decided upon in Quebec City and how they ended up for these provinces. The principle was to have three equal regions of Ontario, Quebec and the Maritimes. Newfoundland, which had been uninterested in Confederation at the time, was to be enticed to join later and in the offer would be given four seats (the same as Prince Edward Island). This set a precedent for seats outside of the equal divisions. When the equality provision was revisited in 1915 by the parliament of Canada to create a Western region out of the provinces that had been carved out of the North-West Territories, provision was again made to entice Newfoundland, this time with six seats.

Table 7.1: Founding Provinces' Senate Seats

Year:	1866	1867	1873	1939
Ontario	24	24	24	24
Quebec	24	24	24	24
Maritime Region	24			
Nova Scotia		12	10	10
New Brunswick		12	10	10
Prince Edward Island			4	4
Newfoundland	4			6
TOTAL	72	72	72	76

The agreement to immediately create a province of Manitoba out of the North-West Territories in 1870 necessitated creating seats in both chambers of parliament. Manitoba was given two seats with provision for it to increase to four as its population grew (*Manitoba Act, 1870*). Then British Columbia was assigned three (*British Columbia Terms*

of Union, 1871). In 1879, the North-West Territories were granted two seats, and this was increased to four in 1903. Then in 1905, Alberta was given three (*Alberta Act, 1905*) and Saskatchewan was given three (*Saskatchewan Act, 1905*), which eliminated the four North-West Territory seats. The *Constitution Act, 1915* created the West as separate district, with 24 senators, divided equally between Manitoba, Saskatchewan, Alberta and British Columbia).

Table 7.2: Current Senate Representation

	Senate Seats
Ontario	24
Quebec	24
Maritime Region	
Nova Scotia	10
New Brunswick	10
Prince Edward Island	4
Newfoundland	6
Western Region	
Manitoba	6
Alberta	6
Saskatchewan	6
British Columbia	6
Territories	
Northwest Territories	1
Yukon	1
Nunavut	1
TOTAL	105

Finally recognizing that the indigenous population of the north was deserving of representation, the remaining North-west Territories and Yukon were given one seat each (*Constitution Act, 1975*) and Nunavut was given an additional seat when it was carved out of the North-West Territories (*Nunavut Act, 1993*), bringing the total to 105, configured as illustrated in Table 7.2.

Change to the Canadian senate has been possible. These changes were each brought about by a political party that had in its cabinet representation from both sides of Canada's social cleavage. Each was sold to the parliament as not substantively changing the representation afforded Quebec in the federal parliament. And the lower chamber, which was supposed to employ representation by population, had had its seat-distribution adjusted to compensate for these changes and for the decline in influence of the second chamber. So, as predicted, the overall representational balance in government has remained constant. As for the proposals that could change that balance, following the example of the first in 1874, they have all been successfully opposed by the government of Quebec and Francophone members of the Canadian parliament.

## **V. Conclusion**

Examining institutional change, and politics more generally, as an interaction between two cleavages, one social and one partisan, offers a perspective not provided by identifying a single dominant cleavage.

In the province of Canada, social groups had long advocated change, almost from the moment of union. When groups on either side of the social cleavage, like the Rouges, a nationalistic Francophone Party, and the Clear Grits, a nationalistic Anglophone Party, proposed change their overtures were met with distrust. Confederation was made possible by a shift in the partisan cleavage that created a new political party, which strategically labelled itself the 'Great Coalition', in the province of Canada. This was a party in that it had common policy objectives, namely the establishment of a federation, the acquisition of the territories to the West of Canada for settlement and the construction of an intercontinental railroad. This partisan group was able to bridge the social cleavage in the province, having the leaders of each social group within its ranks.

While creating a federation was a change for the unitary provinces of Canada, Nova Scotia and New Brunswick, from an institutional perspective the legislature of Quebec and of Canada were not significant departures. There would be a bicameral legislature with equality in seats between Ontario and Quebec in the upper chamber. The 24 electoral

divisions that existed in Quebec at the time of Confederation would continue. Provincially, Upper Canada and Lower Canada would simply be uncoupled and Lower Canada would be governed by its own representatives as before. The Westminster-model would continue to be used.

By using the lens of dual-competing cleavages, we can imagine how a deal was arrived at, even though key parts of the negotiations were done in secret: the negotiations between the delegates from Canada in advance of their approaching the Maritime delegations. Where social interests were concerned, the delegates in a minority position clearly resisted change, insisting that matters concerning a social identity be assigned to the provinces and that the balance in representation be retained, including the guarantee of representation from English Quebec.

Confederation would create new cleavages, both federally and provincially. In terms of a partisan cleavage, it created two political parties, the Conservatives and Liberals, which could compete for government at the federal level, something that impacted on provincial politics as well. The social cleavage was transformed from English and French to Quebec and rest of Canada.

## **Chapter 8: Canada as Imperial Government – Province of Manitoba**

In the British Provinces there had been a very straightforward institutional development trajectory, from nominee council to representative government to responsible government. British constitutional and colonial scholars have suggested that this trajectory was the result of shifts in British policy and law, and it is clear that there were changes in both over time. But there were also political forces at work at the local level, something that is best understood by examining two competing cleavages, the social and the partisan.

Manitoba offers the first opportunity to examine the institutions of a province not created by the colonial office, but rather by a new ‘Canadian’ government in Ottawa. This parent government had itself agitated for responsible government and was the by-product of that system. Manitoba thus offers us a unique opportunity to examine institutional change removed from British colonial policy and oversight. Manitoba also offers the opportunity to examine a province that had a very pronounced social cleavage which was all too familiar to the government in Ottawa, a French catholic and English protestant divide.

In terms of number of years that it took to move from representative government to responsible government to the abolition of the legislative council, Manitoba was the quickest. But in terms of tension and conflict between the two chambers, Manitoba had the greatest, which is a reflection of the social division in the province where English and French were evenly divided.

It was this strong social division in the province that convinced the federal Liberal-Conservative government of Sir John A. Macdonald and George-Étienne Cartier to establish rule through a governor and governor’s council for the, about to be acquired, new territory. Taking lessons from the Patriotes in Quebec, the local population led by Louis Riel tried to use insurrection to establish responsible government using an American republican model, and were just as unsuccessful. In response, the federal government established only representative government under the direction of a governor, who would

not be accountable to, but only advised by, a bicameral legislature with an elected lower chamber and an appointed upper chamber.

Responsible government would be won at the local level when, in response to this system, a political party emerged that was committed to that ‘reform’, and which could bridge the social cleavage through its French and English membership, making it impossible for the governor to retain control of the levers of power in the face of an elected local elite. These English and French leaders of Manitoba’s first political ‘party’ became the province’s first representative government.

With representative government established, the partisan cleavage shifted from being defined by ‘reform’ to being defined by ‘policy’ – from opposition to the governor to opposition to the ministry in the legislature. Responding to the rules of the altered institution, where leading individuals within the lower chamber had the opportunity to form a government, two political parties emerged, a government and an opposition which promoted itself as the government in waiting.

As noted in the previous chapter, at the federal level, the Liberal Party emerged out of the opposition to Macdonald’s Liberal-Conservative party. As will be seen below, one of the things it opposed was the passage of the *Manitoba Act* and, specifically, the establishment of bicameralism, with an appointed upper chamber for the province. Not surprisingly, when they became the government in Ottawa, they saw abolition of the upper chamber as a necessary cure for the province’s financial problems. However, this change had to be made at the local level under Canada’s constitutional rules; something that made this province in law distinct from the British provinces examined in previous chapters. Ottawa could offer a financial incentive, but it could not dictate, and even its advice was seen by some as interference.

Manitoba would be the first province in Canada to abolish its upper chamber. The motivation for doing so was financial, as the province could not afford to sustain the legislature. But as the upper chamber included representation from both sides of the social cleavage, resistance to reform came from the social group that was quickly losing its relative influence due to immigration. Due to the fact that the government had

representatives from both sides of the social cleavage, these party leaders were able to convince the lower chamber and enough of the upper chamber that (i) change was not about advancing one social group over another, (ii) posed no risk to either group and (iii) was in the province's best interests.

## **I. Road to Responsible Government**

To understand the social climate in Manitoba, and to bring it into conformity with the other provinces where the move to representative government and responsible government has already been examined, we start with the territorial acquisition of this region by the federal government and the establishment of its first institutions of governance. As the move to representative government and responsible government occurred for Manitoba under Canadian federal governance, and not British rule, the standard institutional trajectory which this province also follows cannot be an artefact of British colonial policy, though Canadian legislators obviously learned lessons about institutional design from the British. It was a purely Canadian decision to try to establish a governor's council for the territory. In response to local pressure for responsible government, it was again a Canadian decision to give it only representative government and to give it a bicameral institution. The transition to responsible government was the result of local developments, best understood through the lens of competing social and partisan cleavages where, as in other provinces, a partisan group emerged that could bridge the province's social cleavage.

Immediately following Confederation, the Macdonald government set out to acquire the lands to the North and West of Ontario and Quebec and out to British Columbia in the West. In 1670, King Charles II had established his cousin, Prince Rupert, governor of a "Company of Adventurers of England trading into Hudson's Bay", what would become known as the Hudson's Bay Company. The governor and company were given a monopoly over the watershed of all rivers and streams flowing into Hudson's Bay, land that would come to be known as Rupert's Land. On this territory the governor had full vice-regal authority, which could be delegated to senior company officers. While uninterested in

settlement or issues of governance, the company divided the territory into administrative divisions which it could manage through its system of forts. A governor and a governor's council were appointed for each administrative district.

In 1783, Benjamin Frobisher and Simon McTavish and a number of other Montreal businessmen created the North West Company to compete with the Hudson's Bay Company (Ouellet 2000c). Unable to find a working arrangement with the Hudson's Bay Company, which had a monopoly in Rupert's Land, they set out to explore further west and north, claiming the lands they 'discovered' in the name of the British crown.<sup>228</sup> In 1821, under pressure from Colonial Secretary Henry Bathurst, the North West Company was absorbed by the Hudson's Bay Company thus putting an end to corporate and trading conflicts.

In December 1867, the new Canadian parliament considered a series of resolutions moved by William McDougall, the then-minister of public works and a Clear Grit who had followed George Brown into the Great Coalition (though had not departed with him after Confederation was achieved). McDougall was more militant than Brown in his pro-English pro-Ontario farmer, anti-catholic, western expansion rhetoric and beliefs, though he was also more prone to coalition building if it would serve his immediate partisan objectives.

The address which was adopted by the Canadian parliament asked the queen to unite Rupert's Land and the North-West Territory with Canada. The British parliament passed the *Rupert's Land Act, 1868* which authorized the crown to negotiate and accept the surrender of Rupert's Land from the Hudson's Bay Company and to transfer it to Canada, whereupon the Canadian parliament would have the power "to make, ordain, and establish within the land and territory so admitted, all such laws, institutions, and ordinances, and to constitute such courts and offices as might be necessary for the peace, order, and good government of Her Majesty's subjects and others" (s.5).<sup>229</sup>

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<sup>228</sup> In 1793, Alexander Mackenzie joined the firm before McTavish's autocratic business style caused a schism and the creation of the XY Company, which operated from 1795 until reunification with the North West Company in 1801, after the death of McTavish (Brown 2007).

<sup>229</sup> The commercial and trading rights of the Hudson's Bay Company were saved by this *Act*.

Cartier and McDougall were sent to London to facilitate the negotiations. The colonial secretary, Lord Granville, acted as an intermediary. A price of £300,000 was agreed to, with the Hudson's Bay Company keeping one-twentieth of the 'fertile belt' along the North Saskatchewan River and 45,000 acres around each of its trading posts. The Canadian parliament adopted a second address to the queen asking her to unite the land with Canada under these terms (*Canada Journals*, HC, June 1, 1869). And in anticipation of the imperial order-in-council which would allow for the transfer of the land as of December 1, 1869, the Canadian parliament adopted an *Act for the temporary government of Rupert's Land and the North-western Territory when united with Canada*, which gave the name 'North-West Territories' to all the lands (roughly 10 times the size of the country at the time) and allowed for the appointment of a lieutenant-governor who would administer justice and establish laws, institutions and ordinances subject to ratification by the Canadian parliament. He would be advised by a governor's council. McDougall was chosen to be lieutenant-governor under this *Act*.

Under the Hudson's Bay Company, the land that would become Manitoba was included in the administrative district of Assiniboia. The governor, prior to acquisition, was William McTavish.<sup>230</sup> He was assisted by a governor's council, which consisted of representatives of the protestant and catholic clergy, and residents of the district who had links to the company and were of British, French and mixed Aboriginal-European descent, and this latter group was the largest contingent in the settled population.

There were roughly 25,000 native and 10,000 mixed-race residents on this land (Stanley 1960, 1974). The mixed race French called themselves Métis. This population was the product of union between French fur traders and the aboriginal population. The Métis had developed their land in the seigneurial pattern: in long tracts running back from the water. The English-speaking mixed race were either descendants of the Scottish

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<sup>230</sup> Since 1864, he was also the governor of all of Rupert's Land.

settlement founded by Lord Selkirk back in 1811 or settlers who had arrived more recently and chosen to take aboriginal wives.<sup>231</sup>

Arriving on this land was an increasing number of Canadian settlers from Ontario, encouraged by the talk of settling the west following Confederation and by the promise of good farmland, which was by then in short supply in Ontario. A 'Friends of Canada' movement formed, headed by John Schultz, to promote the annexation of the Red River colony by Canada and encourage more settlement by Anglophone protestants from the province of Ontario. They would be supported by the Canada First movement in Ontario.<sup>232</sup> To further complicate matters, McTavish was gravely ill and the Roman Catholic Bishop Taché was absent in Rome.

McDougall, in his capacity as minister of public works, sent a construction crew in 1869 to build a road from Lake of the Woods to Upper Fort Garry, now Winnipeg. Then, the following summer, he dispatched a surveying party to this region. The leaders of these expeditions formed relationships with Schultz and stayed at his house. The surveyors began mapping in support of English style square lots, which was the practice in Ontario, until they were stopped on October 12, 1869 by the Métis (Hayes 2002).

On October 19, a *Comité National des Métis* or 'Council of Twelve' was formed from among the French parishes, with John Bruce as president and Louis Riel as secretary.<sup>233</sup> It erected barricades to prevent McDougall, his council and family from proceeding further into the territory, then Pembina. The Métis then seized the Hudson's Bay Company's Fort Garry (without a fight). To broaden their legitimacy, the Council of

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<sup>231</sup> Thomas Douglas, the Scottish Earl of Selkirk, had brought the settlers. He acquired substantial stock in the Hudson's Bay Company for the purposes of gaining influence, and then used that influence to get the company to sell him 300,000 km<sup>2</sup> for only 10 shillings (Hayes 2002). Constant conflicts, including armed raids and open battles, between the North West Company, Hudson's Bay Company and the local aboriginal and Métis population was the norm for this settlement, and these conflicts were behind the colonial secretary urging the rival fur trading companies to merge in 1821. The difficulties in administering this proprietary colony proved too great and, in 1836, Selkirk's heirs transferred their interest back to the Hudson's Bay Company in exchange for company shares, though the Scottish settlers stayed, some creating their own mixed marriages with the native population.

<sup>232</sup> It advocated that Canada should only accept British immigrants so as to create an Anglo-Saxon protestant 'northern' race.

<sup>233</sup> The communities were organized around church parishes: Métis and some Brits attending Roman Catholic churches and the majority of Brits attending protestant churches.

12 invited 12 representatives from the Scottish and English parishes to meet with them in a 'Convention of 24' which began on November 16 (Hall, Hall et Verrier 2010).

In response to what was seen in Ottawa as an armed uprising, Macdonald delayed the transfer of Rupert's Land with the British government, not wanting the government's failure to assert control in the region to reflect on Canada's capacity to govern its own territory, either in the eyes of the residents of this territory or in the eyes of politicians in the United States, some of whom were agitating for U.S. settlement of this land. Possibly unaware of Macdonald's instructions to delay, McDougall, thinking he was the governor, issued a proclamation on December 1 and tried to assert his authority to govern at Pembina, but when his position became precarious, he had to retreat to St. Paul's in the United States.<sup>234</sup>

Schultz and others in the Canada Party barricaded themselves in government buildings, claiming to be protecting the peace by guarding supplies. The Métis surrounded these men on December 7, and took most of them prisoners, though Schultz escaped (Clark 2000). On December 8, the Comité National de Métis declared itself a 'provisional government'. Initially Bruce was president, but Riel took over as of December 27. Its activities were limited to controlling movement and monitoring communication and anyone suspected of undermining its efforts was arrested.<sup>235</sup>

The Canadian government sent a number of intermediaries; the most successful being Donald Smith who travelled under the auspices of the Hudson's Bay Company (Thomas 2000). He convened a two-day open air meeting at Upper Fort Garry, beginning January 19, and promised that the land claims of the Métis would be respected, and offered to guarantee Métis representation on the governor's council.<sup>236</sup> At the end of the meeting a new convention was summoned; this one of 20 representatives from each linguistic community.

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<sup>234</sup> With no railway crossing Ontario into Manitoba as yet, travel to Manitoba was most easily accomplished by travelling through the United States where intercontinental railways had been emerging.

<sup>235</sup> Those willing to take an oath of neutrality and refrain from disruptive behaviour were released.

<sup>236</sup> Sprague suggests that Smith's real mission was to form a counter-insurgency so as to re-establish Hudson's Bay Company control and only followed his 'cover assignment' when he determined that it would not be successful and that the Métis were not interested in civil war.

The ‘Council of 40’ began to meet January 25, 1870, with their first order of business being the drafting of a ‘liste de droits’, which would form the basis of negotiations with the Canadian government. Included in these demands was the establishment of a province to be governed by a legislative assembly, an annual subsidy of \$80,000 plus eight cents per person to defray the costs of the provincial legislature and government, two seats in the Canadian senate, four seats in the house of commons, and the placing of crown land under the jurisdiction of the provincial legislative assembly, which would also have the power to set criteria for who represented the province in the parliament of Canada and in the legislative assembly (Smith 1994).<sup>237</sup> It most famously demanded shared-use of the French and English languages in the legislature and courts of the province.<sup>238</sup>

The Council of 40 then set out to design the legislature and government for the province. The first decision was that there would be a ‘president’ (Riel was chosen to be the first). A committee of six members (three French and three English) was struck to consider British, Canadian, American, aboriginal and local models for the legislature (Hall, Hall et Verrier 2010).<sup>239</sup> In the end, it was decided that the legislative assembly would have 28 members, 14 English and 14 French. The assembly would have a 2/3 majority veto over the president, who would not have a vote in the assembly.<sup>240</sup> The council proclaimed that responsible government had been established for Assiniboia.

The first assembly met on March 9 and its first undertaking was to settle on a name for the province, and this renamed the body the ‘Legislative Assembly of Assiniboia’. At

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<sup>237</sup> This would be a minimum number of seats and would remain in place until such time as an increase of population entitled the province to greater representation.

<sup>238</sup> The apparent contradiction between cancelling the transfer of land, the establishment of a new province and seats in the Canadian parliament reflects the desire to have the colony established in the first instance as its own royal province under the British crown which could then negotiate entry into Canada.

<sup>239</sup> Hall suggests that the decision to name the leader of the government ‘president’ reflected their favouring of an American-model. It is more likely that this was reflective of the aboriginal structure of a council and chief, using Anglo-American labels.

<sup>240</sup> Originally there were to be 12 for each, but Alfred Scott made the case that Winnipeg should be its own district and not placed within a parish, which was accepted by Riel by giving them 2 seats. This would have given the English two more councillors than the French, so it was decided to add two additional French. The French delegates to the council decided they would select assemblymen from amongst themselves as they had repeatedly gone to the parishes to hold elections. The English delegates decided they would hold new elections.

Smith's suggestion, it selected a committee of three to travel to Ottawa to negotiate with the Canadian government.<sup>241</sup>

Following a series of meetings with the representatives from this provisional government, the federal cabinet decided on a governmental structure for the province and introduced the *Manitoba Act, 1870* in the house of commons on May 2 (*Canada Journals*, HC, May 2, 1870).<sup>242</sup> Macdonald acknowledged that the issue of one chamber or two had been a matter of much discussion among the cabinet, but it is clear from his comments that a unicameral elected chamber was not considered, nor had the institutional design created by the local legislative assembly of Assiniboia ever been considered a viable option. The unicameral-model would have been a single chamber, half appointed and half elected, but in the end they decided on a bicameral-model with an appointed upper chamber as this model offered more restraint on the influence of the politicians in an elected lower chamber (*Canada Debates*, HC, May 2, 1870).<sup>243</sup> It was never an option to transfer crown land to this local government as the federal government had its own plans on settlement and development for the west (Cartier, *ibid.*).<sup>244</sup> In spite of a number of speeches from the government that argued that party politics should be eschewed on so important a matter, the opposition benches challenged the government on everything from its handling of the crisis to the administrative structure it was proposing for the province, showing that while modern party politics may not have been fully matured, the Westminster model of a divided government versus opposition was aiding in its development at the federal level. The Bill received royal assent on May 12 (*Canada Journals*, HC, May 12, 1870)

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<sup>241</sup> It was headed by Father Noel Ritchot, and included Alfred Scott who had American railway connections and Judge John Black, who was a member of the Hudson's Bay Company governor's council and acting governor in McTavish's absence.

<sup>242</sup> The imperial parliament enacted the *Constitution Act, 1871* (formerly *British North America Act, 1871*) to confirm the authority of the Canadian parliament to create new provinces and to legislate for the territories.

<sup>243</sup> Macdonald, always the politician, claimed the government had been reluctant to use the word territory in the first instance, since colony or province was the normal nomenclature, and in no way conveyed status, as Canada had had experience with many models of government in its provinces.

<sup>244</sup> The government modified the Bill slightly before second reading, by adding additional settlements in the West and setting aside for the Métis 200,000 acres more to maintain the ratio based on population (Macdonald, *Canada Debates*, HC, May 4, 1870).

In all, three sessions of the legislative assembly of Assiniboia were convened, with the last session adopting a motion to accept the *Manitoba Act* and join the dominion of Canada. Their acceptance had no bearing on the legal establishment of the province in Rupert's Land or the transfer of territory. The institutions that were created for the provinces were entirely crafted by the federal cabinet and were the institutions that emerged under colonial Britain for its provinces. The federal government had no intention of making the governor accountable to the legislature and monies would be given to him directly for the establishment of local services.

The day after the Bill had been introduced in the Canadian parliament, the government issued orders for the payment of the purchase price to the Hudson's Bay Company. The *Act for the temporary government of Rupert's Land and the North-western Territory when united with Canada* was re-enacted for the balance of territories with the change that the lieutenant-governor of Manitoba would also be the lieutenant-governor of the North-West Territories.<sup>245</sup> On May 20, Adams G. Archibald was appointed the first lieutenant-governor of Manitoba.<sup>246</sup> And on June 23, by order-in-council, the imperial government transferred Rupert's Land and the North West Territories to Canada. The initial size of the province of Manitoba was 33,280 square kilometres and it became known as the 'postage stamp province' due to its small size.<sup>247</sup> Macdonald dispatched 1,200 imperial regulars under the command of General Garnet Wolseley to restore order in the territory, and they arrived in August.<sup>248</sup> Riel fled to the United States.<sup>249</sup>

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<sup>245</sup> An appointed governor's council would advise him in his capacity as lieutenant governor of the North-West Territories.

<sup>246</sup> He was also appointed lieutenant-governor of the North West Territories.

<sup>247</sup> It would not get its current boundaries until 1921.

<sup>248</sup> This expedition cost the government \$100,000, which was subsequently approved by *An Act to indemnify the members of the Executive Council, and others, for the unavoidable expenditure of public money, without Parliamentary grant, occasioned by the sending of an expeditionary force to Manitoba in 1871* (Canada Debates, HC, April 3, 1872).

<sup>249</sup> Riel had tried Thomas Scott, a young member of the vehemently anti-catholic Orange Lodge in Ontario, tried by military tribunal for hostility to the provisional government, insubordination towards his prison guards and inciting others to violence, having him found guilty in an improvised court martial and executed. "This monumental blunder, a product of Riel's inexperience and emotional instability, in addition to the deep-seated cultural divisions within the young nation, unleashed a storm of anger in Ontario, where residents regarded Scott as a martyr and Riel as a traitor and murderer. By contrast, Quebec regarded Riel as a

The general consensus is that the *Manitoba Act* “embodied most of the demands of Riel’s provisional government” (Riendeau 2000, 151). It is true that the *Act* established a province and gave it a legislative assembly and seats in both the Canadian house of commons and senate, confirmed the French and English languages as equal in the provincial legislature and courts, and set aside 1,400,000 acres of land for the Métis.<sup>250</sup> But when we look at the institutions of governance a different picture emerges – the province was given a standard British colonial government, but this time under the umbrella of the Canadian government.

Riel had wanted a single elected legislative assembly which would be half French and half English. The equal French-English configuration only lasted for the first election in the lower chamber where there were initially 24 seats, half of which were elected by predominantly French communities and half by English communities. Riel (like Papineau) wanted republican institutions and, instead, the province got representative government (not responsible government) with an appointed upper chamber. The French were a minority in the upper chamber from the start. By keeping the crown land, the Canadian government could work to change the province’s demographics. Riel had wanted provincial control over its members of parliament and senators so as to ensure linguistic balance in the federal parliament, and this was not conceded.

Historians have pointed to the parliamentary debate, and the seeming division between Quebec and Ontario MPs over the *Manitoba Act*, to suggest that parliament considered both the Ontario-model of unicameralism and the Quebec-model of bicameralism and decided that a bicameral legislature would be appropriate for the province since it accommodates cultural diversity (Bélanger 2007). This is a misinterpretation. Most of the Quebec MPs were following the party line as they were the most loyal supporters of the Macdonald-Cartier Liberal-Conservative government. The

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protector of French, Catholic rights and a distinctive way of life in the West against Anglo-Protestant encroachment” (Riendeau 2000, 151)

<sup>250</sup> Macdonald told parliament that the alternative name had been chosen since Assiniboia might cause confusion as it was the name of a river, as well as a district, and that Manitoba had been offered by the Métis delegation as an alternative (Canada *Debates*, HC, May 2, 1870).

Liberal opposition was led by Alexander Mackenzie from Ontario and this is where this emerging ‘party’ had its strongest support. The Bill was written by the government after negotiations with the Assiniboia delegation and was passed by parliament without amendment. This was party politics, not social division, so the upper chamber must be seen as having been designed to restrain the lower chamber and not protect linguistic minorities (which the French were not at this time). Nevertheless, speeches by Quebec MPs in support of the ‘Quebec bicameral-model’ as ideally suited for representation in a province where there are minorities and in support of ‘traditional institutions’ would figure in the subsequent debates in Manitoba over abolition of the provincial upper chamber, as well as in Quebec as it came to question the merits of its own legislative council.

James McKay was chosen by Archibald to be speaker of the Manitoba legislative council, which made him part of the governor’s executive council as well. His father was Scot and his mother Métis, and he had been on the Hudson’s Bay Company’s governor’s council. He had been prepared to support Canada’s claim to the territory and McDougall’s establishment of a governor’s council, but he was also not prepared to oppose Riel so he had retreated to the United States during the provisional government (Turner 2000). While he was Roman Catholic, his family was Presbyterian.

Only one supporter of Riel was included on the council, François Dauphinais, who also had been on the Hudson’s Bay Company’s governor’s council and had been vice-president in Riel’s provisional ‘Government of Assiniboia’. The other Métis who was appointed, Salamon Hamelin, had opposed Riel, and the other catholic appointment, John H. O.Donnell, had been imprisoned by Riel. Not counting the speaker, four of the seven appointments were from the English community.<sup>251</sup>

For his executive council, in addition to McKay, Archibald appointed Marc-Amable Girard, a Québécois, as provincial treasurer and Alfred Boyd, a merchant, as provincial secretary. In 1871 he added two men from Quebec, Henry Joseph Clarke as attorney general and Thomas Howard as a minister without portfolio.

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<sup>251</sup> The other English members were Colin Inkster, a Red River local; Francis Olgetree, an Irish protestant; and Donald Glum, a Scottish protestant.

Like the British governors before him in the provinces of eastern Canada, Archibald acted as his own prime minister, preparing much of the legislation. He relied on the legislative council to stop legislation that he did not like, and in four instances they did not, all in the first session, whereby he reserved the Bills for the federal government which withheld royal assent in support of the governor.

Alexander Morris took over as lieutenant-governor on December 2, 1872. The number of English speakers in the province was increasing with settlement and a redistribution bill in 1873 had reduced the number of provincial electoral districts in which French-speaking constituents were in the majority, but not to the extent warranted by representation by population. Facing a heated opposition among English voters and their representatives in the assembly, Attorney-General Clarke informed the legislative assembly that the governor would introduce a new Bill to add additional seats for the English (*The Daily Free Press*, July 3, 1872). It was an insufficient promise and a motion of non-confidence in the ministry was introduced in the assembly.

Edward Hay, who had been a member of the Canada Party, was the leader of the 'English party' in the legislature and Joseph Dubuc, formerly of Quebec, was the leader of the 'French party'. They joined forces in a motion of non-confidence in the government and it carried, 15 to 7.

Lieutenant Governor Morris, facing opposition from the leadership of both linguistic communities, asked Marc-Amable Girard to put together a ministry, as he was the only member of the opposition who had government experience. Girard included both Hay and Dubuc in his ministry, in an attempt to unite the two linguistic communities, and increased the executive council to six, so there would be an equal number of Catholics and Protestants in the ministry. This marks the advent of responsible government when, in the face of a legislative party that could both command the support of the legislature and bridge the social cleavage, the lieutenant-governor had no choice but to relinquish control to a ministry that was not his choosing. The new government succeeded in getting the redistribution Bill carried with 'the full support of both races' (Rothney 2000).

This governing party which was forming by this exercise would, through the mechanism of the lieutenant governor designating a minister from the previous government to form the next, define legislative politics in the face of social group activism. There was a clearly identified French party and an English party at the outset, and various other factions would spring up surrounding the issue of the day, but through the ministry various leaders of these factions would be aligned in a ministry that could obtain legislation from the assembly and provide continuity in government. From Girard until John Norquay lost the premiership in 1883, each successive premier claimed to be non-partisan, but it is noteworthy that many ran for or served in the federal parliament as Conservatives (including Girard and Norquay).

The partisan cleavage that seems to emerge after the establishment of responsible government, in an era where politicians would run under various temporary and shifting banners, is between a government and an opposition which, at some point, sees the opposition coalesce as an alternative government. One such temporary banner in Manitoba was the Provincial Rights Party, which was created by Thomas Greenway in the wake of the federal government disallowing Manitoba's local railway legislation in 1882 (Rea 2000). In the 1883 election, 21 government supporters were elected under Norquay and faced a combined opposition of nine (Provincial Rights candidates, Liberals, and independents), who agreed to unite under the Liberal banner with Greenway as their leader. In the 1886 election the government won 20 seats, the Liberals 14 and the independents one. When the Norquay government resigned after a dispute with the federal government, and a new premier could not gain the support of the legislature, Greenway became premier in 1888, after which he won 33 of the 38 seats in the legislature.

Manitoba historians mark this as the first party government. But through the lens of the partisan cleavage, there was already a government party and an opposition to it. It is just that after 20 years of responsible government, the opposition to the government party coalesced around the desire to be government and formed a single opposition party. The desire to return to government would force those who had been the perennial governing

party to adopt the label of Conservative. Thus federal party labels came to define the two sides of the partisan cleavage, but that cleavage itself had existed before.

Manitoba had known the institutional arrangement of governor's council under the Hudson's Bay Company and was to have begun under Canadian governance equally with a governor's council. The institutional changes demanded by one side of the social cleavage, the Métis, were not obtained. The group that went to Ottawa was representative of both sides of the social cleavage and the meetings with the federal government saw them establish representative, not responsible government, though in spite of this, when political parties emerged that created cross-cleavages the rule by governor's ended. Manitoba too had responsible government. All of this occurred under Canadian and not British oversight. While responsible government was established by the Canadian parliament, the shift to responsible government occurred entirely in the province, providing further evidence that understanding local developments is important to understanding institutional change.

## **II. Road to Abolition of the Upper Chamber**

The legislative assembly in 1874, following redistribution, had 14 English-speaking members and 10 French-speaking members. The legislative council had the same membership as before, which was similar in alignment to the lower chamber.

For its part, the legislative council was diverse in composition in terms of ethnicity, but homogeneous in terms of conservative beliefs with respect to government, having learned much of their lessons for governing from the Hudson's Bay Company's governor's council. While this upper chamber had helped Archibald govern and delayed the establishment of responsible government, it became a thorn in the side of the new governing party.

In the speech from the throne the government announced it would lay before the house a report from its delegation who, during the recess, had travelled to Ottawa to request that the boundaries of the province be increased to include more territory and for its subsidy to be increased (*Manitoba Journals*, LA, November 4, 1874). The government reported

that the federal government had refused to increase the borders of the province and it was unwilling to increase the subsidy:

“In declining to change the financial arrangements the [Canadian] Government are not insensible to the serious embarrassment necessarily attendant upon the administration of the government of the Province owing to the cost of maintaining two legislative bodies, numbering thirty-one members, selected from about three thousand families” (*The Daily Free Press*, July 16, 1874).

The total revenue of the province, including the federal subsidy (which was around \$67,000), was “\$77,000 and that over \$40,000 of that amount is required to pay the expenses of legislation, including printing, civil government and care of government house” (*ibid.*, July 15, 1874).

Premier Girard then introduced “An Act to diminish the Expenditure of the Legislature of the Province of Manitoba in certain respects” on July 14, 1874, which included provisions to abolish the legislative council. In doing so, Girard stated:

“Upper Houses were in the first place established not for the protection of the people but for the protection of the Crown and in old times might have rendered certain services, but that day is past. In Ontario they got along well with one chamber, and this Province is in a position to do good work with only one House” (*The Daily Free Press*, July 15, 1874).

Girard and the other ministers dismissed out of hand the normative claims that the upper chamber offered any benefit to government through the revision of legislature (one of the principle arguments offered in defence of upper chambers in this era) or that it protected the minority in the province. It was in the lower chamber where identity politics were played out and it was the government which protected the minority. The Bill passed the lower house and was sent to the upper chamber (*Manitoba Journals*, LA, July 16, 1874).

Before it could arrive in the legislative council, one of the government’s supporters in the upper chamber, Colin Inkster, tabled a “Bill to amend the *Act respecting indemnity to members of the Legislature*” (*Manitoba Journals*, LC, July 13, 1874). Catholic legislative councillor, Dr. John O’Donnell, accused Inkster of taking the first step towards abolition of the upper chamber, but committed to supporting the Bill, precisely because he felt that by lowering or eliminating councillors’ salaries it would remove the government’s case for

abolition. He spoke at length in defence of the legislative council, arguing that the French members of the federal parliament had put the legislative council in place to defend minority rights and that it, like the legislative council in Quebec and the senate in Ottawa, was a protection long-sought by the French in Canada and part of the treaty between the French and the English (*Manitoba Free Press*, July 18, 1874). He also noted that the people had not expressed an opinion on the matter of dissolving the legislative council. The speaker ruled the Bill out of order as it concerned money matters and these had to originate in the lower house (*Manitoba Journals*, LC, July 14, 1874). This led to the first of many acrimonious and personally accusatory debates in the upper chamber between government representatives and the catholic and French councillors over its abolition.

The legislation to abolish the legislative council was introduced in the legislative council the next day, and it was tabled for six months by a vote of four to three, which was the mechanism for killing the legislation (*Manitoba Journals*, LC, July 17, 1874).<sup>252</sup> In the lower chamber the government announced its intention of proroguing the legislature (*The Daily Free Press*, July 17, 1874).

Robert Davis, who was originally from Ontario and was provincial treasurer under Girard, succeeded him as premier later that year.<sup>253</sup> Davis was the acknowledged leader of the Ontario faction, and he included Royal from the Girard ministry as his Francophone attorney-general. In the speech from the throne the following year, the government again announced its intention to abolish the legislative council, stating:

“Inasmuch as the limited income of the Province necessitates the utmost economy in the administration of its affairs, a measure will be submitted to you to provide for the conduct of public business, by the aid of the Legislative Assembly only, thus dispensing with the maintenance of the Legislative Council” (*Manitoba Journals*, LA, March 31, 1875).

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<sup>252</sup> Gunn, Hamelin, Dauphinas and O’Donnell voted to table the Bill. Inkster, Ogletree and McKay (the speaker and a member of the cabinet) supported the legislation.

<sup>253</sup> Riel had been running and getting elected to the federal parliament in Provencher and when this happened again in 1874, the English community was incensed. While Girard and the government could not control Riel, they felt it necessary to resign. Davis remained as a minister and Girard recommended the lieutenant-governor call on him to form the government.

The Bill, “An Act to diminish the expenditure of the Legislature” was introduced on April 27 (*ibid.*).

In addition to the explanation of cost savings, the government argued that the matter “had been very fully discussed at the late general election, and which had been almost unanimously approved of by the people and nearly all of the candidates had pledged themselves to support such a measure, having made it one of the planks in their platform” and that the “constitution of this Province has provided safeguards for the minority” (Norquay, *The Daily Free Press*, April 30, 1875). The normative arguments advanced in support of the chamber revolved around its being a check on hasty legislation (Lemay, *ibid.*) and its role of protecting the rights of minorities (Cornish, *ibid.*). The legislation passed the lower chamber by a vote of 17 to 5. Introduced in the upper chamber (*Manitoba Journals*, LC, May 4, 1875), it was again killed by a motion to put off consideration for three months (*Manitoba Journals*, LC, May 7, 1885).<sup>254</sup>

In Ottawa, the Liberals under Alexander Mackenzie had replaced the Macdonald government in the wake of the Pacific Scandal in 1873. Mackenzie had opposed the institutional design in the *Manitoba Act* as part of his general opposition to the government. He was also waging his own battle with the senate at the federal level. The understanding had been at Confederation that there would be balance in appointments to the federal senate. But with the Macdonald government so long in power, 29 of the 31 senators appointed since 1867 were Liberal-Conservatives. Mackenzie’s government passed the requisite order-in-council to use s.26 of the *Constitution Act, 1867* and appoint additional senators to rebalance the upper chamber (Forsey 1946a, 1946b). The British government refused to advise the queen to let the government make these appointments as there was no existing crisis between the two chambers that warranted its use.<sup>255</sup> Then, in 1875, the senate rejected the government Bill for the construction of a railway from Esquimalt to

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<sup>254</sup> Again it was Gunn, Hamelin, Dauphinais and O’Donnell who stopped the legislation.

<sup>255</sup> They note that it was the intent of the framers of the *Constitution* that the clause only be used when “a difference had arisen between the two Houses of so serious and permanent a character, that the Government could not be carried on without Her intervention, and when it could be shown that the limited creation of Senators allowed by the Act would apply an adequate remedy” (Dunsmuir 1990).

Nanaimo in British Columbia.<sup>256</sup> It was in this climate that Davis and Royal went to Ottawa in October of 1875 to negotiate better financial terms for the province.

The speech from the throne the following year reported that negotiations with the Canadian government had been successful and the province would have its subsidy increased to \$90,000 per annum, on the understanding the province would abolish the legislative council (Manitoba *Journals*, HA, January 4, 1876). A Bill entitled “An Act to diminish the expenses of the Legislature of Manitoba” was subsequently introduced (January 20, 1876). The premier argued that “if the largest members of the Confederacy can legislate satisfactorily by means of one chamber only, the smallest may confidently hope to do so too”, and that the move is “necessary to carry out the wishes of the people, and the requirement of the Federal Government” (Davis, *The Daily Free Press*, January 18, 1876).

Arguments against the legislation were still made on the grounds that this was a chamber that protected minorities. Specifically the need for this chamber to protect the Métis and British mixed race people was underlined, as well as the fact that the federal government had not yet been turned over title to the land that had been set aside in the *Manitoba Act* to the Métis who had homes on this land (Sutherland, *ibid.*).

The government’s approach to the chamber had changed. In this debate the premier acknowledged that the chamber had a role in protecting the minority, but said the arguments in favour of abolition were more compelling, promising he “could assure the minority that their rights would never be trampled upon in this Province. There would always be sufficient English-speaking members in this House who will insist upon giving their French fellow subjects their rights, to protect them” (Davis, *Manitoba Free Press*, January 25, 1876).

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<sup>256</sup> At this point it became public knowledge that Mackenzie had tried to use the clause and the senate and the house of commons both ordered the production of all papers related to the incident. The Conservative majority in the senate then passed the motion expressing “its high appreciation of the conduct of Her Majesty’s Government in refusing to advise an Act for which no Constitutional reason could be offered” (Dunsmuir 1990)

Royal, who as minister of public works, had been in Ottawa negotiating the money, acknowledged that “there was a strong feeling among the people” he represented that the legislative council was “a safeguard to their rights and privileges” but when he saw that abolition was a necessary condition of receiving a larger subsidy from Ottawa, he gave his consent (*ibid.*).

The former premier, Girard, took issue with his own government’s claim that abolition was a condition of obtaining the higher subsidy, noting that the federal government could only suggest abolition and could not make it a condition of the money to be voted by parliament (he was sitting in the Canadian senate as well as the Manitoba assembly at the time), but argued in favour of abolition on the grounds that this had been a body to restrain the will of the elected representatives and protect the crown in the colonial era (*The Daily Free Press*, January 23, 1876). As such it was obstructionist to government policies and programs that were needed to help the province grow and provide services to its residents.

In the upper chamber, the Bill was introduced on January 27, 1876 (*Manitoba Journals*, LC). The debate was again acrimonious and personal. The spectre of the growing English majority in the lower chamber trampling the rights of the minorities, particularly those of mixed race, was central to the debate. At final reading on January 3, the Bill received three votes against and four in favour (*ibid.*). It was given royal assent the following day (*ibid.*).

Allegations were raised at the time that some councillors had been bought off to get it through the council. These allegations originated in the legislative council when O’Donnell first suggested that French members of the council were betraying their ‘race’ when they sided with the speaker over the indemnity Bill on July 13, 1874 (*Manitoba Free Press*, July 18, 1874). But this was a premature accusation as the two Métis members consistently voted with O’Donnell to block abolition legislation. The speaker, James McKay, simply switched to a new cabinet post (as minister of agriculture) and sought election in the assembly, where he was acclaimed, and the other cabinet minister was given a government position as sheriff, but both of these ministers had consistently voted in

favour of abolition and a government appointment following service in cabinet was normal practice. It is unclear if the one councillor who switched sides, George Gunn, received any assurances with respect to his career, as he had been a respected naturalist before entering the council and continued to work as an academic researcher and author after he left. The other person who voted for abolition was a physician and continued as such. Certainly it is misleading to state that “the lieutenant governor ensured passage by the simple expedient of guaranteeing *several* Councillors equivalent remuneration elsewhere in support of the bill” (emphasis added, Kitchin 1973, 68).

Opposition to change in Manitoba was clearly driven by social identity. The economic reality of the province’s financial situation, combined with the partisan politics of Ottawa and the provincial election campaign where abolition had been an issue, created a critical mass in support of abolition in the most socially divided province in Canada at the time. In the end it was only achieved by one vote and the switch in this vote, based on the claims of that member at the time, were simply due to the government’s need for cost saving and an increase in federal subsidy.

### **III. Conclusion**

Manitoba makes an excellent test of the model of institutional development that was observed in the British North American provinces. Each of those provinces followed the same trajectory. The original colonial institutions for governance, namely a governor and a governor’s council, were eventually modified to add in a representative assembly. The demand for such an assembly was thought to be tied to British settlers bringing with them normative ideas about representation learned in Britain and advocated as a basic right in the age of enlightenment. In the end, responsible government was ‘given’ by the British whose political leaders had become pragmatic or ‘won’ by colonial leaders (assisted by their enlightened governors) advancing normative arguments that could navigate British constitutional law surrounding ministerial accountability and parliamentary sovereignty.

In the case of Manitoba, British constitutional law had nothing to do with institutional design. The institutions it obtained were created after Britain had accommodated responsible government in law. And they were created in the first instance by the Canadian and not the British government; a government that itself had emerged out of the battle for responsible government in a socially divided province. They were transformed locally without any ‘grant’ from the higher government in Ottawa and without the need for normative argument. The political reality of the provincial legislature made government by a governor unworkable.

In the face of these differences, the parallels between Manitoba and the province of Canada are striking. In both provinces the social cleavage had led to armed insurrection and a demand for responsible government using an American republic design. With representative government a partisan cleavage emerged in the elected chamber out of opposition to the governor and his councillors. With responsible government, a governing party emerged and the opposition to that government first defined the partisan cleavage, with the opposition coalescing into a political party with the goal of replacing the government party, which in turn dropped the pretext of being non-partisan; Liberal and Conservative parties began to contest elections.

The desire to abolish the upper chamber was part of the platform of the governing party which emerged to obtain responsible government. It was a party that was consciously crafted to include political leaders from both sides of the province’s social cleavage. It was able to achieve change by convincing people on both sides of that cleavage that abolition would in no way undermine the protections that representation in the upper chamber might provide – and that the partisan benefits (financial savings and the advancement of policies and programs to develop the province and improve quality of life) were a more important consideration than social identity concerns.

The acceptance by a majority of the representatives in the lower house, who were linguistic, religious and mixed race minorities, of assurances that the rights of the minority would be protected by the lower chamber and the government, was made more believable

due to the government's practice of equal catholic and protestant membership in cabinet and linguistic duality at the top of government. That the first premier, a Francophone, had made abolition part of government policy from the outset and had his government repeatedly challenged in the upper chamber gave his party's supporters both confidence in and determination to make the change.

The provincial government was buttressed in its case for abolition by a federal political party that had formed its view on the Manitoba legislature in the context of Ottawa's partisan debate over the *Manitoba Act* when it had been in opposition, and in the context of its own frustration with an upper chamber. While the federal government provided a financial incentive, it did so for partisan reasons. It also did not and could not dictate, and while the incentive clearly swayed some of the legislators, it did not deliver a decisive shift in support. The decision was taken locally with opposition to the change being emotional and personal, centred as it was on social identity, and only passed by one vote.

## Chapter 9: Eliminating Provincial Upper Chambers

The four provinces that joined Canada with bicameral legislatures – Nova Scotia, New Brunswick, Quebec and Prince Edward Island – each successfully abolished their upper chambers or ‘legislative councils’, though at different times.

What makes these four cases interesting is that each province has different social cleavages. In Prince Edward Island it was initially a cleavage over property ownership; Nova Scotia the cleavage was first one of religion-culture and later this evolved into a class division and in both instances it most strongly separated the residents of Cape Breton Island from the people who lived on the mainland; New Brunswick’s language religious cleavage divided Acadian and English; and in Quebec there were competing social cleavages with an English minority in province, and the French a minority in Canada.

Two of the provinces, New Brunswick and Nova Scotia, had upper chambers that had little connection to that province’s social cleavage, while the other two had councils designed with the social cleavage in mind (the upper chamber in Quebec designed to ensure that the English minority had representation and in Prince Edward Island the upper chamber was specifically designed to represent property owners). Yet in all four provinces, the social cleavage was considered during abolition.

Abolition of all four occurred in an era of political parties, so it makes the examination of partisan cleavages easier, and the one province that had an elected upper chamber, Prince Edward Island, offers an opportunity to examine a chamber internally divided by the province’s partisan cleavage and yet as the body for property owners represented one side of the social cleavage.

In all four cases we find that change occurred when the partisan group that bridged the social cleavage drove the change. In the two provinces where social cleavages were tied to upper chamber design, we found a shift in the social cleavage preceded change and/or abolition. In all of the provinces, change occurred only when the partisan cleavage defined the debate over institutional change.

In each province an abolition movement arose shortly after Confederation, and the initial argument in favour of abolition was the same in each province, and rested on two premises. The first premise was that Confederation had transferred the role of reviewing poorly drafted or ill-conceived legislation to the federal government, which had the constitutional authority to ‘disallow’ any law enacted by a provincial legislature; and the second premise was that provinces had surrendered most of their jurisdiction to the federal government.<sup>257</sup> Bicameralism was thus an unnecessary expense to oversee ‘local’ matters.

In all four provinces the Westminster-model shaped provincial politics by creating a government and opposition cleavage. In the era of party politics, which would emerge out of this cleavage, the leader of the party that wins the most seats in the lower chamber is usually tasked with forming a government. So, not surprising, in all four provinces the opposition party was the first to favour abolition since they would have to govern having few party supporters in the upper chamber.

The *Constitution Act, 1867* had transferred to the new federal government all indirect taxation, which was the primary source of government revenue in the 19<sup>th</sup> century. Provinces would receive subsidies from the federal government to enable them to provide local services and run the local legislature.<sup>258</sup> Thus reducing expenditures was one of the main motivations for abolition initiatives in all four provinces, just as it had been in Manitoba. All four provincial governments were in contact with each other and shared strategies with respect to abolition.

As illustrated in table 9.1, while an abolition movement began at roughly the same time, the four provinces abolished their upper chambers at different times, with New Brunswick first, Nova Scotia second, then Prince Edward Island and finally Quebec (though Prince Edward Island would have remnants until 1996).

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<sup>257</sup> The birth of the welfare state and a series of judicial decision would give provincial governments much wider jurisdiction than planned or assumed in 1867, and the federal government would eventually discontinue reviewing and disallowing legislation, but these were justifiable and widespread beliefs at the time, even in Quebec.

<sup>258</sup> They could levy direct taxation, but most governments were reluctant to take this unpopular course of action.

Table 9.1: Dates of Provincial Upper Chamber Abolition

Province	Date joined Confederation	Date of Abolition	Mechanism	Notes
Alberta	Sept. 1, 1905	Never had an upper chamber*	N/A	Province created out of territorial land.
British Columbia	July 20, 1871	Never had an upper chamber*	N/A	Joined Canada without a legislative council.
Manitoba	July 15, 1870	1876	<i>An Act to diminish the spending power of the Legislature of Manitoba</i>	
New Brunswick	July 1, 1867	1892	<i>An Act respecting the Legislative Council</i>	
Newfoundland	March 31, 1939	1934*	<i>Newfoundland Act, 1949</i>	Joined Confederation without a legislative council as the legislature was dissolved in 1934.
Nova Scotia	July 1, 1867	1928	<i>An Act abolishing the Legislative Council and amending the Constitution of the Province</i>	
Ontario	July 1, 1867	1866*	N/A	Province created at Confederation without a legislative council. Elections to the legislative council in the province of Canada were suspended a year earlier.
Prince Edward Island	July 1, 1873	1963	<i>Elections Act, 1963</i>	Joined Confederation with an upper chamber elected by property owners. <i>An Act respecting the Legislature</i> merged the two chambers in 1893.
Quebec	July 1, 1867	1968	<i>An Act respecting the Legislative Council of Quebec</i>	
Saskatchewan	Sept. 1, 1905	Never had an upper chamber*	N/A	Province created by parliament out of territorial land.

\* These provinces effectively entered Confederation without upper chambers.

As with previous chapters, initiatives for change are process traced and then placed in a social and a partisan context. The benefit of looking at two cleavages in a society, it is

argued, allows for a more nuanced examination of political behaviour. It is hypothesized that social identity engenders resistance to change as members of one group will mistrust the motives of political actors on the other side of a social cleavage. While the *status quo* may be the result in societies where there are strong social cleavages, for those who want to achieve institutional change the best vehicle for that change is a political party that can bridge the social cleavage.

In both Nova Scotia and New Brunswick, where the upper chamber had no formal representational role with respect to the social cleavage, the principle determinant in achieving change was tied to the partisan debate. As both political parties in the lower chamber adopted abolition policies, the issue was deprived of political oxygen. It was only when the issue became partisan that genuine steps were taken towards reform. Interestingly, while there was no previous representation connection, in New Brunswick the government appointed an Acadian to the upper chamber specifically to vote for abolition. Nova Scotia appointed councillors from each of its counties to do the same. And the political parties in Nova Scotia adopted different policies with respect to the upper chamber in response to the labour movement in Cape Breton, with the Liberals changing the council's power to a suspensive veto in order to try to preserve it and the Conservatives bringing about abolition.

In Prince Edward Island, so long as the property cleavage was strong, abolition was impossible. Islanders who owned property voted for councillors whereas tenants and owners voted for assemblymen. The way cost savings were achieved was to have councillors and assemblymen meet together. Once property declined in importance and the catholic-protestant cleavage emerged as the province's main social cleavage, the practice emerged where the political parties would ensure that a catholic ran against another catholic for one of the positions and protestants competed against each other, and the property qualification was deemed unnecessary and eliminated in 1963. It was only when immigration and a decline in religiosity lessened this religious cleavage that the councillor

position could be eliminated entirely and the province moved to single member constituencies in 1993.

In Quebec, the social cleavage of English and French, with the French seeing themselves as a minority, meant that French politicians were as resistant to change as the English. But as Quebec nationalism shifted from being ethno-racially based to being linguistic-cultural, this resistance was eliminated. Change became driven first by the Liberal Party's desire to establish the welfare state and then by the Union Nationale responding to the federal-provincial cleavage which replaced government formation as the province's principle partisan cleavage.

## **I. Nova Scotia**

If one simply looks at the number of initiatives for abolition of the legislative council of Nova Scotia, absent of partisan and social context, then one might conclude that a fifty-eight year campaign was waged against the upper chamber.<sup>259</sup> But prior to the 1920s, only one government was serious about abolition, and that was the one-term Conservative government of Simon Holmes. His partisan campaign to abolish the council was quickly neutralized by the Liberal Party adopting the same policy in favour of abolition. Returning to power in 1882, the Liberals strategically introduced legislation to abolish the chamber from time to time, usually in an election year, and obtained written commitments from the councillors it appointed (that they would vote for abolition), thus shifting responsibility for its survival onto the councillors it appointed and depriving the Conservatives of an election issue. Most significantly, this deprived the abolition movement of a partisan playing field on which to generate public interest and debate, and thus put pressure on the government, in support of its cause.

Nova Scotia's social cleavage at this time paralleled the territorial divide between Cape Breton and mainland Nova Scotia. Initially this was principally defined by religion

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<sup>259</sup> This is what Beck (1957) concludes in his chapter on the legislative council, which is the only significant examination of the abolition of a provincial upper chamber in Canada.

and language, with Cape Breton having a large number of Gaelic and French Catholics, but by the beginning of the 20<sup>th</sup> century it was becoming increasingly defined by class divisions; leading to labour unrest in Cape Breton as the union movement organized miners. This, in turn, impacted on partisan politics due to a socialist-communist influence. With respect to the upper chamber, this created a normative argument in favour of preserving the upper chamber as a check against radicalized labour – a resistance to change as defined by the social cleavage. More importantly, though, it caused the two main political parties to differ on what to do about the upper chamber. The Liberal party, facing a United Farmers-Labour opposition after 1920, departed from the Conservatives and began to support the council, which motivated them to ‘reform’ it by reducing its veto to a temporary ‘suspensive’ one. With the upper chamber finally a partisan issue, when the Conservatives returned to power that same year, they made abolition their priority, something they achieved just three years later, in 1928.

While abolition was achieved through a specific constitutional mechanism, it presumably would have been achieved by a different, albeit less efficient, mechanism had the Conservative legal strategy proved fruitless. It is noteworthy that even in a province where the upper chamber did not have a strong relationship to the social cleavage, the government, in order to achieve change, made sure that it had representation in the upper chamber in support of abolition from both sides of the social cleavage, so as to neutralize any argument that the chamber had a role to play in protecting either side of the cleavage. In the end, changes were made to the upper chamber only after the two main political parties took different positions over what to do with respect to the upper chamber, and each was able to make the change they preferred while in office. The important lesson from Nova Scotia, therefore, is that while change may be achieved by a group that can bridge the social cleavage, it must be driven by the partisan cleavage impacting on the specifics of change.

Nova Scotia’s legislative council had been created by the *commissions* and *instructions* issued to the governor. These allowed the lieutenant governor to summon up the 21 members, the persons so summoned being provisional appointments to be

subsequently confirmed by the queen. In 1872, at the request of the British and Canadian governments, an Act was passed allowing the lieutenant governor to appoint councillors without requiring confirmation by the queen. This was an uncontroversial change as it was merely reflective of the existing reality. Well into the era of responsible party government, appointments were by this time being made by the Nova Scotia government (i.e. cabinet) so having the queen rubber stamp appointments was thought to be a waste of her's and the Canadian and British bureaucracies' time.<sup>260</sup> As the *Constitution Act, 1867* stated that the constitution of the legislature in the provinces shall “continue as it exists at the Union until altered under the Authority of this Act” (s.88), Nova Scotia governments were under the mistaken impression that the council size was 18, and that appointments were for life, as that was the legislative council seen to exist at the moment of Confederation.

The first calls for abolition came from the anti-Confederation members in the assembly as early as 1869, on the grounds that the financial situation of the province within Confederation (having turned over indirect taxation to the federal government) could not sustain a bicameral legislature. The Conservative opposition that emerged in the chamber after 1872 also adopted a policy in favour of abolition, and began to call on the Liberal government to leave council seats vacant. The government in the first instance refused, as it had insufficient members in the upper chamber that would support its planned legislative programme.

The first serious attempt to abolish the upper chamber came in 1879, when the Conservatives replaced the Liberals as government. During the 1878 election, the abolition of the upper chamber as a way of saving money was included in the Conservative platform, though it was not an election issue. Simon Holmes became the Conservative premier on October 22, 1878.<sup>261</sup>

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<sup>260</sup> The legislation is entitled: *An Act to provide for the appointment of Legislative Councillors in the Province of Nova Scotia*.

<sup>261</sup> They had previously been the government, with Hiram Blanchard as premier, at the time of Confederation. They were defeated by William Annand leading an anti-Confederation Liberal Party shortly after Confederation.

In the speech from the throne, the Holmes government noted that Confederation had removed most of the jurisdiction to the federal parliament, leaving only ‘local’ matters to be handled by provincial legislatures. It asked the two chambers “to consider whether in the limited sphere of legislative action, which is now open to this Parliament, and the urgent necessity for a reduction of the public burdens, the legislation of the province may not be carried on by a single chamber” (N.S. *Journals*, LA, March 6, 1879). The government then introduced a motion in the lower chamber repeating this argument and adding that legislation had been successfully managed by a unicameral legislature in Ontario since Confederation, and asking for a conference to be established with representatives of the two chambers in order to consider what steps could be taken to bring about the abolition of the legislative council (*ibid.*, March 12, 1879). This motion was adopted in the assembly unanimously, marking the first move by the Liberals to diffuse this as a partisan issue. Conferences were then held between representatives of the two chambers on March 19, 20 and 23.

On March 28, the conference committee reported that while the upper chamber agreed with the objective of reducing the cost of legislation, it could not agree with its own abolition (N.S. *Journals*, LA). It noted that in the case of Ontario, there had as yet been no crisis to test the mettle of a unicameral legislature, so it advised waiting before undertaking such a drastic measure. As an alternative, it proposed that a greater saving could be had by reducing the size of both chambers and the salaries paid to all members. The specific proposals from the upper chamber were that no new appointments be made to the council until its numbers were reduced to 13, that the lower house should be reduced from 38 to 20, and that every councillor and assemblyman should take a 25 percent pay cut.

Subsequently the government introduced a “Bill to abolish the Legislative Council of Nova Scotia” (N.S. *Journals*, LA, March 28, 1879). It passed the lower chamber on April 2 and was introduced in the upper chamber the same day (N.S. *Journals*, LC, April 2, 1879). The council voted to table the bill on abolition for three months, effectively killing

the legislation (*ibid.*, April 15, 1879).<sup>262</sup> What the council and assembly were able to agree upon as an immediate step was the abolition of the office of law clerk to the council, as a way to save money.<sup>263</sup>

On April 15, the legislative assembly struck a committee to prepare an address to the queen calling for the abolition of the upper chamber (N.S. *Journals*, LA). In response, the legislative council formed its own committee to prepare its own address for the queen in defence of the retention of the council (N.S. *Journals*, LC, April 17, 1879).

The address from the lower house asked the queen to place before parliament legislation that would permit the lieutenant-governor, on the advice of the government, to increase the size of the legislative council by up to nine additional councillors, which would then tip the vote in that chamber in favour of abolition (N.S. *Journals*, LA, April 17, 1878). It claimed that this had been an election issue and thus was the will of the people. It reported the events in that legislative session, claiming the council had been obstructionist in not adopting the abolition legislation. It asserted that the council cost approximately \$15,000 per year, while the province only had revenues of \$500,000 for the entire operation of government, whereas Ontario which had a population of 1,620,000 and revenues of \$1,200,000 did not have a bicameral legislature, also noting that the other Canadian provinces were taking steps to abolish their upper chambers.<sup>264</sup> This was adopted unanimously, further neutralizing this as a partisan issue for the next election.

The ‘memorial’ of the legislative council countered the claim that it had been obstructionist by pointing out that the only argument raised by the government with the

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<sup>262</sup> In this era, sessions of a legislature ran for only two months a year, with a new session and a speech from the throne occurring at the start of a new session when summoned by the government (under the signature of the lieutenant governor) the following year.

<sup>263</sup> This was abolished through *An Act to abolish the office of Law Clerk of the Legislative Council*, which received royal assent on April 17, 1879, and the clerk of the assembly took over the duties that had previously been performed by the law clerk (N.S. *Journals*, LC).

<sup>264</sup> This address was based on a flawed constitutional understanding. The *Constitution Act, 1867* did not enshrine the council as it existed at Confederation, it merely retained the legislature as defined by the constitution of the province at the time of Confederation. It was the commissions and instructions of the lieutenant governors that limited him to appointing no more than nine councillors on his own authority. The queen was not limited in her capacity to appoint additional councillors, so the government would have been better off simply asking the queen to appoint specific councillors absent of a mention of the goal of abolition of the council.

lower chamber concerning abolition had been the need for cost saving, and that the council's own committee had recommended a reduction in both chambers of number or members and salaries which would save far more money than the abolition of the upper chamber (N.S. *Journals*, April 17, 1879). It objected to abolition on principle, stating that the example of Ontario was irrelevant since in all other jurisdictions an upper chamber existed, all of which were modelled on the parliament of the United Kingdom. It also argued that the council had "never wilfully or wantonly interposed or caused embarrassment to the Government of the country, and they have no evidence, nor do they believe, that the people of the Province are dissatisfied with the Legislative Council as a constitutional member of the Legislature of the country, or desire its abolition" (*ibid.*).

The cabinet adopted its own address in the form of a 'minute' of the executive council which contained a normative discussion of the history of the bicameral legislature in colonial Nova Scotia as a check on the assembly, arguing that the need for such a safeguard had been made obsolete by the powers granted to the Canadian government (N.S. *Minutes*, EC, April 30, 1879). The federal government was the check on a provincial legislature given its constitutional power of disallowance.<sup>265</sup> It cited a number of bills that had been passed by the legislative assembly and defeated in the council. It reiterated the unnecessary expense argument and noted that while the assembly address mentioned Ontario, that Manitoba and British Columbia had since joined Canada without councils and that the other Canadian provinces were all moving towards abolition.<sup>266</sup> The minute 'advised' that the assembly's request be granted.

Constitutionally, the queen was only 'advised' by her British ministers in this era, who expressed disappointment that the governor general of Canada had not provided an impartial perspective to aid the British cabinet in considering the provincial assembly's request. Since the *Constitution Act, 1867* had given the power to amend a provincial

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<sup>265</sup> The powers of disallowance and reservation of provincial legislation were powers that had been assigned to the Canadian government. These would fall into disuse as provincial governments emerged as distinct and autonomous governments with interests and powers well beyond 'local' affairs.

<sup>266</sup> Manitoba had in fact joined with a bicameral legislature, but the upper chamber had been abolished (see previous chapter).

constitution to the provincial legislature, “the circumstances, as placed before me, do not lead me to conclude either that an alteration of the constitution has been proved to be necessary, or that sufficient attempts have been made to remove the evils complained of by well-directed measures of reform and retrenchment” (*Despatch* from Hincks-Beach to Lorne, July 25, 1879).

The Nova Scotia government tried to reopen the matter by presenting a detailed case to the Canadian government of provincial expenses, which were financed principally by a grant from the federal government, and asked it to have the governor general intercede on its behalf.<sup>267</sup> The response from the Canadian government was that the *Constitution Act, 1867* gave the provinces the full authority to amend the provincial constitution and while it was regrettable that the two chambers were, in the moment, hostile to one another, perhaps in time harmony would be restored and, failing that, vacancies would open up allowing the government to appoint new councillors (*Despatch* from O’Connor to Archibald, April 30, 1881).

The government of Nova Scotia then asked the assembly for permission to correspond with the governments of New Brunswick and Prince Edward Island to see if the Maritime Provinces working together could bring about abolition of all three upper chambers (res.6, N.S. *Journals*, LA, 1881). The assembly authorized the government to proceed.

No mechanism for joint abolition emerged.<sup>268</sup> Rather, the governments of Nova Scotia and New Brunswick developed a strategy that the two governments would try in their respective provinces: leaving vacancies in the upper chamber unfilled until there were

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<sup>267</sup>This was in a letter from Holmes, but as government communication went through the lieutenant governor to the governor general, it is attached to a *Despatch* from Archibald to O’Connor (July 22, 1880)

<sup>268</sup> It received from the New Brunswick government an order-in-council committing to “give immediate consideration to any suggestion which may be offered on the subject by the government of Nova Scotia” (N.B. *Minutes*, EC, June 7, 1881).<sup>268</sup> The government of Prince Edward Island expressed its desire to abolish its legislative council, but noted that it was elected so the process would likely have to be different, so asked for proposals as to how the Nova Scotia government planned on proceeding (PEI *Minutes*, EC, June 23, 1881). Representatives of the Nova Scotia government met with their counterparts in New Brunswick. With nothing tangible to report, the provincial secretary asked the lieutenant-governor to try again with the governor general and Canadian government (Letter from Holmes to Archibald, October 17, 1881). He did not.

sufficient vacancies that a group of individuals committed to abolition could be summoned at one time and then quickly adopting legislation abolishing the chamber. In the short term, leaving vacancies would, it was believed, undermine whatever legislative credibility the chamber might have with the public. When it came time to fill the vacancies, only persons who had signed a pledge to vote for abolition would be appointed.

The election of 1882 brought the Liberals back to power and thus a new premier William Pipes. The following year, the Pipes government introduced a resolution calling for the abolition of the upper chamber (N.S. *Journals*, March 17, 1883). The resolution read: “In view of the successful experience of the Provinces of Ontario and Manitoba, the special need of economy in the administration of our local affairs, it is expedient to abolish the Legislative Council of this Province as soon as it can be done, consistently with the existing laws and prerogatives of this Legislature” (res.2, N.S. *Journals*, 1883). The choice of resolution is interesting because it could not bring about abolition; it only expressed the desire of the lower chamber and the government for that unattainable goal. As an alternative, an opposition member proposed that a committee be established to look into how to amend the provincial constitution with respect to the legislative council, but this was opposed by the government and defeated (*ibid.*).<sup>269</sup> The assembly adopted the government’s resolution but, as already observed, the government did not have to take any action as a consequence. This was the first of a long line of fainthearted initiatives introduced by the Liberals to show their official support for abolition and thus ensure it would not be an issue in the subsequent provincial election.

In 1884, an opposition member introduced, in the assembly, the council’s proposal to reduce the costs of government by reducing the number of people in the lower house to 21, the upper house to 11 and the executive council to five, but this was opposed by the government and defeated (N.S. *Journals*, LA, March. 25, 1884). When the Pipes government proceeded to fill three vacancies in the legislative council, this drew an equally

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<sup>269</sup> The defeated resolution read: “A Committee of this House be appointed to enquire into the best mode, if any, of amending the Constitution of the Legislature of this Province, as respects the Legislative Council, and with a view, if possible, of securing a more inexpensive system” (res.3).

unsuccessful motion of censure which stated that the government had broken its commitment and claimed that with these three appointments there should have been sufficient councillors to bring about abolition (*ibid.*, April 16, 1884). The government responded that it had obtained from these appointees a written commitment in advance of their appointment that they would vote in favour of abolition, though it refused to release copies of these letters.<sup>270</sup>

In 1886, with an election ‘in the offing’, an opposition member introduced a resolution insisting that no more vacancies be filled in the council until after the election, but this never made it to debate (N.S. *Journals*, LA, 1886, res.7). The Liberals were re-elected that year, now with William Fielding at the helm, and abolition of the council was not an issue.

In 1887, the first meeting of provincial premiers was held in Quebec City, which was chaired by the premier of Ontario and included the premiers of Quebec, Nova Scotia, New Brunswick, Prince Edward Island and Manitoba (MacKinnon 2002).<sup>271</sup> At the meeting, a series of constitutional amendments and resolutions in support of provincial rights and increased federal transfers were adopted. One of the amendments would have put a clause in the *Constitution Act, 1867* to allow for the abolition of a provincial legislative council by the queen in response to an address adopted by the legislative assembly in the province, provided it had been adopted by a two-thirds vote in the lower chamber.<sup>272</sup> The government in Ottawa was Conservative (though it was still going by the

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<sup>270</sup> In 1894, the government finally released copies of the letter it sent and the commitments it received. The letter sent by the provincial secretary to each prospective nominee read as follows: “Sir,- The Government have under consideration the subject of appointments to the Legislative Council. Your name has been submitted to them and has been favourably considered. In view of the probability of steps being taken at a future day, having in view the abolition of the Council, the Government do not deem it expedient to appoint to that body any gentlemen whose opinions on the subject would prevent his assisting such a movement. They desire, therefore, to know whether, if appointed, you would be willing to support a measure to abolish the Council, should such be brought forward.” (N.S. *Journals*, LA, 1894, app.17)

<sup>271</sup> Each of these premiers belonged to the same political party, the Liberals, though Quebec’s premier had re-labelled his party the *Parti national*.

<sup>272</sup> This was article 12 and it reads: “That in two of the Provinces of the Dominion there is no second Chamber; that in five of these provinces there is a second Chamber; that in one of these five of the Provinces there is elective and for a limited term; that in the other four appointments are made by the Lieutenant-Governor and for life; that the experience which has been had since Confederation shows that, under

name Liberal-Conservative) and these premiers were all affiliated with the Liberals at the federal level, even if in some of the provinces they were not using party labels. None of the constitutional amendments or resolutions, including a call for a reciprocity treaty with the United States, was considered seriously by the federal government.

About to fill another vacancy in 1888, the Liberals introduced a “Bill to Abolish the Legislative Council” (N.S. *Journals*, LA, March 12, 1888). During the ensuing debate, the government defended making appointments to fill vacancies, noting that the Conservative government in 1879, just as it was making abolition a priority for its party, had made appointments so as not to be at a disadvantage in that chamber when its legislation was considered (Longley, N.S. *Debates*, LA, March 21, 1888). Of particular note in the debate is the description of the composition of the upper house by a member on the government side:<sup>273</sup>

“is composed of men who are to some extent retired from active business, men who represent the soil, the land owners of the country, retired wealthy merchants, men not engaged in active legal and professional business, and these are men who from their calmness of demeanour, their attention to public affairs, their admitted knowledge and experience, are fairly entitled to pass upon matters and measures in a manner that any other body of men in this country cannot rival” (Roche, *ibid.*).

Even though the practice of appointing councillors from each of the different counties of Nova Scotia had emerged by now, there was no suggestion that the body represented the regions of the province. It is also noteworthy that the councillors from Cape Breton did not

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responsible government, and with the safeguards provided by the British North America Act, a second Provincial Chamber is unnecessary, and the expenses thereof may, in all the Provinces, be saved with advantage; that under the Act a Provincial Legislature has power to amend the constitution of the Province ; that this power includes the abolition of the Legislative Council, or changing the method of constituting the same; that the provision has failed to effect the abolition of the Council in some Provinces where public opinion is believed to favour such change; and that the Act should be so amended as to provide that upon an address of the House of Assembly, the elected representatives of the people, Her Majesty the Queen may by proclamation abolish the Legislative Council or change the constitution thereof, providing that the address is concurred in by at least two-thirds of the members of such House of Assembly” (N.S. *Journals*, LA, 1894, app.17).

<sup>273</sup> This member of the government opposed abolition on the grounds that the chamber had repeatedly found flaws in legislation passed by the lower chamber and that no case had been made by the government that the upper chamber was being obstructionist or that a crisis was at hand.

identify a representational role for themselves with respect to the island. The Bill passed easily through the lower chamber (N.S. *Journals*, LA, March 26).

In introducing the legislation in the upper chamber, the government's case was shifted from one of cost savings to one of the 'will of the people' as expressed by the political parties united in the lower chamber (Fraser, N.S. *Debates*, LC, March 28, 1888). In opposition to the Bill, it was argued that the agitation for reform in the lower house was a response to the upper chamber doing its job as an independent body and that if the government was serious about reform it should follow Prince Edward Island's example and create an elected upper chamber (Baker, *ibid.*, March 28, 1888) or arrange conferences with the upper chamber to see if together the chambers could come up with a better design (Goudge, *ibid.*). There was a belief that the financial savings would not be what successive governments had claimed (Baker and Whitman, *ibid.*). The role of the chamber in revising legislation was not any less needed based on the flaws the council found in recent legislation, which is why some councillors who had voted for abolition in 1882 were voting against it now (Creelman and Goudge, *ibid.*).

Even if the Conservatives were, as they claimed, more committed to abolition when they were in government, they were defeated in the following election, which caused several councillors to argue that that either meant the people did not care about abolition or the people did not support this cause (e.g., Goudge, *ibid.*). And it was pointed out that it had not been an election issue. It was also noted that, beginning in 1884, the Liberal government could have appointed members who wanted abolition, but instead appointed people who would further other legislation which it considered a greater priority (*ibid.*). With respect to the issue of the written pledges, it was said that, in asking for them, the premier had told the appointees that they would be free to renounce the commitment to vote for abolition should their views change (*ibid.*). The Bill to abolish the legislative council was defeated 11 to 8; with three of the councillors voting against, having pledged to vote for any such legislation (two had been appointed by the Conservatives under Holmes and one under the Liberals).

In 1890, in advance of the provincial election, the Liberal government again introduced a “Bill to Abolish the Legislative Council” (N.S. *Journals*, LA, April 11, 1890). It was passed the following day and sent to the legislative council where it was introduced on April 12 and referred to committee on April 14 (N.S. *Debates*, LC). The committee concluded that the Bill was an affront to the rights and privileges of the upper house, as any change to the council should originate in the council (*ibid.*, April 15, 1890). It was deferred for three months, which meant that it died when the election was called.

The following election was in 1894. In advance, the government appointed three new councillors. Before they could take their seats in the chamber, the leader of the government was asked if they had signed pledges as to how they would vote on abolition, but the government refused to answer, though it had asserted such in the lower chamber since 1884 (N.S. *Debates*, LC, January 24, 1894). The matter was referred to the council’s committee on privileges. A legal opinion from two respected jurists, Benjamin Russell and R.L. Borden, the latter of whom would go on to be prime minister of Canada, was obtained. The legal counsels recommended that in the absence of evidence of the existence of such pledges the members should be admitted and given their seats in the chamber. They went on to write:

“that the giving and taking of a pledge by which a member of the legislative council becomes bound to the political leader for the time being to vote for or against a particular measure is wholly unconstitutional” (N.S. *Journals*, LC, January 26, 1894).<sup>274</sup>

Citing Edmund Burke’s views on representation and May’s *Constitutional History of England*, they note that the matter of extracting pledges from candidates is outside of the British constitution and, even if made, are not binding on the person if elected to the British house of commons. If a pledge to constituents is unconstitutional then *a fortiori*, a pledge to a minister of the day, who a councillor in no way represents in the legislature, must be a “violation of the order and tenor of the constitution” (*ibid.*). The government is free to appoint people who might be like minded on an issue, but it may not obtain a pledge on

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<sup>274</sup> R.C. Weldon, dean of the law school at Dalhousie University, gave his concurrence to this opinion.

how a councillor will vote on a particular piece of legislation. Again citing May, they write:

“Parliament is a deliberative body. The appointee to the legislative council ‘must enter the legislature a free agent, to assist in its deliberations’ not merely to register a decree determined upon in advance of all deliberation, ‘and to form his own judgement’, after debate and conference with his associates ‘upon all public matters’” (*ibid.*)<sup>275</sup>

This opinion was presented to the dean of law at Dalhousie University, R.C. Weldon, who gave his written concurrence. The committee passed these opinions onto the upper house and recommended unanimously that no Bill to abolish the legislative council be allowed to be introduced into the upper chamber until the government gave assurances that it did not feel any member was bound by any pledge or undertaking. The government subsequently acknowledged that it had received the same pledges from the ten appointees it had made and promised to release all correspondence. A vote on the committee report was postponed at the government’s request.

The government then introduced a “Bill to Abolish the Legislative Council” in the upper chamber (N.S. *Journals*, LC, January 27, 1894). Copies of correspondence between all Liberal appointees to the upper chamber was tabled in both chambers, showing that the government had in fact obtained pledges from each councillor to vote for any government Bill for abolition and, in the one case where a councillor refused to pledge in advance how he might vote on an issue placed before the chamber, he had given his commitment to resign his seat if he could not, in good conscience, vote for such a government Bill (N.S. *Journals*, LA, January 29, 1894).<sup>276</sup>

In moving the Bill for abolition in the upper chamber, the leader of the government said he had no intention of making a lengthy argument in support of the Bill, his “purpose

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<sup>275</sup> Thomas Erskine May was a constitutional lawyer and clerk of the British house of commons. To this day, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*; original title: *A Treatise upon the Law, Privileges, Proceedings and Usage of Parliament* is the principle parliamentary authority, or parliamentary rule book, for the parliament in the United Kingdom and countries like Canada that adopted the Westminster-model under its unwritten constitutional conventions.

<sup>276</sup> When the Conservative leader was challenged to release copies of his pledges or disclose how the commitments they claimed to have from their appointees had been obtained, he declined on the grounds that these were privileged and only the government can release cabinet documents.

mainly in moving the bill was simply to carry out the well-known policy of the government” and even acknowledged the good work done by the council (Murray, N.S. *Journals*, LC, January 30, 1894). Other councillors expressed surprise that the minister had not given a defence of the Bill or an explanation of why it was suddenly urgent (e.g., Baker, *ibid.*). And it was again noted that this had not been a political issue in any election (LeBlanc, *ibid.*). The bill was deferred in the council for three months (*ibid.*).

In the lower chamber, at the government’s suggestion a committee was struck to prepare a new address to the queen (N.S. *Journals*, LA, February 8, 1894). The address, adopted on February 9<sup>th</sup>, recounts the long history of attempts at abolition, cites the agreement of the premiers with respect to constitutional amendments and asks the queen to put before the British parliament an amendment to the *Constitution Act, 1867* to permit the governor general to abolish the legislative council of Nova Scotia following an address by the assembly adopted by two-thirds vote.<sup>277</sup> The address included copies of the correspondence with Liberal councillors and stated that the Conservative’s appointees had all made similar commitments. Providing mutual cover to each political party going into the election, the address notes that: “the question of abolition of the Legislative Council has not assumed a party form, the political opponents of the present government being as active and outspoken in their advocacy of abolition as are the members and supporters of the Administration in the Assembly” (N.S. *Journals*, LA, 1894, app.17).

As before, the legislative council adopted its own address in reply (N.S. *Journals*, LC, 1894). It cited the important work it had done in revising legislation, and pointed to the salaries paid to members of the lower chamber and to cabinet ministers as offering much greater savings if the province were serious about costs. And it noted that the premiers’ conference, where a change to the *Constitution Act, 1867* had been proposed, was a meeting between leaders of the same political party, the Liberals, and that this party had

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<sup>277</sup> In other words, it asked the queen to have the British parliament make the changes to the Canadian constitution agreed to by the premiers at Quebec City, but not adopted by the provincial legislatures or the Canadian parliament

put its constitutional reform ideas before the people of Canada during the federal elections of 1887 and 1891 and the party had been defeated.<sup>278</sup>

The cabinet adopted a minute responding to the legislative council (N.S. *Minutes*, EC, February 24, 1894). Interestingly the government missive acknowledges the work of the legislative council in reviewing and improving legislation, but suggests that the lower chamber would take more care in drafting bills if it knew there was not a second chamber to catch its mistakes. The Canadian government took no position in passing all these addresses on to London on the grounds that it was outside of its jurisdictional competence, though it attested to the facts in both chamber's documents with one qualification (Canada *Minutes*, PC, October 8, 1894). With respect to the legislative council's reference to the premiers' conference, it confirmed they were all affiliated with the federal Liberal Party but says the resolutions did not figure prominently in the party platform or subsequent federal elections. The response of the British government was "that as the Province has the power to alter its constitution if it sees fit to do so, a resort to Imperial legislation would be inexpedient except in circumstances of urgent necessity" (*Despatch* from Ripon to Aberdeen, December 3, 1894). This despatch was received two years later, when George Murray had succeeded Fielding as Liberal leader and premier.

In 1897, in advance of the next election, the Conservative opposition introduced a motion committing the lower chamber to deal with legislation to abolish the council, and to pay the councillors a retirement allowance equal to three years' salary, which was defeated (N.S. *Journals*, LA, February 9, 1897). The Liberal government then introduced its own Bill for abolition of the chamber on February 18, and this was adopted by the assembly the following day (*ibid.*). Again, in anticipation of the 1901 election, the Liberal government moved to introduce a Bill to abolish the upper chamber in that chamber (N.S. *Journals*, LC, 1901). The Liberals in the council would not allow the Bill to be introduced until they got

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<sup>278</sup> An amendment to this address was proposed, which would have committed the council to passing a Bill in favour of its abolition with the proviso that it not come into effect unless approved by the people voting in a referendum, but this proposal was defeated by the council.

assurances that the government did not consider any pledge by a councillor to vote for abolition as binding.

The first socialist member of a maritime legislature was elected in 1911, Alex McKinnon. He was elected from Cape Breton. The socialist party of Canada had a notable following in this area, particularly among coal miners (Baldwin et Shell 2001; Frank et Reilly 1979). The United Mine Workers of America, which shared executive officers with the SPC under the leadership of J.B. McLachlan, had ‘set up’ shop here in 1909. These developments had an impact on the debate over the upper chamber, as members in both parties began to consider a role for the chamber as a way to prevent a temporary rise in radicalism.

In 1911, the British parliament altered the powers of the house of lords, to reduce its veto to one of temporary delay (*Parliament Act, 1911*). Money Bills it could delay for only one month provided the Bill was sent to the house of lords at least one month prior to the end of the session. The ‘suspensive veto’ on all other Bills was for two years, but if at that time a Bill passed a second time by the house of commons in the same form, it would become law. Not surprisingly this idea found followers in the Nova Scotia legislature. In 1916, Conservative W.L. Hall introduced a Bill to transition to a suspensive veto, in the hopes that it would then be possible to abolish the council through subsequent legislation. It was defeated. In 1917, Liberal R.M. MacGregor introduced a private member Bill that would have limited the council’s veto to two years with the same Bill becoming law if passed by three consecutive sessions of the legislature. The purpose of this Bill was genuine reform, but as he was a minister and the Liberal government had not yet adopted this as its policy, this Bill was withdrawn.<sup>279</sup> In the next legislature, the assembly passed a resolution calling for reform of the upper chamber, and then struck a conference committee to work with the legislative council on possible changes (*N.S. Debates, LA, 1922*). While the councillors on the conference committee rejected discussion of abolition, alternative

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<sup>279</sup> MacGregor was a cabinet minister and while he introduced this as a private member, proceeding with the Bill would have been embarrassing for the government. Under current parliamentary rules, federal ministers are not allowed to introduce private members bills.

reforms such as making the council elected were raised. The committee was re-struck in 1923, but no concrete proposals were advanced by either chamber.

Earnest Armstrong took over as Liberal Party leader in 1923, after 39 years of Liberal rule in the province. In this parliament the United Farmers and the Labour parties had emerged onto the scene and formed the official opposition. While the Conservatives had been reduced to three seats in the 1920 election, it was apparent that the political wind was shifting in the province, due to an economic downturn and labour unrest in Cape Breton. There, McLachlan, now a member of the Communist Party of Canada, had been organizing coal miners through the UMWA to strike (Frank et Reilly 1979). The most violent strike would occur between March and June of 1925, right in the midst of the provincial election.

Laying the groundwork for the 1925 election with respect to the upper chamber, the Conservatives introduced a Bill calling for the abolition of the council on February 25, 1924 (Corning, N.S. *Journals*, LA). After a raucous debate, the assembly split along party lines and voted to delay the Bill for three months' time (*ibid.*, April 3, 1924). The Liberals had emerged as defenders of the council, painting it as a bulwark against communism (N.S. *Debates*, LA, April 3, 1924).

The Liberal government then introduced legislation to set retirement at age 70, to limit new council appointments to 10-year terms and to limit the council's power to a suspensive veto, so that a Bill rejected by the council would become law if it were adopted by the lower house in three successive sessions (N.S. *Journals*, LA, April 6, 1925). The council amended the legislation, raising the proposed retirement age to 75, exempting sitting councillors from the 10-year term limit and preserving their full veto for any Bill that would alter the constitution of the legislature, and all money Bills (N.S. *Journals*, LC, April 24, 1925). This was passed by the council on April 27. The assembly attempted to get the council to back down, but it refused to back down on its amendments (N.S.

*Journals*, LA, May 1 & 5, 1925) and the amended Bill became law on May 7, 1925.<sup>280</sup> The Liberals were defeated at the polls, losing all but three seats in the assembly, with the Conservatives taking the remaining 40.

In 1926, the new Conservative government of Edgar Rhodes introduced legislation to abolish the council (N.S. *Journals*, LA, February 25, 1926) and this passed the assembly on March 16 (*ibid.*).<sup>281</sup> It was introduced in the upper chamber two days before the house was prorogued and the council voted to not proceed on the Bill (N.S. *Journals*, LC, March 18, 1926). Again in 1927, the government introduced its Bill to abolish the legislative council (N.S. *Journals*, LA, February 8, 1927). The Liberals in the lower chamber tried to kill the Bill by having it postponed for three months, but were unsuccessful (*ibid.*, February 10, 1927), and the Bill passed the lower chamber on February 15. In the upper chamber it was postponed for three months, again killing the legislation (N.S. *Journals*, LC, March 11, 1927).

These Bills had no more hope of passing than the abolition legislation the Liberals faint-heartedly introduced while they were in office. But unlike the Liberals, the Conservatives had a new found partisan commitment to abolition, and they were now differentiated from the Liberals on the need for an upper chamber. This time the political posturing was not designed to neutralize a political issue; it was designed to make it a wedge issue and thus create general public debate and support. The government's real plans for abolition lay in its plan to appoint additional councillors. The government only made one appointment to the council, that of a cabinet minister since he was needed to introduce and manage government legislation and to answer questions about government matters in that chamber. All other vacancies it left open, planning to fill them in one shot whenever there were a sufficient number to tip the scales in favour of abolition and thus prevent the appointees from being captured by the other councillors or swayed by the work of the chamber.

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<sup>280</sup> It is entitled: *An Act to amend Chapter 2, Revised Statutes, 1923, "Of the Constitution, Powers and Privileges of the Houses"*, legislation concerning the two chambers having been brought together in a single act through the consolidation of the province's legislation.

<sup>281</sup> It was entitled: "An Act to abolish the Legislative council, and amending the Constitution of the Province".

The government approached the federal government with a legal opinion that the size of the council was not set at 21, but rather was unrestricted since the queen had never surrendered her power of appointment in the *commissions* she gave to the governors, authorizing them to make provisional appointments. Furthermore, councillors only served at pleasure so could be removed. The lieutenant-governor would appoint 20 additional councillors on March 15, 1926, over and above the current councillors, to bring about abolition. The law officers in the federal government responded that the province should seek a judicial interpretation and that, in the meantime, they advised the lieutenant-governor not appoint a council bigger than 21 persons.

To try to entice some or all of the councillors to resign, the provincial government made an offer of a ten-year pension to the life members and a five year pension to term councillors, an offer the council declined.

A reference was made to the supreme court of Nova Scotia by the government on May 12, 1926, which was heard by the court on July 12 (S.C.N.S., *Re: Legislative Council*). The court could not agree on answers to the questions put before it, so it *pro forma* adopted the view of the chief justice as the court's position to allow the government to appeal this decision to the Judicial Committee of the Privy Council in London, the final court of appeal in this period.<sup>282</sup> On October 18, 1927, the JCPC rendered its decision that while the lieutenant governor had originally been authorized to only make 21 provisional appointments, the queen could appoint as many as she wanted, and that when the change had been made in 1872 to allow for the lieutenant governor to make appointments in the queen's name, he assumed her unrestricted authority, which was now exercised on the advice of the Nova Scotia cabinet. What is more, tenure was at pleasure and not for life for those appointed prior to the introduction of the 10 year term limit, so any and all councillors appointed prior to 1925 could be dismissed by the government.

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<sup>282</sup> Three judges ruled that councillors served at pleasure, but only two said it was the lieutenant-governor's pleasure (one said the pleasure of the king and one said they were life appointments), two ruled that the lieutenant-governor could summon more than 21 and two that he could not. Following the grant of leave to appeal, the government by-passed the supreme court of Canada, which the JCPC expressed disappointment with, and presented its case to the JCPC, with counsel for the legislative council presenting its case.

In light of the ruling, members of the council offered to work with the government but it was uninterested. The six ten-year appointees had to be worked with, the two Conservative members of the council were retained and all the Liberal pre-1925 members were given the option of resigning or being dismissed, of which three did the former and six did the latter. To represent all of the counties of Nova Scotia at the time, 14 Conservative councillors were appointed, bringing the number of the council to 22. The government wanted to ensure that no region of the island could claim to have not been allowed to vote on the upper chamber's abolition, something important in a province where the social cleavage had a territorial dimension.

The Bill abolishing the upper chamber was passed by the council on February 24, 1928 and given royal assent on March 2 (N.S. *Journals*, LC, 1928); it came into effect on May 31 of that year (s.6 of the *Act*).

While it had been talked about for half a century, for most of that time it had not been defined by the partisan cleavage, since both political parties had abolition as part of their platforms. In the case of the Liberals, by posturing in support of abolition in the assembly in advance of each election, they intentionally neutralized the issue, thereby depriving it of public debate. It was only when the partisan cleavage came to define the abolition issue, with the Liberals favouring the retention of the chamber with a suspensive veto and the Conservatives remaining committed to abolition that the public and their elected representatives genuinely engaged in a debate over the upper chamber, thus making it a partisan issue. Each party made the changes they wanted in a very short period of time, with the Liberals obtaining reform in the lower chamber in one parliament, and the Conservative achieving abolition in the next. While the government's partisan motivation for abolition was the Liberal's majority in the chamber, the constitutional mechanism they were handed by the JCPC would have allowed them to simply alter the balance of the chamber and make it their own. That they still wanted abolition reflected the partisan divide that had emerged over the future of this chamber.

In the first fifty years of posturing with respect to abolition, the principle defence advanced in support of the upper chamber was its capacity to improve legislation. No

significant argument in defence of the upper chamber was advanced with respect to the province's social cleavage or on behalf of any social group. It was only during the five years where both parties took different positions with respect to the upper chamber, ones that threatened and accomplished significant changes to the *status quo*, that a defence emerged relative to the social cleavage of the province, including that it would protect the province from the radicalism of the workers' movement in Cape Breton, but this defence was short-lived as it was not a role that members of the chamber embraced. Further, the government appointed councillors for each county of Nova Scotia so that any claim to a representational role could be countered by the fact that the representatives from these communities had voted for its demise.

## **II. New Brunswick**

New Brunswick achieved abolition of its upper chamber faster than any other province which joined Canada with an upper chamber. That it took until 1892 is due to the fact that both political parties adopted policies in favour of abolition of the upper chamber, thus neutralizing it as an election issue. Further, the Liberals found some benefit to having the upper chamber around to vilify. When change occurred, it did so because the government made the legislative council an election issue, the council having embarrassed the government by offering to adopt a number of decade old campaign promises which the government had failed to deliver. As in Nova Scotia, the government had appointees make pledges to support abolition in advance of being appointed. Being accused of not being serious about abolition, the Liberals were forced to use the pledges it had obtained from its appointees to bring about abolition in record time. While the legislative council in this province had no history of representation with respect to the province's social cleavage, the government found it necessary to appoint an Acadian to the chamber to vote in favour of abolition. From abolition becoming a salient issue in New Brunswick politics to it coming into effect, it took less than two years. No special constitutional mechanism was required, only party loyalty spurred on by the partisan interests of the governing party.

When New Brunswick joined Confederation in 1867, it had a legislative council of 12 members. With a restricted electoral franchise for the house of assembly, both chambers were composed of elites. However, the composition of the lower chamber, which had already been more diverse in terms of regional representation prior to Confederation (the upper chamber being disproportionately centred on Fredericton), was increasingly becoming diverse in terms of the province's social cleavage, the English and French divide. Since 1810 the three oaths had been eliminated and inflation was altering the impact of the property requirement for voting. Acadians and Catholics were beginning to engage with provincial politics, helping decide who would win the ridings in the northern half of the province and winning seats for members of their community in the process.

The Confederation debate had shifted the province's partisan cleavage away from government formation in the years surrounding the creation of union, but it was slowly returning. In 1878, John James Fraser became premier and attorney general, his predecessor and colleague having resigned over the non-denominational school issue. Fraser called an election and one of his platform promises was the abolition of the legislative council. Young (2000b) argues that this was still an era of 'loose fish' and not of political parties, but there was a government party and that was decidedly defeated at the polls. To stay on as premier, Fraser reached across the province's social cleavage that had been primed by the school issue and included Acadians and Irish Catholics in his government, as well as the leader of the Anglicans who had opposed the legislation.

In the speech from the throne in 1879, the government asked the legislature to consider "the propriety of amending the Constitution of the Province, by vesting the powers of Legislation in one Legislative Chamber" (N.B. *Debates*, HA, April 34, 1879). The government noted that Ontario did not have an upper chamber and Manitoba had successfully abolished its own to reduce costs. The Bill was subsequently introduced by the government (N.B. *Journals*, HA, March 26, 1879). The government did not bring it back for a final vote in the lower chamber before the legislative session ended.

The province's social cleavage was between the Acadians, who populated the northern half of the province and the English descendants of loyalist settlers, who populated

the southern half. In terms of representation along the province's social cleavage, the assembly and the coalition government could claim to have a role, but the upper chamber could not. No argument was advanced in this period in defence of the council with respect to the cleavage.

In 1881, a Bill was again put before the legislature in the context of reducing the cost of governance (N.B. *Synoptic Report*, HA, February 18, 1881). The arguments advanced against the bill were that there needed to be an upper chamber to prevent hasty and ill-conceived legislation, and those in favour were based around the cost, and the government stressed that there was no constitutional requirement to have a bicameral chamber (*ibid.*, March 21, 1881). The Bill passed the assembly 29 to 3 (N.B. *Journals*, HA, March 21, 1881). The issue had support on both sides of the partisan cleavage that was forming between government and opposition. While it passed easily in the lower chamber, it did not make progress through the council.

Andrew Blair was acknowledged to be the leader of the 'opposition' going into the election of 1882. The government appeared to win 22 of the seats in a 41 seat legislature in that election. Both the government and opposition had adopted abolition of the council as part of their platform in that election, thus neutralizing it as an election issue. Blair's platform included a number of other specific measures to reduce the size of government (Young 2000a). The premier who had faced the electorate in that election was Daniel Hanington, who had never faced the legislature, having been appointed on the recommendation of Fraser while the house was prorogued. When Hanington did meet the legislature he found his support not as solid as the election returns might have led him to believe. By 1883, Blair was able to cobble together the opposition to form what would come to be known as the Liberal Party, defeating the government on a motion of non-confidence and forming a government that would last for 20 years.

Throughout the following decade, both political parties, usually referred to as government and opposition rather than by the federal labels of Grit or Liberal and Conservative, included abolition in their platforms, making it a non-issue in elections. The

Blair government blamed the legislative council for its failure to deliver on promises. Yet it made no serious attempt to abolish the chamber.

In October 1887, Blair and David McLellan, the provincial secretary, attended the premiers' conference at Quebec City. They returned with the resolutions agreed to at the conference, including the resolution asking for an amendment to the *Constitution Act, 1867* so that provincial legislative councils could be abolished by a two-third vote in the lower chamber on an 'address to the queen' requesting its abolition. The bulk of the resolutions concerned provincial rights and an increased subsidy from the federal government.<sup>283</sup> The legislative council refused to pass the resolutions.

The legislative council used a government supply Bill to issue a financial report that, if adopted, would have put in place most of the financial changes Blair had proposed in the election of 1882, with the one exception being its own abolition. Blair appointed two legislative councillors to avoid the embarrassment of having to vote against his own election agenda and obtained his original supply Bill. He then called a snap election in 1889.<sup>284</sup>

The opposition accused the Blair government of simply failing to deliver on its promises irrespective of the council, and accused the government of being insincere about abolition. Blair's Liberals were suffering from internal divisions and the election was not decided at the polls but rather in post-election machinations. By making the issue of the legislative council interfering in money Bills a major issue in the election, Blair had barely hung onto power. But having made it an issue, the government could no longer sit on its hands and blame the council for its shortcomings. It had to act.

In the speech from the throne opening the session of 1891, the government announced its determination to proceed with abolition of the legislative council. As the lieutenant governor informed the two chambers:

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<sup>283</sup> Blair did not introduce the resolution in favour of reciprocity, saying that it had not been formally adopted by the premiers, though he told the chamber that he supported this policy. That would be central to the party platform of the federal Liberal Party.

<sup>284</sup> The previous election had been 1892, with the tradition in this era that elections would occur every four years, governments formed from within the legislature when a government lost the confidence of the lower chamber in between elections.

“It is believed by my government that the time had now arrived when decisive action may be taken towards amending the constitution of the province, and vesting the legislative functions now existing co-ordinately in the two branches, exclusively in the elective branch” (N.B. *Synoptic Report*, HA, March 12, 1891).

The government argued that the people had been expecting it to act on the matter which had been before the legislature for over a decade, that being the upper chamber had too frequently defeated legislation which passed the lower house and that the money spent on the chamber could be better spent on public services (Colter, *ibid.*).

The opposition repeatedly accused the government of not being serious about abolition, having appointed new legislative councillors, but committed if the government were serious to lend its support (Atkinson, Alward and McKeown, *ibid.*). The opposition also tried to make the government’s failure to appoint Olivier J. LeBlanc, a government minister and representative of the Acadian community in the cabinet, to the council in its latest appointments an issue. LeBlanc had resigned in 1891, and ran unsuccessfully for the house of commons on behalf of the Liberals.

After letting the opposition repeatedly accuse the government of insincerity and attack its decision to appoint councillors, the premier disclosed that when he had appointed councillors he had asked them each to make the following pledge:

“Having been notified that the government has it in contemplation to ask my acceptance of a seat in the legislative council and to appoint me thereto at an early day, I beg to assure you that in case my appointment shall take place I will accept the same upon the understanding that I will at all times vote for any measure or measures introduced and promoted by the government for the purpose of bringing about the abolition of the council, and I hereby pledge myself accordingly” (*ibid.*, 1891).

As noted in the previous section, this idea of extracting pledges from councillors first emerged in Nova Scotia and was shared in 1881 at an intergovernmental meeting of Nova Scotia and New Brunswick and then subsequently discussed when all the provincial premiers met in Quebec City in 1887. In Nova Scotia, Liberal premiers had extracted the pledges without intending that they be followed, and it is possible this was Blair’s intention as well. After all, a private member’s Bill in support of abolition the year before had been

defeated in the upper chamber and two government members there voted against its introduction. Certainly this is what the opposition accused the government of during the debate.

The government took the greatest umbrage with the opposition trying to make the Acadians part of the debate over the council. It responded by appointing LeBlanc to the upper chamber. LeBlanc would vote in favour of abolition.

The government Bill introduced that year passed the lower house and was sent to the council (N.B. *Journals*, HA, April 10, 1891). Councillors, including members appointed by the government, amended the Bill to put off abolition to 1894 or at the next provincial election. This led to renewed accusations by the opposition that the pledges were a sham and did not reflect a firm commitment on the part of the government for its abolition. The government denied this, using its majority to accept the amendments (N.B. *Synoptic Report*, HA, April 16, 1891). *An Act relating to the Legislative Council* was given royal assent that same day. Blair called a general election on September 28, 1892 and the legislative council ceased to exist.

The reason it took a decade from the first Bill to abolish until it was finally accomplished reflects the lack of salience on this issue as both political parties endorsed the abolition movement thereby removing it from election debate. Once the government made the legislative council an election issue in 1889, it created momentum for this issue. Abolition was achieved in a very short period of time. The province's social cleavage was not a serious factor in its abolition as the upper chamber had no representation function with respect to the French-English cleavage, while the lower chamber and the government did. Yet the government still found it necessary to appoint an Acadian to the chamber to secure passage of its legislation. He took his seat in the chamber on the day the abolition Bill came up for vote in the council, and it passed.

### **III. Prince Edward Island**

Prince Edward Island is an interesting case because its upper chamber was elected and had a specific representational role, that of representing property owners. Property

ownership was the dominant social cleavage in the province when it joined Confederation in 1873. The upper chamber would resist abolition until 1963, with the last remnants of bicameralism disappearing only in 1996. Given the small island population, reducing the cost of the legislature was a significant issue and the two political parties came to differ over policy with respect to the council. While the institution was able to resist abolition for so long, there were, however, three specific and limited institutional changes and each change was tied to a shift in the social cleavage at the time:

- From Confederation until 1893, the councillors and the property owners refused to support abolition. While the Conservatives favoured abolition, when the Liberals came to power, they reduced the size of both chambers and merged them, with councillors still elected using the property qualification. While it marks the end of bicameralism, this was not abolition, as both assemblymen and councillors continued to be elected, the former by universal male suffrage and the latter by property owners as before.
- In 1963, the property qualification was eliminated, again by a new Liberal government. By then, property ownership was no longer the dominant cleavage in the province, which was now catholic-protestant. As the province was evenly divided between the two groups, and there were two representatives elected in each riding – an assemblyman and a councillor – the practice had emerged where the political parties ran catholic against catholic and protestant against protestant. While the property qualification was eliminated, the distinction between assemblyman and councillor was maintained so as to permit this practice to continue. As this was an informal arrangement and the role of councillor had been to represent property owners, this was the abolition of the upper chamber.
- By 1996, the changing demographics of the province and a decline in religiosity had led parties to stop the practice of using the councillor and assemblyman positions to provide religious balance. So the province changed the electoral law to move from dual- to single- member constituencies, eliminating the title councillor in the process.

It is the shifts in the social cleavage that made change possible; just as it was resistance from one side of the social cleavage that prevented abolition for so long in the face of a desperate fiscal situation.

In switching to an elected upper house in 1862, the upper chamber had been made half the size of the lower chamber. The council had six dual member districts (two councillors elected in each county) plus an additional councillor from Charlottetown, while the assembly had 15 dual member districts. The property qualification to vote for a councillor was \$325 of property, whereas to vote for an assemblyman one need only be a male of 21 years of age and resident in the riding for at least 12 months. There was a modest property qualification of owning or occupying property worth 40 shillings.<sup>285</sup> Voters could cast a ballot in more than one riding, provided they met the property qualification. Councillors were elected for eight year terms, half every four years, while assemblymen were elected in general elections called by the government of the day at intervals of usually four years.

To serve in the council one had to be at least 30 years of age, but to serve in the assembly one needed to be at least 21 years of age and have \$162.22 worth of property in the riding which he represented. The property qualification for assemblymen had been set in 1856, when the currency was in pounds sterling (£50 at the time), so this amounts reflects simply the currency conversion. While the intention was to have a higher property qualification for councillors, the decision not to have a property qualification in the law adopted in 1862 was at the suggestion of the British colonial secretary, who advised the provincial government and legislature that it was better to impose a property qualification on the voters than on the candidates.<sup>286</sup>

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<sup>285</sup> This was the equivalent of universal male suffrage and was the least restrictive voting franchise in Canada at the time (Massicotte *et al.* 2007).

<sup>286</sup> This lack of a property qualification to serve in the council, and the more partisan nature of this body, are the reason John A. Macdonald and the Canadian delegation did not offer to appoint senators from this chamber (if it had entered Confederation at 1867).

The property requirement to vote preserved the social cleavage in Prince Edward Island that the earlier council configuration had been designed to reflect, with the propertied class and tenants each having a chamber to represent their interests. This made abolition of the upper chamber nearly impossible.

The issue of ‘absentee landlords’ was settled upon entering Confederation. First, the federal government provided money with which the province could acquire land. Second, the *Land Purchase Act, 1875* was adopted to allow tenants to purchase their property.<sup>287</sup> Third, it transferred the British powers of disallowance and reservation to the Canadian government, so these absentee land owners lost their capacity to block local legislation from overseas.<sup>288</sup>

The change in land ownership had an interesting effect on the province’s social cleavage. While it removed the influence of overseas landlords, it swelled the ranks of people who could meet the property qualification. This new propertied class was even more militant in their desire to protect the upper chamber as a defender of their interests.

Like all small provinces at the time, where provincial budgets were limited in size due to the inability to levy indirect tax, Prince Edward Island could not carry the cost of so many legislators and of having two chambers which doubled the cost in terms of services, printing and administration.

The Liberal-Conservative Party defeated the coalition government of Louis Henry Davis on a motion of non-confidence in 1879. During the election, the leader of the

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<sup>287</sup> It required owners of estates 500 acres or more to sell their land to the government at prices determined by a three-person commission. Owners who lived on their estates were entitled to retain up to 1,000 acres. This law had originally been adopted in 1874 and had been reserved, as with previous legislation, for approval by the colonial office.

<sup>288</sup> The *Land Purchase Act* had previously been passed by the legislature in 1874, but following earlier precedent from when Prince Edward Island was under British control, all Bills relating to the land question were reserved by the lieutenant governor for the parent government’s approval. So in this instance it was sent to the Canadian Governor General, Lord Dufferin, an Irish landlord, who found the legislation ‘monstrous’ and rejected it without even consulting the Canadian cabinet. The new *Act* had one small change that made it acceptable to the governor general in that the chair of the commission would be chosen by the Governor General-in-Council (McCallum 1981). The other two commissioners were chosen, one by the landlords and one by the provincial government (from a list approved by the legislature).

Liberal-Conservative party, William Wilfred Sullivan, had promised to cut government expenses and to press for the settlement of the province's claim for increased federal funding as a means of balancing the budget while eliminating direct taxation. The promise of eliminating taxes resulted in him winning 24 of the 30 seats in the lower chamber (MacBeath 2000). Part of his promised government cuts was the abolition of the upper chamber, though in his election material he vowed that "ample protection would be given to rights of property-holders" in the new unicameral assembly (Yeo, P.E.I. *Debates*, HA, March 17, 1880).

On summoning the legislature, the government announced its intention to proceed with the abolition of the upper chamber. It then introduced a Bill that would have abolished the council, and raised the property qualification for assemblymen to \$600 and the residency requirement for voters to five years (P.E.I. *Journals*, LA, 1979). For its part, the legislative council proposed its own legislation that would have reduced the size of each legislature by half and combine them in a single legislative assembly, with seven councillors elected using the existing council districts and 15 assemblymen elected using its existing districts (P.E.I. *Journals*, LC, 1979).

In the speech from the throne in 1880, the government informed both chambers that it would proceed with: "A measure for lessening the expense of Legislation by the abolition of the Legislative Council" (P.E.I. *Debates*, HA, March 4, 1880). On March 12, the government re-introduced its Bill. In introducing the legislation, the premier rejected the council proposal of combining the chambers, and argued that the savings of \$6,000 per year was sufficient reason to abolish the upper house. He noted that after all the public meetings convened by property owners, there had not been a single petition submitted in support of the council (Sullivan, P.E.I. *Debates*, HA, March 12, 1880). It was additionally argued that if the cost of elections were factored in, the savings brought about by abolition would be closer to \$8,000 a year (Perry, *ibid.*). The opposition countered that the public had been quite emphatic at its public meetings that the property owners should not lose their representation and argued that the lack of petitions was a reflection of the people's

confidence in the council to protect the existing constitution and defeat any government Bill, as it had the year before (Yeo, *ibid.*), and that there had equally been no petitions submitted calling for the abolition of the council (Yeo, P.E.I. Debates, HA, March 17, 1880). The Bill was passed by the house on April 21 and defeated in the legislative council.

The following year the government introduced a Bill to ‘abolish’ both chambers and establish a new assembly of 22 persons, with 15 elected using the districts of the assembly and seven elected using the districts of the council, but with the same property qualifications for each (P.E.I. *Debates*, HA, March 4, 1881). To be elected one would need property of \$600 and to vote there would be a minimal property requirement and a residency requirement of a year. The opposition attempted unsuccessfully to amend the Bill so that councillors would be elected by only property owners (P.E.I. Debates, HA, March 9, 1881). Government members, however, were able to reduce the residency requirement to one month (P.E.I. *Debates*, HA, March 11, 1881). The Bill passed the house, but did not pass the council. In response, the government introduced legislation to force all the councillors to face the electorate at the next general election alongside members of the assembly (P.E.I. *Debates*, HA, March 28, 1881). This was defeated in the council.<sup>289</sup>

The following year, in anticipation of a provincial election, the government introduced a straightforward resolution in favour of the abolition of the legislative council which would have vested all the powers of the legislature in the assembly (P.E.I. *Debates*, HA, March 13, 1882). Given the government majority, this resolution was adopted in the lower house. It then re-introduced its Bill to establish an assembly with different districting but the same qualifications, which met the same fate as the previous Bills, passing the assembly and going on to defeat in the council.

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<sup>289</sup> It would have been entitled ‘An Act to amend an Act to change the constitution of the Legislative Council and by rendering the same elected’.

In 1886, again in anticipation of a general election (and a partial election of the council), the government introduced its Bill again on the pretext it would be opportune to have it before the people to let them decide. It forced the house to vote on a series of motions, first to go into committee of the whole to consider the merits of introducing a Bill, then to state that it was expedient to do so and then to strike a committee to prepare the Bill (P.E.I. *Debates*, HA, April 28, 1886). The Bill was then introduced on May 10. Its provisions were the same as its last incarnation, with the council being abolished and the assembly becoming the legislature but with a \$600 property qualification to sit in the assembly. It was adopted by the lower house as the last piece of legislation before the end of the session, meaning that it didn't go on to the council (P.E.I. *Debates*, HA, May 13, 1886).

Direct taxation had been ended in 1882 with the repeal of the *Assessment Act*. By blurring the distinction between loans and grants and capital and operating accounts, Sullivan was able to make the province's finances appear better than they were (MacBeath 2000). But his party's popularity was dwindling. Seeing the writing on the wall in advance of the 1890 election, Sullivan left the premiership by having himself appointed chief justice, leaving it to his successor, Neil McLeod, to face the voters. McLeod barely won 16 of the 30 seats (Driscoll 2000).

In 1890, Prince Edward Island undertook a consolidation of its statutes. The laws were prepared by an independent commission. This commission did not propose changes to the laws or institutions they governed. It simply brought the laws together into a set of more manageable statutes. During the assembly's consideration of the election law, which was to be the *Act respecting the Representation of the People*, the opposition expressed its desire to see the two chambers amalgamated with councillors elected by property owners and assemblymen by universal male suffrage (P.E.I. *Debates*, HA, April 16, 1890). The premier claimed the government had proposed just that in 1881 (McLeod, *ibid.*), a claim the opposition rejected, arguing that that "plan was to abolish the Council, pure and simple" (Sinclair, *ibid.*). The government was able to use the fact that the opposition did not have a

coordinated plan in terms of the relative balance of councillors and assemblymen in such a chamber to prevent their proposal from proceeding.

The next opportunity to consider the amalgamation came when the legislature considered *An Act respecting the Legislature*. This Bill brought together the powers and qualifications of the respective chambers into a single piece of legislation. Debate occurred over the property qualification for assemblymen and whether or not it was an unfair restriction, given there was no such restriction to serve as a councillor. Arguments in favour of the qualification were that anyone worth their salt and eager enough to seek election would be able to meet the minimum requirement and that it prevented outside influence, particularly from Americans, who had been influencing elections in other provinces where candidates had been put up for election or paid money to run (P.E.I. *Debates*, HA, April 17, 1890). In the end, the only change made by the legislature was that the property qualification was rounded to an even \$160, instead of the \$162.22.

In March 1891, three of McLeod's members resigned to contest the federal election and the Liberals won two of the ensuing by-elections. The third was won by John Theophilus Jenkins, an independent Conservative at odds with his party (Driscoll 2000). This meant the Liberals had a majority and Frederick Peters became Premier.

Upon joining the assembly, Jenkins moved that "the number of members of the House be reduced to fifteen (15), and the members of the Legislative Council be reduced to seven (7). The members of both Houses to sit in one Chamber, and to act conjointly" (P.E.I. *Debates*, HA, July 11, 1891). As this was the last day of the session, the matter went no further.

In the next session, the attorney-general in the new Liberal government introduced the government's plan to amalgamate the two chambers (P.E.I. *Debates*, HA, March 31, 1892). There would be 15 districts, each electing two members: one a councillor elected by voters who met the existing property qualification and the other an assemblyman elected by the wider franchise that was in place for the lower chamber. The Conservatives, now in opposition, claimed that the Liberals were adopting *their* plan (McLeod, *ibid.*). While this

was not true, what was true was that only the Liberals would be able to change the legislature because the councillors did not trust the Conservatives and would reject any proposal they made.

The Bill was introduced into the legislative council on April 11 (P.E.I. *Journals*, LC). The Council debated the Bill for four days (P.E.I. *Journals*, LC, April 13, 14, 18 and 19). The debate in the council broke down along party lines. There were members of the council who had been elected under the Conservative banner and who had committed to abolition. While they tried to amend the Bill and to kill it, the majority of the council voted for the change and it passed the council on April 28 (P.E.I. *Journals*, LC).<sup>290</sup> The Bill was reserved by the lieutenant-governor for the federal government to pass judgement on (P.E.I. *Journals*, LC, May 5, 1892).

In the speech from the throne of 1893, the government informed the two chambers that it would again have placed before them: “A measure to reduce the cost of legislation in this Province will be submitted for your consideration” (P.E.I. *Journals*, LA, March 8, 1893). Then at the start of the session the government tabled the federal government’s response to the lieutenant-governor reserving the previous legislation to combine the two chambers, namely that the federal government did not feel it appropriate to advise the governor general to offer a judgement on the law as this was entirely a provincial matter (*ibid.*, March 15, 1893). P.E.I.’s Liberal government then reintroduced its “Bill to lessen the cost of Legislation, by abolishing the Legislative Council of the Province, and providing for one Chamber, to be called the Legislative Assembly, possessing the same powers and authorities now vested in the Legislative Council and House of Assembly” (*ibid.*).

The new chamber established by the *Act respecting the Legislature* in 1893 consisted of 15 dual member constituencies, half elected using the property qualification of \$325 of freehold or leasehold property and half elected by men who were British citizens,

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<sup>290</sup> The council made some minor amendments and these had been concurred in by the lower chamber (P.E.I. *Journals*, LC, April 25, 1892).

having attained the minimum age of 21 and who own or occupy property in the riding worth \$6 a year. Property owners could vote in more than one riding if they owned property in that riding. To be a candidate for either councillor or assemblyman one need only be at least 21 years of age and male. Councillors would campaign against each other in the riding, as would assemblymen, and the winner need only get a plurality of votes. The bill passed the council on April 19 (P.E.I. *Journals*, LC). It received royal assent the next day (P.E.I. *Journals*, LC, April 20, 1893).

The preamble to the *Act* states that the express condition for the council agreeing to merge with the assembly was that half of the members of the new body would be elected using the property qualification and that this qualification and the proportion of councillors cannot be changed unless agreed to by at least 2/3 of the assembly. This institution remained virtually unchanged until 1963.

In 1922, women were granted the vote and made eligible to be elected as either councillor or assemblyman.<sup>291</sup> This Act kept the property qualification to vote for a councillor at \$325 worth of property, which one needed to have held for six months. People, who served in the war, including aboriginals, were also entitled to vote for councillor. To vote for assemblymen one needed to live in the riding for at least two months, in the province for at least a year, be a British subject and be 21 years of age. Aboriginals who lived on a reserve could not vote. Non-residents were prohibited from canvassing or campaigning.

As the 20<sup>th</sup> century proceeded, the significance of absentee landlords passed from voter's memory into the island's history. With property ownership slowly becoming more common and the \$325 requirement having less relevance as the value of money shifted over

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<sup>291</sup> Interestingly, during the years of Conservative governments, the council had proposed amending the voting rules for the upper chamber so that women who inherited property could vote, the criteria for voting simply being property ownership. This was defeated in the assembly. When the Liberals first brought in legislation to merge the two chambers, it was raised again as a possible amendment but was dropped because it may have had the effect of causing the legislation to fail in the lower chamber (Mackenzie, P.E.I. *Debates*, LC, April 14, 1892). Given that Conservatives in the upper chamber had offered to support the amendment and voted to oppose the bill altogether, this seems a likely outcome.

time, the social cleavage in the island shifted from class and property to religion. The province was evenly divided between catholics and protestants. Informal arrangements had developed such as designating one public school as catholic and another as protestant, or alternating teachers between the two (Sharpe 1976). Banks even alternated managers between catholic and protestant (Sellick 1973). So relations were cordial, but the cleavage was pronounced.

Due to the small population, island politics became polarized between Liberal and Conservative. Third parties were shut out of elections.<sup>292</sup> Voters were roughly evenly divided between Liberals and Conservatives and party identification took on an almost “religious significance” (MacKinnon 1978). To not identify as either Liberal or Conservative made one a “political heathen” (*ibid.*). Small swings in popularity would shift the legislature dramatically between the two parties and it was normal for the party that was several percentage points ahead to garner almost all of the 30 seats. In the 19 general elections from 1893 to 1963, 10 percent of all elected representatives owed their seats to 25 or fewer votes (Clark 1973).

The two political parties responded to the religious cleavage by ensuring their candidates were on the same side of the cleavage, so protestant ran against protestant and catholic against catholic. With two seats in each district, one a councillor and one an assemblyman, both religious groups could be evenly represented. Strong party ID and competitiveness between the two parties meant that the same party would usually win both the councillor seat and assemblyman in a district. Even though it had little impact on outcome, there was resentment over the property qualification in the era of the automobile. Some people would spend all Election Day driving from riding to riding where they owned property (as property voters could vote in any riding where they owned property).

In 1961, a royal commission was appointed to look at electoral reform in the province.<sup>293</sup> Reporting in March of 1962, its main recommendation was that aboriginals be

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<sup>292</sup> From Confederation, only in one election (2000) was a third party (NDP) able to win a single seat in the legislature.

<sup>293</sup> It was appointed under the authority of *The Public Inquiries Act*, which is similar legislation to that enacted in other provinces and federally. Historically royal commissions were appointed under the royal prerogative, as were judges, but the legislatures in Canada has over time codified judicial power, thus

given the vote, that a provincial ‘election act’ be created and an independent ‘chief electoral officer’ appointed (DesRoches, MacKinnon, O’Connor, Ross et Grindlay 1963). The commission provided draft legislation for the legislature to enact should it wish to follow all of its recommendations.

In its review of the property qualification for voting, it recounted the “extremely bitter turmoil” between 1773 and 1893 over the elimination of the legislative council, which it appropriately described as a “consolidation of upper and lower houses” (*ibid.* report, 8). In addition to noting that this solution was the only one that was acceptable to the two houses in a time of financial difficulty that necessitated downsizing, it added the normative endorsement to the change in terms of subsequent party politics by suggesting that this merger prevented “the pitting of members of one party against each other which would have result from a four – or more – man contest, and enabling the political parties to arrange balanced contests from different areas, religions and occupations” (*ibid.*). The four person contest was what existed when parties ran candidates in dual member constituencies for both the council and assembly.<sup>294</sup> As an argument in favour of the existing system it claimed that “decades of experience lie behind the present electoral legislation” (*ibid.*). It recommended that the property vote be retained, though noted that in presentations before the commission some citizens argued for its abolition.

The one change the commission recommended was that ‘multiple voting’, where a person who owns property can vote in every riding in which they own property, be eliminated (*ibid.*, 9). It reported the overwhelming consensus of the province was, on this

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necessitating enabling legislation for commissions. Additionally, Canada, unlike the United Kingdom, had since 1867 eschewed prerogative for most offices, which is why the authority of cabinet ministers in Canada, particularly at the federal level, are defined by statute. The commissioners for this inquiry were Judge J.S. DesRoches (chair), Frank MacKinnon, Louis O’Connor, J. Stewart Ross and R.A. Grindlay.

<sup>294</sup> The reference to four ‘or more’ candidates from one party refers to the reality of that era when electoral legislation did not designate party members and thus enable political parties to narrow the field of its ‘approved’ candidates to persons chosen by the party, either by its elites, as was the early mechanism, or a structured nomination process that involves party members, as has emerged as the practice federally and provincially in Canada (in the United States, a party’s nominee for many elected offices must win the approval not of party members, but of registered voters who self-identify as loyalists to the party, though this varies by state).

one point, that this was unfair and should be abolished. Specifically, it identified the fact that property values varied by county. Furthermore, owners and their spouses could ‘double’ ballot and thus disproportionately influence vote outcome. While not expressed as such, this was clearly a reflection of the belief in this period that since women had the vote, their votes would be cast in support of their spouse’s vote choice, thus giving married male ‘property owners’ two votes in contrast to their single male counterparts. As the same party would usually win both the councillor spot and the assemblyman spot, there is no reason to believe that either being allowed to vote in multiple ridings or ‘double’ balloting was distorting the election count on the council side. But there is clear evidence that anecdotally it was believed to be a factor and thus created resentment. The solution, the commission concluded, was that property owners should vote in the constituency they reside and, if they did not own property in that constituency, they could opt for one specific constituency where they held property. On the main aspect of its mandate, the commission recommended a redistribution of electoral boundaries so the population of each riding was more evenly distributed.<sup>295</sup> Its proposed legislation would have raised the property qualification to vote for councillor to \$1,000.

The Conservative government introduced an *Election Act* that incorporated many of the commission’s recommendations, but on the property qualification it parted ways from the commission. It retained the distinct title of councillor and assemblyman so that the religious balance in elections could be retained. Any citizen resident in the riding the day the election was called, provided they had lived in the province for the preceding 12 months and were at least 21 years of age, could vote for both positions.<sup>296</sup>

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<sup>295</sup> The property qualification by this time was ownership of \$1,000 of property. The provincial legislature had added two additional groups into the ‘property owner’ category, those who had served in a war (as a way of incentivizing military service) and clergy who were in charge of a parish (as the main religions prevented them from owning property – and the Roman Catholic Church has long before prevented them from marrying – so as not to subdivide or lose church property which had been assigned to them by the crown in an era where religious authority and political authority were mutually reinforcing).

<sup>296</sup> The term ‘British subject’ was replaced by ‘citizen’ through the *Canadian Citizenship Act, 1947*.

This maintained the legislature's practice of accommodating the new dominant social cleavage, while finally abolishing the remnants of the upper chamber. While it simply reflects the shift in the social cleavage, it is not insignificant that it was done at the same time as aboriginal residents were given the vote. Historically, aboriginals were denied the vote because they did not own land, the reserve land being held in trust by the crown for a 'band'(now 'nation') to use collectively. The federal government had also historically tried to get aboriginals to take individual title to the land with the offer of voting rights as a way of assimilating them into mainstream Canadian society. Normative theory had been shifting away from property ownership as a criterion.<sup>297</sup> What had emerged as the new theory permeates the debate, as evidenced by one of the speeches delivered in support of the Bill:

“Democracy realizes that every individual citizen has the right to vote but it is not altogether the right to vote that is necessary, it is the right of every individual to have equal rights in voting with special privileges to none”  
(Harrington, P.E.I. *Debates*, LA, March 21, 1963).

There was opposition to the change reflecting the residual belief in the duality of the legislature and in voter behaviour, the obligation to respect the merger of the two chambers and the belief that property owners required representation. But the chamber passed the Bill without amendment (P.E.I. *Journals*, LA, April 16 & 19, 1966). The *Election Act, 1963* was given royal assent on April 23, 1963 (P.E.I. *Journals*, LA).

It would take until 1996 for the distinction between councillor and assemblyman to be eliminated.<sup>298</sup> In the intervening time, the demographics of the Island shifted; the population grew, diversity in faiths grew and religiosity declined. As this occurred, the political parties slowly phased-out the practice of having protestants run against protestants and catholics against catholics for the councillor and assemblyman position.

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<sup>297</sup> It was a slow shift. The Royal Commission on Electoral Reform and Party Financing (Lortie Commission) as recently as 1922 contains detailed discussion about the connection between property ownership and the vote, and, in many cities across Canada, while residency is the central determinant, property owners who are not resident in the municipality are often entitled to vote.

<sup>298</sup> The minimum age for voters was lowered to 18 years of age by *An Act to amend the Election Act*, 1967.

In 1974, the legislature established an Electoral Boundaries Committee which held hearings on changing the electoral system. It recommended retaining the dual member ridings and the titles councillor and assemblyman, not for any religious balance (as this practice had ceased), but so as to maintain the single member plurality voting mechanism in dual member ridings that were needed to elect a 30 person legislature. The belief was that single member constituencies would be too small given the island's small population and a smaller legislature would not be workable with so many cabinet ministers.

The *Election Act* 1993 established an Electoral Boundaries Commission. This commission recommended the province switch from dual member ridings to 30 single member districts. The government did not proceed with the recommendation at the time. But a private members bill was introduced the following year to move the province to single member districts. The *Electoral Boundaries Act*, 1994 established 27 single member electoral districts. The title councillor was eliminated in the process.

While P.E.I. moved to unicameralism in 1893, it took until 1963 for property owners to lose their separate representation in the council and until 1996 for the position of councillor to be eliminated. These changes to the legislature in Prince Edward Island are all linked to shifts in the province's social cleavage. The Liberals and Conservatives took different positions with respect to abolition, making the future of the upper chamber a publically debated issue. This was also a public issue since the upper chamber was elected. The Conservative plan for abolition was resisted by property owners. While the council was merged with the assembly under the Liberals, it was only when the catholic-protestant cleavage replaced property as the principle social cleavage that the property qualification could be removed as a vote criterion. When the religious cleavage lessened, the province was able to move to single member constituencies, the last province in Canada to do so.

#### **IV. Quebec**

The abolition of the legislative council in Quebec makes an interesting case study because in this province the social and the partisan cleavages each shifted so quickly in

such a short period of time, in what had become known as the ‘quiet revolution’. The province has consistently had a very identifiable social cleavage, with a minority English population in a majority French province. But this French majority is also a minority in a predominantly English federation.

While representatives of the English minority in Quebec, led by Alexander Galt, had originally pressed for an upper chamber, this institution quickly became tied to Quebec’s Francophone identity. George-Étienne Cartier, the Francophone leader in Sir John A. Macdonald’s federal government, strategically ‘sold’ the proposed federal-provincial institutional configuration for the province as being the preservation of Quebec’s historic institutions, the protection of which had long been the rallying cry of the French minority in Canada in defence of its civil law, seigniorial system and Roman Catholic religion, each of which had been threatened by the British government and English settlers. With the rise of an *ultramontane* nationalism, which was conservative and faith-based, the preservation of an upper chamber was seen as an important safeguard against liberalism. Beginning in the 1960s, Quebec nationalism was being transformed, eschewing religion and traditionalism, thus eliminating its connection to so called historic institutions.

In terms of the partisan cleavage, the internal requirements of the Westminster model generated a government and opposition, with the Conservatives being the initial government party and the Liberals in opposition. The Liberals would be the first to try to abolish the upper chamber in 1878, after the Conservatives in that chamber tried to force the lieutenant governor to remove them from office. Former Liberal cabinet minister Honoré Mercier would try again when he became premier in 1887, but he would be opposed by both French and English members of the assembly, including in his own party which had been forced by the council from office a decade earlier. The reason for their lack of support for revenge against the governor and their political opponents in the upper chamber was that French leaders had come to see these institutions as central to Francophone identity in Canada. As for the English, they saw them as institutions that provided a safeguard for their community as Quebec’s largest minority.

The Union Nationale in the 20<sup>th</sup> century would replace the Conservatives as the principle governing party until 1960. The Liberals, who came to power under Jean Lesage that year, saw the council as an obstacle to their adoption of liberal policies and programs, from the creation of a state-own hydro-electric company to the establishment of the welfare state. They made abolition of the upper chamber a partisan issue. This was a period of great shifts in provincial politics as the federal government and constitutional change became dominant provincial issues. As this happened, the Union Nationale shifted its position from defence of the council to reform of the council and to eventually abolition, quite rapidly. In the end, any claim for this chamber as a defender of the English minority was dwarfed by the need for partisan gain. A unicameral ‘national assembly’ was billed as the institution Quebec needed for its ongoing struggle with the federal government over money and jurisdiction.

As Quebec did not exist at Confederation, the *Constitution Act, 1867* established the new province in which the provincial powers would be exercised by a legislature composed of the lieutenant governor, a legislative council of 24 seats (s.71) and a legislative assembly of initially 65 seats (s.80).<sup>299</sup> Legislative councillors in the upper chamber would be appointed by the executive council acting through the lieutenant-governor, one for each of 24 separate divisions which corresponded to the 24 electoral divisions in Quebec prior to Confederation, divisions that were also being used for Quebec in the senate of Canada (s.72). Legislative Councillors had to have \$4,000 of property (net worth) in the district for which they are appointed (s.73).<sup>300</sup> Quorum was ten, including the speaker who was appointed by the government (s.78).

As noted above, Cartier had strategically sold the existence of an upper chamber for Quebec as central to the French identity. The social cleavage of Quebec had long pitted

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<sup>299</sup> Both numerical values are significant in that they match identically the seats assigned to Quebec in the federal parliament. The Confederation deal had, after all, been achieved by partisan groups overcoming the social cleavage of the province of Canada, which federally would come to be represented by Quebec on the one side and, within the administrative division of Quebec, would return to being an internal cleavage for provincial purposes (education, etc.) between English and French Quebecers.

<sup>300</sup> This is the same property qualifications as members of the Canadian senate from Quebec.

French against English over institutional change. But the institution itself had been a compromise between the English and French in the cabinet of the Great Coalition and it was the English cabinet minister from Quebec, Alexander Galt, who had been most insistent about its configuration. For Galt it was about ensuring English representation, and for Cartier it was about conservative restraint. But the long history of French resistance to institutional change made it possible for Cartier to marry bicameral institutions to Francophone identity, something that would be seen in the debates over its abolition up until the 1960s.

Quebec began Confederation with a strong governing party organized through Cartier's wing of the Liberal-Conservative Party. For Quebec, the Conservatives had free reign in government formation and in appointments to the upper chamber.<sup>301</sup> The province of Canada was still in place until the new *Constitution Act, 1867* was proclaimed, so Joseph Édouard Cauchon was tasked with taking over as premier of Canada East in 1866 and forming a government that would then become the first government of Quebec to face the electorate (Désilets 2000a). The issue of legislation to give autonomy to minority communities so they could organize their own school boards in each half of the province was his undoing. Realizing he was suddenly unpopular among English protestants in Canada East, and unable to find an Anglophone in the legislature to be part of his cabinet in the new province, he relinquished the position to Pierre-Joseph-Olivier Chauveau, who became Quebec's first premier (Hamelin et Poulin 2000).

The Conservatives were able to govern Quebec until 1878, with the last premier being Charles Boucher de Boucherville. Boucher found himself at odds with Lieutenant Governor Luc Letellier de St-Just, who had been appointed by the Liberal government in Ottawa, and Boucher kept matters from him fearing he would disclose them to his opponents in the legislature (Rumilly 2000). While this caused tension between the two, it

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<sup>301</sup> Macdonald had committed to working with the opposition to ensure a balance in appointments, but when it came to Quebec, the Liberals had very little following and years of Conservative governments had led to half of the province of Canada's legislature being predominantly Conservative, and quite cohesive for the politics of the time.

was when Boucher issued proclamations in the lieutenant-governor's name, without consulting or showing them to him, that Letellier dismissed the premier (Munro 2000).

The lieutenant-governor called on the Liberal leader, Henri-Gustave Joly de Lotbinière, to form a government, which he did, even though the legislature was decidedly Conservative (that party had a 20-seat majority). Both chambers of the legislature passed resolutions condemning the lieutenant-governor's actions. Even in Ottawa, Prime Minister Alexander Mackenzie, and his Quebec lieutenant Wilfred Laurier, were taken by surprise and thus condemned his actions (Rumilly 2000).<sup>302</sup> Joly dissolved the legislature so his government could face the electorate.

The Conservative firebrand Joseph-Adolphe Chapleau opened that campaign with the rallying cry: "Silence the voice of Spencer Wood and let the mighty voice of the people speak", referring to the lieutenant governor's official residence at Spencer Wood (*ibid.*). But more substantive issues such as the construction of rail lines were of greater interest to the voters and, in the end, they elected a divided legislature (Hamelin 2000). This left Joly in power, and he included in his cabinet a young Honoré Mercier, who was a dynamic speaker and could effectively counter the rhetorical skills of Chapleau.

The constitutionality of the governor's behaviour would plague the government. While Joly claimed that the electorate had already pronounced on the matter, the Conservatives in the upper chamber refused to grant supply unless the lieutenant-governor would agree to remove the government it claimed was illegitimate. At the time, the Conservatives had a 2 to 1 majority in the legislative council. Joly responded by having his government introduce "*un bill pour modifier la constitution de la Législature de cette Province en ce qui concerne le Conseil Législatif*" (Québec *Journaux*, AL, 19 Juin, 1878).

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<sup>302</sup> The practice prior to Confederation was that when a ministry was defeated, the lieutenant-governor would ask another member of the party which seemed to have the majority, often a member of the cabinet who was not directly implicated in the issue on which the ministry was defeated, to try to put together a new ministry and then face the chamber. In the modern era, where there are political parties, the governor (like the queen) removes himself from all decision-making, so they simply turn to the leader of the opposition, who is the leader of the party with the next greatest number of seats in the chamber. This was an era of transition where party politics were emerging so it is perhaps not surprising that the conventions surrounding the governor's decision making choices were unclear. They are still unclear today (Hicks 2009a)

This Bill to abolish the legislative council was adopted by the lower chamber, 31 to 29 (*ibid.*, 47 Juillet, 1878). It went nowhere in the upper chamber.

As for the lieutenant-governor, when the Conservative government returned to power in Ottawa, Prime Minister John A. Macdonald came under pressure from the provincial Conservatives to fire Letellier.<sup>303</sup> Cartier had died in 1873 and Hector-Louis Langevin had replaced him as Quebec lieutenant. Macdonald sent Langevin to London to get a ruling on what the federal government could do and whether or not Letellier's actions had been legal.<sup>304</sup> Upon his return, the decision of the law officers that the lieutenant-governor had acted constitutionally, but equally the governor general of Canada had the authority to remove him (and had to do so if advised by his ministers), in hand, Macdonald then removed Letellier from office and appointed long-time Conservative, Théodore Robitaille, as lieutenant governor in July of 1879.<sup>305</sup> With a new governor in place, the legislative council again blocked supply at Chapleau's urging. While the Liberals were busy trying to drum up public support against the council, the Conservatives quietly siphoned off some of their members in the lower house and, when they had a majority in the assembly, the new lieutenant governor dismissed Joly and called on Chapleau to form a government.

Chapleau entered into talks with Mercier, hoping he could attract the Liberal into a coalition government and heal some of the political wounds that had been opened through the use of the legislative council and the lieutenant-governor for partisan purposes. One of the conditions for Mercier to join the government became the abolition of the legislative

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<sup>303</sup> Chapleau who had campaigned against the lieutenant-governor's interference which he called a *coup d'état* was convinced that the best way back to power was to get their own man in the governor's residence and have him do the same, telling members of the Conservative government in Ottawa: "At this moment Spencer Wood is a real barometer. If the old man goes out, it's fine weather, if he stays in, it's bad! And to think that it's you in Ottawa who control the climate"(Désilets 2000d).

<sup>304</sup> Langevin was not as adept at handling the block of federal politicians from Quebec known as 'Club Cartier' and out of his league with the new ones rising to prominence in provincial politics (Désilets 2000c). Macdonald became increasingly frustrated as pressure in Quebec mounted, including a threat by his own Quebec ministers of resignation.

<sup>305</sup> He retired, financially ruined and physically broken, having suffered a heart attack during the controversy. He died in 1881.

council. When the ‘ultramontanes’ learned of the talks, they forced Chapleau to break off talks and to govern with only the Conservatives.

The term ultramontanes has its origin in Europe where conservative forces in the early 19<sup>th</sup> century looked ‘beyond the mountains’ to the papacy for leadership in their fight against the new ideas emerging in the wake of the French Revolution. In Quebec, since the 1840s, the Quebec Catholic Church had re-engaged with the Church in Rome and was being influenced by the *Syllabus of Errors* issued by Pope Pious IX in reaction to the enlightenment. It was anti-modernist and anti-democratic. For the ultramontanes, preservation of the provincial upper house was an essential bulwark against North American liberalism.

Provincial politics was changing through this rise in nationalism. This was rooted in catholic religion’s fight against the growing secularism of society, and ‘clerico-nationalisme’ was seeing an active entry into legislative politics. Due to this activism on the French side of the social cleavage, it was getting increasingly hard for premiers to recruit Anglophone leaders into their ministries to bridge the social divide, making politics in the assembly all the more volatile and alliances temporary.

It was in this climate that Louis Riel was hanged in 1885, having tried to recreate his Manitoba rebellion in Saskatchewan on behalf of their Métis. This caused reverberations throughout Quebec, on both sides of the social cleavage, with the Francophone leaders using inflamed rhetoric to achieve short-term partisan goals and forcing Anglophone leaders to retreat from co-operation. One such Francophone leader was Honoré Mercier, who used the opportunity to create the Parti nationale, by uniting moderate Francophone Conservatives and Francophone Liberals, and using this new electoral vehicle to ride popular outrage into office in 1887.

Committed to abolishing the upper chamber, in 1890, the government introduced: “*un bill modifiant la constitution de la Législature de cette province, en ce qui a rapport au Conseil législatif*” (Québec *Journaux*, AL, 4 décembre, 1890). At second reading, the government argued that Ontario had abolished its upper chamber at Confederation, that the

council cost taxpayers \$66,000 per year and that the upper chamber represented no constituency that required representation, unlike the house of lords in England, and that it was simply an artefact of history (Rochon, Québec *Débats*, AL, 11 décembre, 1890). The premier's true reason for wanting it abolished was its machinations on behalf of Chapleau in 1879, saying: "La conspiration ourdie à Spencer-Wood a triomphé dans la Chambre haute". Toute le monde sait parfaitement bien que le jour ou la Chambre haute refusait les subsides à Sa Majesté, elle était avisée par le représentant de Sa Majesté" (Mercier, *ibid.*). The abolition movement had little resonance in the lower chamber with either the English representatives or the *ultramontanes*. Mercier had to accept its lack of support and agree to table his own legislation after only a short debate (Québec *Journaux*, AL, 11 décembre, 1890).

The increased importance placed on social identity had deepened the social cleavage in the province to such a degree that Mercier could not even get the support of his own partisans in the legislative assembly, including some who had voted in favour of abolition in '78.

This marrying of culture and religion created a strong social identity, and it would remain entwined with Quebec partisan politics until the quiet revolution. As a result, there was no great friction between the upper chamber and the government when the Union Nationale replaced the Conservatives as the government, even though this party did not have any formal members in the upper chamber.<sup>306</sup> The same was not true for the Liberal Party which was starting to embrace a secular agenda of reform.

The Liberals came again to power in 1897, under the premiership of Félix-Gabriel Marchand. Marchand was successful implementing most of his platform, particularly his promise to tighten provincial purse strings, but where he stumbled was in the area of education reform (Brassard et Hamelin 2000). Due to a negative reaction to his platform

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<sup>306</sup> A bill proposing a luxury tax was defeated under Premier Maurice Duplessis of the *Union Nationale* in May 1945. It is rumoured that Duplessis was actually pleased by the defeat, because it was an unpopular measure that had been pressured on him by his party and cabinet colleagues (Bonenfant 1968). Regardless, there were no initiatives to change the upper chamber until 1965.

from the church, Marchand lessened his ambition and introduced a Bill with the goal of improving education through better teacher training and a system of school inspections, standardized textbooks and a reduction in tuition fees through government subsidy to common schools. This was still seen as a threat by the ultramontane bishops. Marchand got his Bill passed in the assembly (*Quebec Journals*, LA, January 5, 1898). The archbishop of Montreal, Paul Bruchési, gave the legislative councillor Thomas Chapais the task of blocking the Bill in the upper chamber. Which he successfully did (*Quebec Journals*, LC, January 10, 1898).<sup>307</sup>

Marchand responded by introducing a “Bill to amend the constitution of the Quebec legislature in so far as the Legislative Council is concerned” (*Quebec Journals*, LA, March 13, 1900). In a variation on the argument that an appointed upper chamber in Canada, unlike in the United Kingdom, does not have philosophical underpinnings in terms of representing a unique constituency, the government argued that the composition of the chamber in terms of the type of man who was currently ensconced was identical to those who were sitting in the lower chamber (Robidoux, *Québec Débats*, 9 mars, 1900). The government did not feel the party that had lost the election should be able to stop its legislation. The Bill passed the lower chamber, 30 to 14 (*Quebec Journals*, LA, March 16, 1900). It was defeated in the legislative council.

But Quebec was changing through a rejection of “les trois dominantes de la pensée canadienne-française: l’agriculturisme, le messianisme et l’anti-étatisme” (Brunet 1957). Since the newspaper *Le Canadien* had been established in Lower Canada proclaiming as its objective the protection of ‘notre foi, notre langue, nos institutions’, these three pillars had been at the centre of Quebec’s identity. Even in advance of the quiet revolution, institutions of the past were starting to be abandoned and the faith of catholicism discarded, leaving language as the central marker of French group identity.

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<sup>307</sup> Marchand had to settle for a simply codification of the existing school laws, which he introduced two days later.

Jean Lesage and the Liberal party came to power in 1960. This was an era where democratisation and equality, standard of living and a social safety net, accessibility to education and state intervention in the economy, were emerging as governmental policy in North America and Europe, through an emerging welfare state. What made Quebec unique is that it had to come from behind to catch up, and it did this with such speed that a Toronto journalist dubbed it a quiet *revolution* (Thomson 1984; Bélanger 2000).

Lesage made René Lévesque the minister of natural resources. In early 1962, Lévesque started a public campaign for nationalization of hydro-electricity, and by September he had convinced his cabinet colleagues to proceed (Chanlat, Bolduc et Larouche 1989). An election was called on the issue, and the liberals ran under the slogan “Maîtres chez nous”, with Lesage claiming the time for Quebec to take control of its economic destiny was: “Maintenant ou jamais!” (CBC, November 7, 1962). Daniel Johnson, the leader of the Union Nationale, argued that the Liberals were on a slippery path to socialism. Since a large number of legislative councillors served on the boards of the largest corporations in Canada and Quebec, Lesage decided to use the election to launch a pre-emptive strike against the council, warning it not to block the will of the people of Quebec, which was “still a democracy” he said (*ibid.*).

The Lesage government was re-elected with an increase in its seats from 51 to 63 in the 95 seat lower chamber. Just before the end of the year (December 28), Hydro-Québec launched a hostile takeover, offering to buy all of the stock in 11 electricity generating companies at a price slightly above market value. In addition to these companies which were acquired at a cost of \$604 million, most electric co-operatives and municipally-owned utilities were also taken over, making Hydro-Québec the largest electric company in 1963.

As this was happening, at the premier’s suggestion, the legislative assembly of Quebec had struck a committee to consider the constitution and the future of Quebec. While the committee was principally interested in Quebec’s place in Canada, an amending formula, federal institutions and Quebec’s jurisdictional relationship with the federal government, the committee also considered the possibility of a written constitution for

Quebec and it reviewed the structure of the provincial institutions of governance. This was a period of great interest in the Canadian constitution and in institutions of governance more generally.

There was a nominal change to the council that year, as tenure in the council was altered from an appointment for life to an appointment until age of 75. Mandatory retirement was being established for most government and private sector jobs at age 65. There would be a constitutional amendment to reduce the tenure of appointments to the federal senate to 75, two years later. None of this was particularly controversial, as it was tied to the growth of pension plans.

In the United States, members of both legislative chamber in congress had been provided pensions upon retirement at age 60, having served a minimum of 10 years at age 62, with a minimum of five years in office, since 1946.<sup>308</sup> In Canada, members of legislative chambers had been on salary for some time, with Ontario and Quebec being the first to establish full-time salaries. The British house of commons' pension was revamped in this same year following a commission report under the chair of Sir Geoffrey Lawrence, which established a pension for MPs payable at age 65. Members of the British house of lords, being hereditary peers of the realm, held their seats for life and then it went to their eldest son, upon death.<sup>309</sup> Quebec, in establishing a mandatory retirement for the upper chamber, had established a pension plan for them, based on the one for members of the assembly.

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<sup>308</sup> In the race to establish these pensions, provision was made for minimum 'buy ins' (i.e. recipient contributions to achieve a full pension based on service and not on contribution, to date, as these pensions were designed to fill a gap in the social safety net for older and younger alike, created by mandatory retirement). In the U.S., a legislator only needed to have contributed for five years. In the Canadian parliament, the buy-in was set at 1963 in 1968, following the U.S. model, when it redesigned its pensions to meet the example set by Quebec and Ontario -- see the study commissioned at the time by the government from the Emeritus Dean of Graduate Studies and Research, C.A. Curtis (1969).

<sup>309</sup> The *Life Peerage Act, 1958*, allowed for the appointment of non-hereditary peers, of which four women were appointed that year (sociology professor and judge Barbara Wootton was the first), but their appointments are equally for life. Their seat in the chamber does not go to an offspring but, along with their titles, reverts to the crown.

In 1965, Lesage introduced a “*Projet de Lois du Parlement du Québec*”, which was inspired by the *Parliament Act 1911* in the United Kingdom and which would have changed the veto power of the upper chamber into a ‘suspensive veto’ (Quebec *Journals*, LA, January 22, 1965).<sup>310</sup> The legislative council could delay money Bills for no more than one month, at which time the Bill would be given royal assent and become law (s.1).<sup>311</sup> All other bills the council could amend or defeat, but they would become law if adopted by the lower house in two sessions no less than a year apart (s.4).

The Bill was only modified slightly in the lower chamber from the form presented by the government (Quebec *Journals*, LA, February 16, 1965). The definition of money bills was tightened so that it applied just to Bills that “contain *only* provisions for appropriating” etc. (s.2) and the certification of the speaker was replaced with a requirement that a clause be placed in each Bill stating that it was a money Bill to be adopted by the assembly along with the Bill (or removed if it so chose), the clause equally being non-justiciable as the speaker’s ruling would have been (s.3).

The Union Nationale opposition in the lower chamber proposed an amendment which would have exempted any amendment to the Canadian or provincial constitutions (Québec *Débats*, 1965). If there was a dispute between the two chambers over any such amendment, it would be decided by Quebec voters in a referendum. The year before, the federal government had convened a conference of premiers to adopt an amending formula for the constitution and Lesage had agreed to the Fulton-Favreau formula and it was also before the legislature.<sup>312</sup> In support of giving the council control over constitutional amendments, the Union Nationale argued that the upper chamber would protect Quebec’s

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<sup>310</sup> The *Parliament Act* limited the upper chamber to a delay of three parliamentary sessions or two calendar years on most legislation.

<sup>311</sup> The speaker of the assembly would certify what was a money Bill (s.3) and his ruling could not be challenge in court (s.8). The legislation defined money Bills as: All Bills for appropriating any part of the public revenue of the Province, or for imposing, altering or repealing any tax allocated to such revenue, or for legislating on any subordinate mater incidental thereto” (s.2).

<sup>312</sup> It was based on a formula first developed by federal justice minister E. Davie Fulton and then modified by another federal justice minister Guy Favreau. Some matters, such as the use of English and French, unanimity would be required to amend the constitution. For other matters resolutions of 2/3 of the provinces. It is similar to the formula that was adopted in 1982 where some matters require unanimity, some require.

rights, even when an assembly might be convinced to surrender them, and was a necessary protection under the Fulton-Favreau formula, which the Union Nationale opposed.<sup>313</sup> The *Union Nationale* amendments were rejected and the Bill was adopted by the lower chamber (*Quebec Journals*, May 16, 1965).

The legislative council received the Bill on February 17 and adopted it in principle on March 24 (*Quebec Journals*, LC).<sup>314</sup> The legislative council amended the legislation to exempt legislation that (i) affected the constitutional rights of minorities or (ii) the *Canadian Constitution*, Quebec's constitutional status or the "constitutional or jurisdictional status of the Legislative Council, including the rights, indemnities, allowances, pensions and other prerogatives of its members" (*Quebec Journals*, LC, March 24, 1965). When the lower house received the amendments, it postponed consideration until May 11, when it debated and rejected the amendments (*Quebec Journals*, LA, March 25, 1965).

The government then announced that it would approach the British parliament to amend the *Constitution Act, 1867* to make the changes to the powers of the council that had been passed by the assembly, and confirmed that it had received assurances from the federal government that any request would be forwarded on with a favourable recommendation (*Québec Débats*, May 11, 1965).<sup>315</sup> The following day Premier Lesage moved an address to the queen asking that she put before the parliament of the United Kingdom "An Act to amend The British North America Act, 1867" which would add all the clauses of the government Bill to that *Constitution Act, 1867* (*Québec Débats*, AL, May

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<sup>313</sup> Lederman *et. al* (1966-7, 353), in their examination of the machinations surrounding the Fulton-Favreau amending formula, write that "it is not clear whether this was done wholly or partly to prevent Council reform from being achieved without Council's consent by later use of the Fulton-Favreau Formula". But the *Union Nationale* took the position that Lesage had failed to protect Quebec's interests in agreeing to the formula and saw the upper chamber as key to stopping this amendment and to stopping future amendments. And the council, in its address to the queen, states that its objective was to protect the constitutional rights of minorities.

<sup>314</sup> At the same time as this bill was passing, debate was raging in Quebec over the Fulton-Favreau amending formula as agreed to by Lesage. The *Montreal Star* urged adoption in order to end the constitutional impasse. Laval University students voted 2485 to 482 against and the Union Générale des Étudiants du Québec threatened to organize a march on the legislature in May, if the government tries to ratify it (*Montreal Star*, March 18, 1965).

<sup>315</sup> On May 20 the government removes the "*Projet de Lois du Parlement du Québec*" from the order paper.

12, 1965).<sup>316</sup> Subsequently, the leader of the opposition in the upper chamber announced he would introduce an address requesting the queen reject the assembly's proposals for reform of the council (Asselin, *Québec Débats*, LC, May 20, 1965). The assembly's address was adopted on May 26 (*Quebec Journals*, LA) and the council's address on June 2 (*Quebec Journals*, LC).

The council's address points out that it had adopted most of the restrictions to its powers as proposed by the lower house "except only the constitutional matter, the vested rights of the members of the Legislative Council and the constitutional rights of the minorities" (*Quebec Journals*, LC, June 2, 1965, art.2). It also points out that the lower chamber had not communicated its decision to reject the amendments as was the usual process (art.3), and that all means to reconcile the two chambers had not been exhausted (art.4). It claims it would have concurred with the amendment proposed by the Union Nationale in the assembly. And it points out that the *Constitution Act, 1967* gave the provinces control over their own constitutions (art.6), that what the government proposes violates the spirit and letter of the *Constitution* (art.7) and constitutes an intervention of the parliament of the United Kingdom in the constitutional affairs of Quebec (art.10). It concurrently adopts an address to the governor general, insisting that the government of Canada remain neutral in the matter.

In the house of commons, the Canadian government set out its position that this was unprecedented and thus not a constitutional amendment in the usual sense, which would have required the concurrence of parliament, but rather a matter that only concerned one province of which the government would be instructing the governor general to forward the address from the Quebec legislative assembly onto the queen (Martin, *Canada Debates*, HOC, June 16, 1965).<sup>317</sup> As this was a provincial matter, the government would allow the advice of the ministers of the crown for Quebec to be substituted for its own advice, so the

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<sup>316</sup> The proposal was to add these clauses as a 79A of the *Constitution Act, 1867*. A second address was adopted concurrently to ask the Governor General of Canada to forward the first address to the queen.

<sup>317</sup> The governor general had, Martin told the assembly, asked for the government's advice in a letter dated June 8.

queen would be advised to support the address, and the government asked the Canadian parliament to refrain from sitting in judgement on the developments in this province.<sup>318</sup> Parliament did nothing to interfere with the transmission of the addresses. The British government advised the queen not to involve the parliament of the United Kingdom as the province of Quebec had full authority to amend its own provincial constitution.

Defeated in 1966, Lesage tried as leader of the opposition to introduce “An Act to abolish the Legislative Council” (Québec *Débats*, AL, 7 décembre 1966). The new premier, Union Nationale Leader Daniel Johnson, stopped its introduction on procedural grounds.<sup>319</sup>

At the Union Nationale party convention in 1966, resolutions were adopted to “abolir le Conseil législatif sans l’intervention de Londres, ni d’Ottawa dans les affaires internes du Québec” and to “procéder à une réforme de nos institutions parlementaires pour en faire un instrument moderne et efficace au service de la communauté québécoise” (Bertrand, Québec *Débats*, LA, 26 novembre 1968). The Union Nationale was beginning to shift its position. It still favoured replacing the council with some other representative body. Constitutional issues had emerged in Quebec’s provincial politics as a dominant issue, with both parties agreed on the need for more provincial exclusive jurisdiction and more money, but they had bitterly split over the idea of an amending formula which the Liberals had seen as a means to an end and the Union National has framed as a surrender of Quebec’s claim to a veto over constitutional change. Lesage had made the legislative council part of this constitutional debate when he had the legislature ask the queen and Ottawa to interfere in Quebec’s internal constitution rules and to bring about abolition of the chamber.

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<sup>318</sup> Martin informed the house of commons that the queen and the governor general had each given their permission to inform the Canadian house of commons of this advice, even though advice to the crown is normally a matter of utmost secrecy.

<sup>319</sup> The item on the order paper was ‘public bills’ and only the leader of the government can determine what can be introduced at this point in the assembly’s proceedings. After debate, the speaker ruled that the one exception, which is a matter of urgency, could not be seen to apply since the legislative council had been around 99 years.

Premier Johnston proposed that the legislature reconstitute the committee on the constitution (Québec *Débats*, AL, 21 février 1967).<sup>320</sup> In addition to preparing Quebec's demands vis-à-vis the *Constitution* of Canada, which had been its primary focus, Johnston proposed that the committee also examine the possibility of abolishing the legislative council as it was presently constituted and replacing it with “un organisme représentatif des corps intermédiaires, des minorités du Québec, des agents de l'économie au des professions, avec des structures et des pouvoirs conformes aux besoins de notre époque”. And he informed the lower house that the majority in the upper house would be in favour of such a change. As the provincial political party that could convince the council to accept reform, the Union Nationale sought to take the lead on the issue. The Liberals dismissed the proposal as too complex and argued that a committee on the constitution should be primarily focussed on altering the federal constitution, which it argued had been the focus of the previous committee on the constitution that it had established.

Lesage again introduced “An Act to abolish the Legislative Council” on February 22, 1967 (Quebec *Journals*, LA). Before the Bill could be debated in principle, the premier challenged the Bill on the basis of the rules and procedures of the assembly that prevent anyone but the lieutenant governor-in-council (i.e. the cabinet) from introducing a measure that impacts on the prerogatives of the crown, arguing that the Bill could only be introduced by the government (Québec *Débats*, AL, 28 février 1967). The speaker put it to the assembly on whether or not the Bill touched on a royal prerogative and the assembly voted 54 to 37 that it did, so in a subsequent vote the assembly voted to rescind second reading, which in parliamentary procedure means it removed agreement to proceed with debate on

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<sup>320</sup> In 1967, Ontario Premier John Robarts convened the ‘Confederation of Tomorrow’ conference in Toronto as part of Canada’s centennial as a way to break what was then seen as a constitutional impasse and address some of Quebec’s concerns. This led to the federal government convening a meeting with the premiers wherein the new Justice Minister, Pierre Trudeau, would lay out his plan for constitutional renewal. It would be a three stage process: first, ‘patriation’ of the constitution with an entrenched amending formula and a Bill of rights; second, improving federal institutions of governance (which included the supreme court and the senate, so as to allow the provinces to have an equal say in appointments); and then third (and the federal government would only agree to discuss this after the first two had been done), a redistribution of federal and provincial jurisdiction and powers. At the conference, Trudeau would verbally spar with the delegation from Quebec, bringing him Canada-wide prominence and launching him into contention for the leadership of the Liberal Party. He accomplished the first phase as prime minister in 1982 and left politics in 1984.

the merits of the Bill, whereupon a further motion removed it from the order paper altogether, preventing it from being considered later in that session (Quebec *Journals*, LA, February 28, 1967).

Succeeding Johnston as premier was Jean-Jacques Bertrand. As deputy leader, he took over as temporary leader when Johnson died of a heart attack in 1968. He would win the party leadership the next year. The Bertrand government introduced a “Bill to Abolish the Legislative Council” on October 22 (Quebec *Journals*, LA). In the speech from the throne the government had maintained its position that the upper chamber should be replaced by a different body, so this was a recent departure, though in introducing the Bill the premier suggested the change of the lower chamber into a ‘national assembly’ respected the party platform concerning new institutions (Bertrand, Québec *Débats*, LA, 26 novembre 1968).

Included in the Bill was provision to give councillors a \$10,000 a year pension, essentially a continuation of their salary, immediately upon the abolition of the council until death.<sup>321</sup> This was the main point of debate during deliberation in both chambers, which centred on the fact that most councillors had not contributed sufficiently into the pension plan to warrant such a high pension, as it had only been established when the mandatory age 75 retirement was adopted (Lesage, *ibid.*). It was claimed that when other provinces had abolished their upper chambers they had not provided compensation (Laporte, *ibid.*)

It has been argued that this pension created an incentive for councillors to support the legislation. The true incentive of public office is not financial, as Curtis notes in his study of government pensions at the time:

“Few people go into public life for the money income involved; indeed the real income of the position comes in the form of prestige, power and the ability to influence decisions. In the main, this is non-pecuniary” (Curtis 1969).

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<sup>321</sup> Upon death the spouse, if there were one, would receive a pension of half this amount.

Further, the criticism of the Quebec legislative council at the time was that too many councillors were also directors of corporations. These councillors were sought after by larger corporations in Canada and Quebec because they served in the legislature and thus could influence legislation and government policy, so if income was the only or primary consideration, then it was in councillors' self-interest to remain legislators with salary and directorships, rather than accepting the reduced income of pension alone.

The issue of the council revising legislation and being a protection for minorities was raised in debate, but on both points the opposition in the lower chamber was the most vocal in rejecting these roles for the chamber (Lesvesque, *Québec Débats*, LA, 26 novembre 1968). The government chose instead to take the high road and praise its work and the competence and contribution of the people who had been councillors for the province (Bertrand, *ibid.*). The popular press took issue with the pension, with one editorialist liking it to a disability pension which councillors were entitled to because they had become 'moribund' (Cormier, *La Presse*, 22 novembre 1968), and another noting that only in Quebec could someone get paid \$10,000 to commit 'hara-kiri' (Daoust, *La Presse*, 30 novembre 1968).

The Bill passed the assembly on November 29 (Quebec *Journals*, LA). It was introduced into the upper chamber on December 6 (Quebec *Journals*, LC). The councillors defended the role the chamber had provided in revising legislation, noting that between 1960 and 1968, they had proposed 1,074 amendments, of which 1,053 were accepted, nine accepted with a revision and only 12 rejected by the lower house (Asselin, *Québec Débats*, LC, 12 décembre, 1968). The compensation was defended on the grounds that it was not a pension but compensation for being terminated prematurely or when a contract is broken (*ibid.*). No arguments were raised in the upper chamber concerning its role in defending minority interests.

With some irony, the upper chamber proposed two technical amendments to clear up the language with respect to cancelling the current pensions and salaries and establishing the new pension, and to be accommodating to the tight timeframe and the chamber

suspended its rules to allow for the Bill to be adopted immediately and returned to the lower chamber (*Quebec Journals*, LC, December 13, 1968). The assembly accepted the amendments (*Quebec Journals*, LA, December 13, 1968). On December 18, *An Act respecting the Legislative Council* received royal assent and became law (*ibid.*). It came into effect on December 31 of that year (s.95 of the Act), whereupon the legislative assembly became the unicameral ‘National Assembly of Quebec’.<sup>322</sup>

While the abolition of the upper chamber in Quebec had been a partisan issue from the beginning, with the Liberals supporting abolition and the governing party, first the Conservatives and then the Union Nationale, opposing it. It was only when the council became part of the debate over the constitutional issues, including an amending formula, that the issue became salient for the public and institutional change became a priority for both political parties. While Quebec had an English minority that favoured the upper chamber, the primary social cleavage was between English Canada and a federal Québécois minority. Once shifts in that cleavage transformed nationalism from conservative and religious into linguistic and cultural, the resistance of that group to institutional change disappeared. In the end it was the Union Nationale government of Jean-Jacques Bertrand that achieved the change, and of the two political parties, this was the one most able to bridge the smaller social cleavage internal to Quebec, which it would try to do the following year over education, marking the end of this party as a governing party.<sup>323</sup>

## V. Conclusion

In the two provinces where there was no significant relationship between the province’s social cleavage and the upper chamber, both sides of the partisan cleavage supported abolition as early as 1879. While we might have assumed therefore that

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<sup>322</sup> Councillors who had been speaker or leader of the government or opposition were given \$12,000 a year pensions.

<sup>323</sup> The key provision of what became known as ‘Bill 63’ stated that schooling “shall be given in the English language to any child for whom his parents or the persons acting in their stead so request at his enrolment”. Immigrants would not be compelled to send their children to French school and French parents could send their children to English schools if they so wished.

abolition should have occurred quickly, it did not. In New Brunswick abolition occurred in 1892 and in Nova Scotia it took until 1928 to achieve. The reason for the delay in both these cases was that since both political parties supported the change, their concurrence effectively neutralized it as a political issue, thus depriving it of election discourse. It was only when it became a political issue that the public engaged with the debate.

What is key is not that the political parties disagree on the outcome. In Nova Scotia, Prince Edward Island and Quebec, change occurred only after the two parties disagreed over what changes should be made. In New Brunswick, the two parties agreed in terms of platform from the start, but change occurred only after the council became part of a partisan election debate. It is when the issue becomes a public partisan issue that governments have political capital at stake and this necessitates their delivering on the platform promise.

In New Brunswick, the government found it useful to have the council around as a scape goat. It is only when the council countered the government's claims that it was responsible for all the financial problems by offering to pass all the cuts to government that the government had originally promised that the party made it a serious issue in the election. The government had been getting councillors to sign pledges that they would vote for abolition in advance of appointment, though there is some evidence that it did not initially intend to hold them to these pledges. When abolition became a partisan issue and the seriousness of the government's intention was challenged, the government made councillors honour their pledges. It is noteworthy that on the day the council voted its own abolition, the government added an Acadian to the chamber to vote for the bill.

In Nova Scotia, governments of both political parties also obtained pledges. But again there is evidence that, at least, the Liberals never intended to hold them to these pledges. No serious attempt was made to abolish the chamber, as bills, resolutions or addresses to the queen were usually introduced in advance of an election. In the 1920s, with the rise of labour unrest and socialism in Cape Breton, the two main political parties separated their policy over the future of the council, with the Liberals favouring 'reform' as

a check against temporary radicalism and the Conservatives continuing to support abolition. The Liberals had the council accept a suspensive veto. The Conservatives brought about abolition. While a judicial decision gave the Conservatives an efficient mechanism to achieve abolition, they were leaving seats vacant so abolition would have occurred, just more slowly had this decision been different. Two things are noteworthy, one is that the councillors were offered pensions if they resigned on their own, and they refused, and the government felt it necessary to appoint councillors from every county in Nova Scotia to vote for abolition.

In the two provinces where the upper chamber had a specific representational role with respect to the province's social cleavage, developments concerning the social cleavage were instrumental to making changes. In Prince Edward Island, the elected legislative council represented property owners, and given the province's history of absentee land ownership, this emerged early as the defining social identifier for the province's residents. Abolition proved to be impossible, so the only solution to reduce the cost of legislation was to reduce the size of both chambers and have councillors and assemblymen meet together in a single chamber. Once the property cleavage disappeared as the province's principal social cleavage, being replaced by the catholic-protestant cleavage, political parties began to navigate this cleavage by using the councillor and assemblyman positions to give representation to each side of this cleavage. In 1963, the property qualification for voting was eliminated, effectively abolishing the legislative council positions, though the two titles of councillor and assemblyman were retained to allow this informal representation of protestant and catholic in the chamber to continue. By 1996, immigration and a decline in religiosity meant the religious cleavage had lost relevance and the province moved to single member constituencies.

With respect to Quebec, the legislative council was structured the same as the province's representation in the federal senate, with 24 separate districts, so as to ensure that the English minority in the province always had representation. But while there was an English minority in a French province, the French majority was defined by being a minority

in a wider Canadian cleavage. Given the historical identification with institutions in this province and a conservative nationalism among the French elites for the first half of the province's history, it was the French who most strongly resisted change. This ethno-religious nationalism would give way to linguistic cultural nationalism. The cleavage over constitutional issues was also replacing government formation as the principle partisan cleavage in the province. Resistance to change thus dropped away from the French side of the social cleavage and the need for change became tied to partisan objectives, first to build Quebec's welfare state and then to battle Ottawa. While the Bill bringing about abolition provided a pension for each councillor equal to their salary, this was the era of pensions and compensation and there was a greater financial incentive to stay in office, so abolition occurred not due to this expenditure but due to the chamber's acceptance of the government's partisan objectives. It is significant that the party that achieved the change was the political party which could best bridge the internal social cleavage of the province, even though this cleavage was less significant than the one which made Francophones identify as a minority in Canada. Additionally, the overall representation of the Anglophone minority in the provincial government was not altered as the English representatives in the assembly and in the cabinet were maintained and, based on the language of education question that was decided at this time, was seen as effectively representing this community's interests.

## Chapter 10: Conclusion

A popular first year university text on Canadian politics by Dyck (2011) uses a number of cleavages and identity markers to provide the societal context for ongoing public policy disputes in Canada. Among the ones identified are regionalism, aboriginal/non-aboriginal, French/English, ethno-cultural, gender, class, urban/rural, religion and age. This approach ‘only gets us so far’ (Lipset et Rokkan 1967). For their part, Lipset and Rokkan suggest that identifying a single social cleavage in the society is a preferable approach for an analysis of politics. This led them to conclude that there were four cleavages that could explain the emergence of political parties in Western European countries. The four they identified were owner/worker, church/state, urban/rural and centre/periphery. Where their approach might have gotten them further, it equally only gets us so far.

As the starting part for this dissertation, it was posited that a preferable approach for an analysis of the societal context for politics would be to identify not one but two cleavages in the society, one ‘social’ and one ‘partisan’. Partisan cleavages were defined as those that emerge due to differences over ideology, policy and/or obtaining and retaining public office. Social cleavages arise from group identity markers and can form around any ascriptive or constructed characteristic such as race-ethnicity, class, religion and/or language. The research question to be answered was what societal factors drive and restrain institutional change. Each of these two cleavages was expected to impact on change differently, with a strong social cleavage expected to create an ‘out’ group that would impede change, so that a cross-cutting by the partisan cleavage of the social would be necessary to achieve change.

Institutional change is under-theorized, understudied and not properly understood. Yet many governments and organizations expend a great deal of resources trying to achieve institutional change. With respect to formal institutions of governance, ‘second’ or ‘upper’ chambers in legislatures are most often singled out as in need of change, since many of these institutions were created in eras where different theories on governmental design were

popular than the prevailing ones today. This is particularly true for Canada, where ‘reform’ of the federal upper chamber has been the focus of numerous public campaigns, as governments and organizations have tried to introduce provincial or democratic selection for senators.

Institutional change has been possible for upper chambers in Canada. The first institutions established in Canada became the provincial upper chambers and were eventually abolished. Two of these were also made elected and two of them had their veto reduced to a suspensive one prior to abolition. This offered a number of cases to examine in order to develop a theory of institutional change.

The approach to this dissertation project was to hypothesize how societal cleavages might impact on institutional change and then process trace the changes which were proposed and occurred to test those hypotheses. Most of the propositions that formed part of the hypotheses were found to be solid, while two were found to be ill-conceived or wrong. The results of that research are presented in detail in the previous chapters as an historical narrative. They are presented here in summary.

An attempt has been made in reporting this research to fill gaps and correct errors in Canada’s historical record. Additionally, two previous theories surrounding institutional change were revisited. Specifically, Lipset and Rokkan’s theory of how political parties emerge, and the prevailing colonial studies theory on why institutions of governance developed along a common institutional trajectory, were examined. The conclusions on those two are presented in section one and two, respectively. In section three, the theory of institutional change that emerged from the testing of the initial hypotheses is presented as restated propositions.

## **I. Political Parties**

While the focus of this dissertation was on changes to formal institutions of governance, the corollary to an examination of partisan cleavages and their shifts is an examination of the emergence, evolution and disappearance of political parties. This

offered the opportunity to test Lipset and Rokkan's theory of how political parties emerge. Their study of political parties in Western Europe using a single social cleavage led them to conclude that the dominant *social* cleavage in a society led to the formation of parties. Our approach has been to conceive of a society as having two cleavages, one social and one partisan, which may align or be cross-cutting. If Lipset and Rokkan had been right, then the two cleavages would have been in alignment when the main political parties emerged in each of the provinces studied during this dissertation.

In the case of Newfoundland, the social cleavage and partisan cleavage were initially and frequently aligned. The Reform Party became the first political party to emerge in opposition to the governor and his Tory elite and to win elections to the assembly in the era of representative government. Its members were mostly Roman Catholic. This Reform Party developed into the modern Liberal Party of Newfoundland, so this would support their theory on party formation. It is worth noting, though, that it was only when this party was able to cross the social cleavage and win support from protestants as well as catholics that Newfoundland was able to get responsible government in 1855, becoming the last province to make the change. And the divisiveness of sectarian politics in this province resulted in the Tory government, which came back to power seven years later, restructuring the assembly, the cabinet and other government offices so that Methodists, Anglicans and Roman Catholics would be equally represented, including within the two main political parties.

In the case of Upper Canada and Lower Canada, the social cleavage and the partisan cleavage was aligned in the era of representative government. So one could make a case that the first incarnation of the Reform Party in Upper Canada, which was seen as being dominated by Irish, Scottish and Yankee social outsiders, and the Parti Canadien and the Parti patriote in Lower Canada, which were largely Francophone parties, were the first reform parties and thus predecessors to the modern Liberal Party. This reasoning would suggest that the Tories, which were Anglican in Upper Canada, and defined by class in both

provinces, led to the Conservatives. But this ignores the machinations surrounding government formation in the united province of Canada.

To achieve responsible government for Canada, the reform parties in both Upper and Lower Canada had to merge. The merged Reform or Liberal Party was created specifically to cross the social cleavage. This Liberal Party was taken over by conservative elements and given the label Liberal-Conservatives so as to appear to be bi-partisan. While they ran for office using different labels. (e.g. the Blues in Lower Canada and the Conservatives or Tories in Upper Canada), they governed as the Liberal-Conservatives. This party was designed to hold onto government by crossing the social cleavage and would eventually surrender its claim to being the successor to the Reform Party of Baldwin-La Fontaine and become the Conservative Party of Canada after Sir John A. Macdonald ceased being its leader. This is the first formal political party in Canada. The Liberal Party of Canada would emerge out of the opposition to this governing party and this party would incorporate some former Clear Grits from Ontario and Rouges from Quebec, but it equally emerged as a cross-social cleavage vehicle to win power.

In Prince Edward Island, which was the first province to have a political party with the emergence of an Escheat Party, it clearly had its first partisan experience defined by the province's social cleavage; and in Manitoba there was an initial English Party and a French Party. But these party experiments were short-lived, precisely because they were defined by the social cleavage. Reform or Liberal parties emerged specifically to obtain responsible government, and these crossed these provinces' social cleavages.

In Nova Scotia the social cleavage and the partisan cleavage were not in alignment when the Reform Party fully emerged. The Reform Party had members from both sides of the province's social cleavage and it achieved responsible government in a very short period of time. In New Brunswick, the electoral rules denied one side of its social cleavage the vote, when political parties began to emerge. Once Acadians began to vote in significant numbers, the social and partisan cleavages aligned over the issue of Confederation, but two parties had already emerged prior to this point and, while these

elections resulted in a temporary departure from those parties, they returned to their original configuration after several elections.

While the social cleavages cannot explain the emergence of political parties in Canada, our examination of the partisan cleavage provided insight into how and why parties emerged in each of these provinces and in the new federal country, see figure 10.1.

Figure 10.1: Partisan Cleavage Group Formation



When the governor had autocratic or semi-autocratic authority, in that he was only advised and assisted by the upper chamber of the bicameral legislature, this created a cleavage between him and those who objected to his decisions and to the council's structure and membership. This cleavage between governor and opposition led to party formation. While this may have been initially defined by the social cleavage, the need to achieve change forced alliances and thus emerged a partisan group that could achieve institutional change. It is because it was not a single social group that it was able to achieve change. The first political party, therefore, was the party that obtained responsible government.

There will invariably be people who oppose the government's decisions and policies and people will seek election by running against the government's record and platform. The cleavage between government and opposition will convince some who run against the government to join forces as a political party in order to replace the government. This is what creates the second political party.

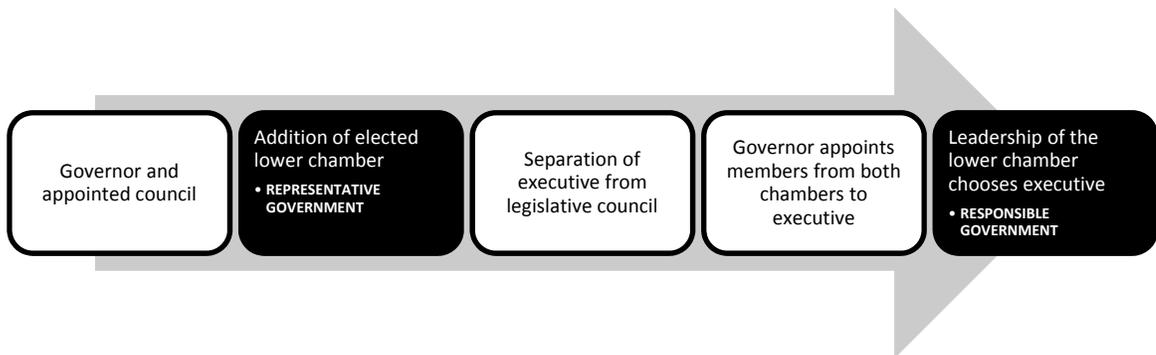
In both eras, the partisan cleavage over who should control the power of the state motivated legislators to come together and form political parties. The successful parties in terms of achieving institutional change, but it would also appear in terms of forming governments and having longevity, were those that could cross the social cleavage. The

political parties that represented a single social group disappeared and their members who remained in the legislature either joined the main contenders for government formation or remained independents.

## II. Standard ‘Westminster’ Developmental Trajectory

In the colonial studies literature, the prevailing theory on why colonial institutions developed the way that they did is that the British government established representative government to attract settlers. This conclusion is based on the *prospecti* issued by the land companies to settlers and the fact that the prevailing political economy model favoured by the British government prescribed such institutions. As to why responsible government was finally granted, these scholars suggest it was the result of normative arguments being advanced in the colonies and a pragmatic British government departing from the doctrine of British parliamentary supremacy. This theory sees colonial institutions as being *given*. Thus it offers no insights into why institutions appeared in some colonies before others.

Figure 10.2: Institutional Changes leading to Responsible Government



The other argument advanced in this literature was that there was no standard developmental trajectory in the colonies. It concludes that the institutions given to a colony were the result of the prevailing institutional design favoured by the colonial office at the time. Yet our examination of the British North American provinces, each of which did not achieve institutional change through revolution, found that a consistent series of

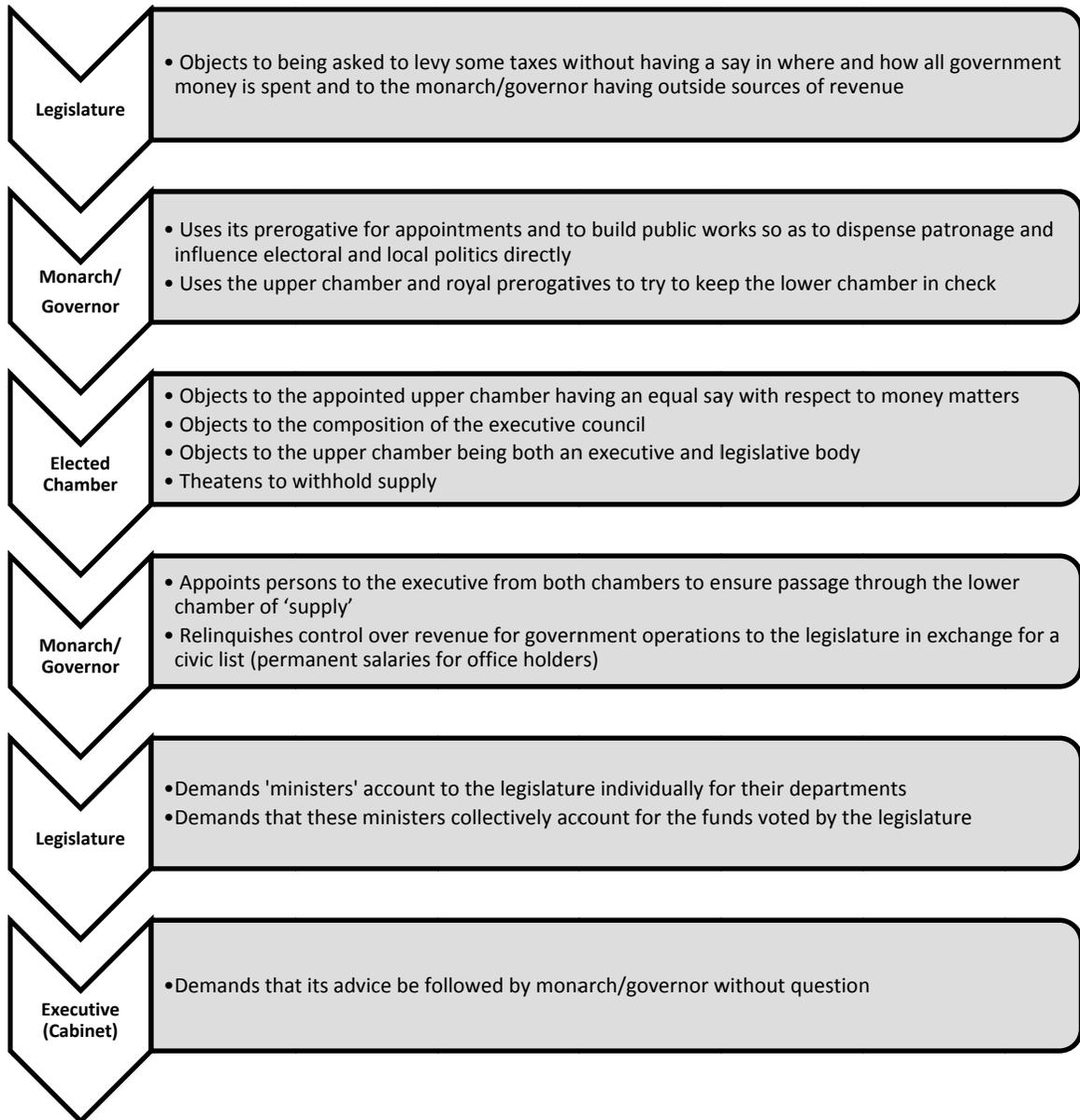
institutional changes were followed in each province, though at different times, as illustrated in figure 10.2.

In the literature on bicameralism, the explanation for why the lower house comes to dominate the upper house is the legitimacy that comes with elected membership. Legitimacy is not in the early stages a by-product of election. The lower chamber obtained the lead in levying taxes because of being given authority by the king in England and the governors in the colonies, and this lead was given to them because the tax base shifted away from the most significant landowners and towards a larger and more diverse merchant class, and the elected lower chamber lent the king and governor legitimacy towards these taxpayers. In other words, it was the legitimacy to levy taxes on the people and not the legitimacy of these chambers towards the king on behalf of the people, rooted in some democratic mandate, that made the lower chambers emerge as the lead chamber with respect to taxation and supply. In fact, the establishment of an assembly for the colony, just as it had been in England, was in part a strategic move by the British crown to legitimize the levying of taxation on the local population so as to support local government and defence.

While ‘no taxation without representation’ has been a reform mantra in England and throughout the world, particularly in the era of representative government in Canada’s provinces, it needs to be remembered that taxation requires a level of compliance that can only be partially enforced by the power of the state, so there is a benefit to a ruler, even in a non-democratic environment, to make the levying of taxes appear voluntary. That is what was behind the very first *Magna Carta*. Having the taxes set by any legislative body is as much about enforcement as it is about accountability – and that is why the nobility had the power in the first king’s councils of England and landed gentry had the first influence in the governors’ councils in the colonies. That being said, the perceived legitimacy created by democratic theory will inevitably embolden elected legislators and will result in an increase

in demands for autonomy and greater decision making authority.<sup>324</sup> Normative arguments will thus come to dominate these demands for power.

Figure 10.3: Inter-Institutional Discourse during Representative Government



<sup>324</sup> Once the king began using parliament to lend legitimacy to the levying of his taxes, it was inevitable that parliament would obtain supremacy over the crown; the elected lower house came to dominate the upper chamber as the tax base shifted from landowners to a merchant class; and the supremacy of parliament inevitably led to parliament's capture by the executive branch (Hicks 2009b).

In just 100 years, the colonial institutions of governance in British North America were transformed from a Tudor-style monarchical system to a Victorian model of government with a bicameral legislature. Growing out of that original governor's council were two, three, four and then five distinct institutions for governance: the officials who would become the executive council and form the basis for a cabinet; the appointed or nominee members who would become the legislative council or upper chamber; an elected legislative assembly as the lower chamber; and, under the auspices of the last two bodies working together as a parliament or general assembly for the province, a separate and independent judiciary would be structured.

As noted there will be demands that emerge from the legislature with respect to institutional design and decision-making authority. These also followed a standard trajectory in the era of responsible government and are illustrated in figure 10.3. This discourse between governor and the leadership in the legislature occurred in England, the British provinces of Canada and the Canadian province of Manitoba. It is hypothesized, therefore, that this may be a natural breakdown in the British monarchical model. The ruler, be it king or governor, after accepting the need for representative institutions in order to more easily levy taxes, encounters a series of challenges to his or her authority.

As this interaction and response occurred in England, in all the non-revolutionary provinces of British North America and in the non-British province of Canada, it is clear that the standard trajectory of institutional development was a response to developments within the polity and the institutions of governance and not simply a grant from the colonial office. Why these changes occurred at different times brings us to our central research question.

### **III. Institutional Change**

It was hypothesized that social cleavages would not lead to change but rather to restraint, as social groups would distrust one another's motives. While initially it was thought that each social group would advocate competing institutional changes that might

advance their group's political influence, after reviewing the constitutional rules in Canada and recent attempts to change the Canadian *Constitution*, it was concluded that 'out' social groups would opt for the *status quo*, given their fear that any change might weaken whatever relative influence they have in the institution in question or in the overall structures of government.

The hypothesis that began this dissertation was that there were not one but two cleavages that were at play in politics, one being 'social' and one being 'partisan'. Both are 'political' cleavages in that they involve power relationships and both are 'societal' in that they operate across the polity, but the social cleavage is created out of a person's sociological identity while the partisan cleavage emerges out of competition over policy outcomes and the pursuit of public office.

Normative theory will be advanced in support of and in opposition to any change to the institution of governance being advocated by any group. Inertia and path dependency will neutralize normative arguments in favour of change, no matter how compelling or temporally popular they might be. What will determine the success or failure of the proposed change is the interaction of elite representatives on the two sides of the competing societal cleavages.

In every change that was successful, the group driving the change had among its senior members the leaders from both sides of the social cleavage. This was true for achieving responsible government, reducing the second chamber's veto to suspensive, and election and abolition of the upper chamber, even for Confederation.

It had originally been hypothesized that: "*The social cleavage will be a stronger determinant of the success or failure to achieve change than the partisan cleavage. The more socially divided a society is, the harder it will be to achieve institutional change.*" The assumption in sociology is that issues concerning social identity are more important to people than policy issues (Lipset et Rokkan 1967). However, the partisan cleavage would appear to be as important as the social cleavage in determining whether or not change occurred. The existence of a social cleavage in a society does not necessarily mean that the

‘out’ group that will resist change. In New Brunswick, changes occurred taking the province from representative government to responsible government and then to abolition without the leadership of the French community opposing the changes, because, in the first era, they did not have representation in either chamber that would make them want to preserve the *status quo* and, in the second era, they opposed Confederation, but when it came to abolishing the upper chamber their representation was in the lower chamber and in cabinet, so changes did not impact on their influence in the overall structure of government. Nevertheless, the government still appointed an Acadian to the upper chamber the day of the vote, to vote for its abolition.

The other proposition was that turned out to be wrong was that: “*Change that is supported by both sides of the partisan cleavage will be the easiest to achieve*”. In Nova Scotia, Prince Edward Island and Quebec, it was only when the two political parties differed that change occurred. In New Brunswick, the parties agreed over change but it was only when it became an election issue that abolition occurred. It seems that it is necessary to have a partisan debate over change so that the government party has political capital invested in carrying it out.

Responsible government was bitterly debated in the provincial legislature and public press in each of the provinces, with Newfoundland’s and Nova Scotia’s legislative debates being the most bitter. While Canadian history focuses on how Confederation was achieved by a ‘Grand Coalition’ in Canada and how the delegations from each province contained the leadership of the government and opposition parties, it was equally bitterly debated and, in Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland, provincial parties realigned temporarily around this issue as Anti-Confederate parties emerged specifically to fight the issue. Where we posited that the bigger the change the more cross-cleavage support might be required, it would also seem that the bigger the change the more engaging the partisan debate needs to be so that holders of public office a vested interest in achieving the change.

The propositions that were first hypothesized have been restated based on this research as follows:

- 1) *In instances where change occurs, the partisan cleavage will have created a group that can overcome the resistance to change advanced by elite representatives of social groups.*
- 2) *The partisan cleavage and the social cleavage are equal determinants of the success or failure to achieve change.*
- 3) *When the social cleavage and the partisan cleavage aligned:*
  - c. *If proposals for change came from the 'out' group, the elites that represented that group would have insufficient influence to bring about the change.*
  - d. *If proposals for change came from the 'in' group, the elites that represented the 'out' group would resist change and opt instead for the status quo.*
- 4) *When the social and the partisan cleavages are cross-cleavages:*
  - a. *If change is seen to come from a social group it will be resisted as outlined in 3.*
  - b. *When proposals for change come from only one side of the partisan cleavage, it will only be successful if the group has elite representatives from both sides of the social cleavage among its leadership.*
  - c. *For change to occur there needs to be a public debate between the two sides of the partisan cleavage surrounding the change.*
- 5) *Successful change will not significantly vary social group representation in the overall structure of governance.*
- 6) *For a change to the social group representation to occur, a shift in the social cleavage will hsvr preceded the change, with that shift reducing or eliminating the perceived need for that group's representation in the institution in question.*

## IV. Road Ahead

The results of this dissertation to the importance of looking for two cleavages in a polity, one social and one partisan, when trying to identify the impact of societal divisions on politics in general and institutional change in particular. The belief was that if the two cleavages were uncoupled, it would allow for greater insight than identifying multiple cleavages or a single one. This clearly is a better approach to the study of institutions.

With respect to political parties, it suggests that the emergence of political parties in Western Europe should be re-examined using this approach. Clearly the social cleavages in the British non-revolutionary provinces did not have their political parties form around the social cleavage.

Karl Marx, and those who followed him, thought that armed rebellion would be necessary to achieve the institutional change that benefited the proletariat. So there seems to be an innate understanding that social groups will resist change when advanced by an 'out' social group. What Marx did not predict is that 'out' social groups would opt for the *status quo*, which would explain why the workers' revolution he predicted would change the world never materialized. As the *status quo* is easier than change, most institutions remain unchanged. Whether this theory for how institutional change occurs in non-revolutionary environments extends to other British derivative countries, to countries the British did not found and to different political systems are all deserving of research.

The standard developmental trajectory of the Westminster-model should also be examined in other British non-revolutionary colonies. The evidence here was that societal context is central to when institutional change occurs. This may mean that in other countries, which have substantively different social and partisan cleavages, this model may not hold. Canada offered the benefit of having both ceded/conquered and settler colonies and had, in the case of Manitoba, a province that was not a British but rather Canadian colony, so there can be some confidence that the model would be applicable to all British colonies. But this is also worthy of exploration.

## Appendix I: Abbreviations and Terminology

1 <sup>st</sup> Reading	The parliamentary term in most Westminster models of government for the introduction of a bill. A bill, when enacted, becomes law.
2 <sup>nd</sup> Reading	The term, also predominantly but not exclusively used in the Westminster model, for the approval in principle of the objectives of a bill. A chamber will sometimes give approval in principle for a bill so that it can be sent to a committee of the chamber, the next stage in consideration, without genuinely accepting the principle of the legislation. Strategically there may be any number of reasons to support a bill at 2 <sup>nd</sup> reading while opposing its adoption.
3 <sup>rd</sup> Reading	The term for a chamber approving the bill in a specific form, and may be preceded by amendments proposed by the committee which studied the bill in detail or in the chamber through votes on proposed amendments prior to the final vote.
A.B.	Alberta
A.G.	Attorney General
B.C.	British Columbia
BNA	<i>British North America Act</i> (now called the <i>Constitution Act</i> with relevant year following the name of the Act as there were several enacted by the British Parliament over a number of years, many of which are still the constitutional authorities for non-revolutionary institutional change in Canada).
Britain	Short form for the ‘United Kingdom of Great Britain and [more recently just Northern] Ireland’ which was united in 1801; ‘Great Britain’ was united in the person of James I in 1603 and legislatively under the British Parliament in 1707, and includes Scotland, England and Wales; and most of Ireland (except for the North) was given independence in 1921.
British	An adjective pertaining to the U.K.
B.M.	British Museum
B.T.	Board of Trade Archives
Can.	Canada
C.O.	Colonial Office
<i>Debates</i>	The record of what was said, now recoded verbatim, in a legislative chamber in Canada, the U.K. and other British institutional derivatives. The term <i>Hansard</i> is used more frequently in the U.S. and <i>Debates</i> in Canada, but they are interchangeable.
EC	Executive Council (this would come to be known as the Cabinet)
G.B.	Great Britain [Scotland, England and Wales]
HA	House of Assembly
HoC	House of Commons (federal elected lower chamber in Canada, as well as in the unitary country of the U.K.)
JCPC	Judicial Committee of the Privy Council

<i>Hansard</i>	Another term for the official record of the legislative debates, which are the formal record of what was said, now verbatim, in a legislative chamber in Canada, the U.K. and other British institutional derivatives.
H.B.C.	Hudson Bay Company. It was formally established through letters patent as “The Governor and Company of Adventurers of England trading into Hudson's Bay” and was given vice regal authority over most of the land which is now Canada.
I	Imperator (Emperor) or Imperatrix (Empress)
<i>Journals</i>	The formal record of a legislature. It does not contain speeches, except for the King/governor’s speech from the throne. It records motions and amendments and, when a roll call is requested pursuant to the rules of the legislative chamber, the actual votes cast at each stage of consideration of a bill.
LA	Legislative Assembly (the elected lower chamber)
LC	Legislative Council (the upper chamber, usually appointed)
M.B.	Manitoba
M.H.A.	Member of the House of Assembly
M.L.A.	Member of the Legislative Assembly
M.N.A.	Member of the National Assembly
M.P.	Member of Parliament
N.A.C.	National Archives and National Library of Canada
N.B.	New Brunswick
N.F.	Newfoundland and Labrador
N.S.	Nova Scotia
O.C.	Order-in-Council
P.C.	Privy Council
P.E.I.	Prince Edward Island
Qc	Quebec
R	Rex (King) or Regina (Queen)
Royal Assent	Having received majority voters at each ‘reading’, a bill becomes law in Canada when it had passed all three readings in both chambers and then received Royal assent. Historically the King (or governor) could withhold assent. There is believed to be a constitutional convention in both the U.K. and its former colonies, like Canada, who have retained the monarchy as head of state, that assent cannot be withheld.
S.C.C.	Supreme Court of Canada
Sol.Gen.	Solicitor General
S.K.	Saskatchewan
U.K.	United Kingdom of Great Britain and [Northern] Ireland (Ireland, except for the North, was separated and given independence as the Irish Republic or Eire in 1921)

## Appendix II: Bibliography

NB: *Commissions* of appointment, *instructions* and *despatches*, references to legislative debates and newspaper articles appear in the text and are not repeated in this bibliography. Documents available through reproduction in sessional papers are noted in footnotes at the outset of each section.

### Canadian Constitutional Acts and Documents

(in chronological order)

*Édits, ordonnances royaux, déclarations et arrêts du Conseil d'État du roi concernant le Canada.* 1854. Quebec: De la presse à vapeur de E.R. Fréchette.

*The Royal Proclamation*, October 7, 1763 (RSC 1985, Appendices, No. 1)

*The Quebec Act 1774*, more formally known as *An Act for making more effectual Provision for the Government of the Province of Quebec in North America*, 14 George III, c.83 (U.K.)

*The Constitutional Act 1791*, more formally known as *An Act to repeal certain Parts of an Act, passed in the fourteenth Year of his Majesty's Reign, intituled, An Act for making more effectual Provision for the Government of the Province of Quebec, in North America; and to make further Provision for the Government of the said Province*, 31 George III, c.31 (U.K.)

*Newfoundland Fisheries, Judicature and Marriage Acts:*

(i) *An Act to Repeal Several Laws relating to the Fisheries Carried on upon the Banks and Shores of Newfoundland, and to make Provision for the Better Conduct of the said Fisheries for Five Years*, 5 George IV c.51 (U.K.)

(ii) *The Newfoundland Act 1824*, enacted as *An Act for the Better Administration of Justice in Newfoundland, and for other purposes*, 5 George IV c. 67 (U.K.)

(iii) *An Act to repeal an Act passed in the Fifty-seventh Year of the reign of His late Majesty King George the Third, entitled, 'An Act to regulate the Celebration of Marriages in Newfoundland' and to make further Provision for the Celebration of Marriages in the said Colony and its Dependencies*, 5 George IV 68 (U.K.)

*An Act to make temporary provision for the Government of Lower Canada*, 1840, 1 & 2 Victoria, c.9 (U.K.)

*The Union Act, 1840*, more formally known as *An Act to re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada*, 3-4 Victoria, c.35 (U.K.)

*Vancouver's Island Act, 1849*, more formally known as *An Act to Provide for the Administration of Justice in Vancouver's Island*, 12 & 13 Victoria c.48 (U.K.)

*An Act to empower the Legislature of Canada to alter the Constitution of the Legislative Council for that Province, and for other purposes*, 1854, 17 & 18 Victoria, c.118 (U.K.)

*An Act to change the Constitution of the Legislative Council by rendering the same Elective*, 1856, 18 & 19 Victoria, c.140 (Canada)

*British Columbia Act, 1858*, more formally known as *An Act to Provide for the Government of British Columbia*, 21 & 22 Victoria, c.99 (U.K.)

- British Columbia Act, 1866*, more formally known as *An Act for the Union of the Colony of Vancouver Island with the Colony of British Columbia*, 29 & 30 Victoria, c.67 (U.K.)
- British North America Act, 1867* (now *Constitution Act, 1867*), more formally known as *An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith*, 30 & 31 Victoria, c.3 (U.K.), 31-32 Victoria c. 105 (U.K.)
- Rupert's Land Act, 1868*, more formally known as *An Act for enabling Her Majesty to accept a surrender upon Terms of the Lands, Privileges, and Rights of "The Governor and Company of Adventurers of England trading into Hudson's Bay," and for admitting the same into the Dominion of Canada*, 31-32 Victoria, c.105 (U.K.)
- Temporary Government of Rupert's Land Act, 1869*, more formally known as *An Act for the temporary Government of Rupert's Land and the North-Western Territory when united with Canada*, 32-33 Victoria, c.3 (U.K.)
- Manitoba Act, 1870*, more formally known as *An Act to amend and continue the Act 32 and 33 Victoria, chapter 3; and to establish and provide for the Government of the Province of Manitoba*, 33 Victoria, c.3 (Canada)
- Rupert's Land and North-Western Territory Order, more formally known as the *Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territories into the Union*, June 23, 1870 (RSC 1985, Appendices, No. 9)
- British Columbia Terms of Union, 1871, more formally known as the *Order of Her Majesty in Council admitting British Columbia into the Union*, May 16, 1871 (RCS 1985, Appendices, No. 10)
- British North America Act, 1871* (now *Constitution Act, 1871*), 34-35 Victoria, c.28 (U.K.)
- The Numbered Indian Treaties (1871-1922)
- Prince Edward Island Terms of Union, known more formally as the *Order of Her Majesty in Council admitting Prince Edward Island into the Union*, June 26, 1873 (RSC 1985, Appendices, No. 12)
- Parliament of Canada Act, 1875*, more formally known as *An Act to remove certain doubts with respect to the powers of the Parliament of Canada under section eighteen of the Constitution Act, 1867*, 38-39 Victoria, c.38 (U.K.)
- Adjacent Territories Order, known more formally as the *Order of Her Majesty in Council admitting all British Territories and Possessions in North America and Islands adjacent thereto into the Union*, July 31, 1880 (RSC 1985, Appendices, No. 14)
- British North America Act, 1886* (now *Constitution Act, 1886*), known more formally as *An Act respecting the Representation in the Parliament of Canada of Territories which for the time being form part of the Dominion of Canada, but are not included in any Province*, 49-50 Victoria, c.35 (U.K.)
- British Columbia Terms of Union, known more formally as the *Order of Her Majesty in Council admitting British Columbia into the Union*, May 16, 1871 (RSC 1985, Appendices, No. 10)

- Canada (Ontario Boundary) Act, 1889*, more formally known as *An Act to declare the Boundaries of the Province of Ontario in the Dominion of Canada*, 52-53 Victoria, c.28 (U.K.)
- Statute Law Revision Act, 1893*, more formally known as *An Act for further promoting the Revision of the Statute Law by repealing Enactments which have ceased to be of force or have become unnecessary*, 56-57 Victoria, c.14 (U.K.)
- Canadian Speaker (Appointment of Deputy) Act, 1895, Session 2*, more formally known as *An Act for the removing of doubts by the Parliament of the Dominion of Canada respecting the Deputy-Speaker of the Senate*, 59 Victoria, c.3 (U.K.)
- The Yukon Territory Act, 1898*, more formally known as *An Act to provide for the Government of the Yukon District*, 61 Victoria, c.6 (Canada)
- The Alberta Act, 1905*, more formally known as *An Act to establish and provide for the Government of the Province of Alberta*, 4-5 Edward VII, c.3 (Canada)
- The Saskatchewan Act, 1905*, more formally known as *An Act to establish and provide for the Government of the Province of Saskatchewan*, 4-5 Edward VII, c.42 (Canada)
- British North America Act, 1907 (now Constitution Act, 1907)*, more formally known as *An Act to make further provision with respect to the sums to be paid by Canada to the several Provinces of the Dominion*, 7 Edward VII, c.11 (U.K.)
- British North America Act, 1915 (now Constitution Act, 1915)*, more formally known as *An Act to amend the Constitution Act, 1867*, 5-6 George V, c.45 (U.K.)
- British North America Act, 1916*, more formally known as *An Act to amend the British North America Act, 1867*, 6-7 George V, c.19 (U.K.)
- Statute Law Revision Act, 1927*, more formally known as *An Act for further promoting the Revision of the Statute Law by repealing Enactments which have ceased to be in force or have become unnecessary*, 17-18 George V, c.42 (U.K.)
- British North America Act, 1930 (now Constitution Act, 1930)*, more formally known as *An Act to confirm and give effect to certain agreements entered into between the Government of the Dominion of Canada and the Governments of the Provinces of Manitoba, British Columbia, Alberta and Saskatchewan respectively*, 20-21 George V, c.26 (U.K.)
- Statute of Westminster, 1931*, or more formally *An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930* 1931, 22 George V, c.4 (U.K.)
- British North America Act, 1940 (now Constitution Act, 1940)*, more formally known as *An Act to include unemployment insurance among the classes of subjects enumerated in section ninety-one of the Constitution Act, 1867*, 3-4 George VI, c.36 (U.K.)
- British North America Act, 1943*, more formally known as *An Act to provide for the readjustment of the representation of the provinces in the House of Commons of Canada consequent on the decennial census taking in the year one thousand nine hundred and forty-one*, 6-7 George VI, c.30 (U.K.)
- British North America Act, 1946*, more formally known as *An Act to provide for the readjustment of representation in the House of Commons of Canada on the basis of the population of Canada*, 9-10 George VI, c.63 (U.K.)

- Letters Patent Constituting the Office of Governor General of Canada (1947), *Canada Gazette*, Part I, Vol. 81, p.3104
- British North America Act, 1949* (now *Newfoundland Act*), more formally known as *An Act to confirm and give effect to Terms of Union agreed between Canada and Newfoundland*, 12-13 George VI, c.22 (U.K.)
- British North America Act (No.2), 1949*, more formally known as *An Act to amend the British North America Act, 1867, as respects the amendment of the Constitution of Canada*, 13 George VI, c.81 (U.K.)
- Statute Law Revision Act, 1950*, more formally known as *An Act for further promoting the Revision of the Statute Law by repealing Enactments which have ceased to be in force or have become unnecessary and for facilitation the publication of Revised Editions of the Statute*, 14 George VI, c.6 (U.K.)
- British North America Act, 1951, s.*, more formally known as *An Act to amend the British North America Act, 1867*, 14-15 George VI, c.32 (U.K.)
- British North America Act, 1952*, more formally known as *An Act to amend the British North America Acts, 1867 to 1951, with respect to the Readjustment of Representation in the House of Commons*, 1 Elisabeth II, c.15 (Canada)
- British North America Act, 1960* (now *Constitution Act, 1960*), more formally known as *An Act to amend the Constitution of Canada, 1867*, 9 Elizabeth II, c.2 (U.K.)
- British North America Act, 1964* (now *Constitution Act, 1964*), more formally known as *An Act to amend the Constitution Act, 1867*, 12-13 Elizabeth II, c.73 (U.K.)
- British North America Act, 1965* (now *Constitution Act, 1965*), more formally known as *An Act to make provision for the retirement of members of the Senate*, 14 Elizabeth II, c.4 (Canada)
- British North America Act, 1974* (now *Constitution Act, 1974*), originally entitled *British North America Act (No. 2), 1974* and enacted as Part I of the *Representation Act, 1974*, 23 Elizabeth II, c.13 (Canada)
- British North America Act, 1975* (now *Constitution Act (No. 1), 1975*), was enacted as Part I of the *Northwest Territories Representation Act*, 23-24 Elizabeth II, c.28 (Canada)
- British North America Act (No.2), 1975* (now *Constitution Act (No. 2), 1975*), 23-24 Elizabeth II, c.53 (Canada)
- Miscellaneous Statute Law Amendment Act, 1977*, 25-26 Elizabeth II, c.28 (Canada)
- Canada Act 1982* (including the *Constitution Act, 1982* as Schedule B, Part I of which is the *Canadian Charter of Rights and Freedoms*), more formally known as *An Act to give effect to a request by the Senate and House of Commons of Canada*, 1982, c.11 (U.K.)
- Constitution Amendment Proclamation, 1983*
- Constitution Act, 1985 (Representation)*, 33-34-35 Elizabeth II, c.8 (Canada)
- Constitution Amendment, 1987 (Newfoundland Act)*
- Constitution Amendment, 1993 (New Brunswick Act)*
- Constitution Amendment, 1994 (Prince Edward Island)*
- Constitution Amendment, 1997 (Quebec)*
- Constitution Amendment Proclamation, 1997 (Newfoundland Act)*
- Constitution Amendment Proclamation, 1998 (Newfoundland)*

*Constitution Act, 1999 (Nunavut)*

*Constitution Amendment, 2001 (Newfoundland and Labrador)*

## **Acts of the British Isles**

(in chronological order)

*Ecclesiastic Appeals Act 1532*, enacted as *Act in Restraint of Appeals, 1533*, 24 Henry VIII, c.12 (England)

*Act of Supremacy 1534*, 26 Henry VIII, c.1 (England)

*Act of Succession 1534*, enacted as an *Act Respecting the Oath to the Succession*, 26 Henry VIII, c.2 (England)

*Crown of Ireland Act 1541*, enacted as *An Act that the King of England, his Heirs and Successors, be Kings of Ireland*, 33 Hen 8 c. 1 (Ireland)

*Act of Supremacy 1559*, enacted as *An Act restoring to the Crown, the ancient Jurisdiction over the State Ecclesiastical and Spiritual, and abolishing all foreign Power repugnant to the same*, 1 Elizabeth, c. 1 (England)

*Act of Supremacy (Ireland) 1560*, enacted as *An Act restoring to the Crown, the ancient Jurisdiction over the State Ecclesiastical and Spiritual, and abolishing all foreign Power repugnant to the same*, 2 Elizabeth 1, c. 1 (Ireland)

*Navigation Act 1651*, enacted as *Goods from Foreign parts by whom to be imported* (Commonwealth of England)

*Staple Act 1663*, enacted as *An Act for increase of Shipping, and Encouragement of the Navigation of this Nation* (Commonwealth of England)

*Plantation Duty Act 1673* (Commonwealth of England)

*Bill of Rights 1688*, enacted as *An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown*, 1 William and Mary 2, c.2 (England)

*King William's Act 1699*, enacted as *An Act to Encourage the Trade to Newfoundland*, 10 & 11 William III, c.25 (England)

*Act of Settlement 1700*, enacted as *An Act for the further Limitation of the Crown and better securing the Rights and Liberties of the Subject*, 1 Elizabeth, c. 1 (England)

*Acts of Union 1707:*

(i) *Union with England Act 1707*, enacted as an *Act Ratifying and Approving the Treaty of Union of the Two Kingdoms of SCOTLAND and ENGLAND*, 1707, c.7 (Scotland)

(ii) *Union with Scotland Act 1706*, enacted as *An Act for an Union of the Two Kingdoms of England and Scotland*, 6 Anne, c.11 (England)

*Succession to the Crown Act 1707*, enacted as *An Act for the Security of Her Majesties Person and Government and of the Succession to the Crown of Great Britain in the Protestant Line*, 6 Anne, c.41 (Great Britain)

*Palliser's Act 1775*, enacted as *An act for the encouragement of the Fisheries carried on, from Great Britain, Ireland, and the British Dominions in Europe, and for securing the return of the fishermen, sailors, and others employed in the said fisheries, to the ports thereof, at the end of the fishing season*, 15 George III, c.31 (Great Britain)

*Papist Act 1778*, enacted as *An Act to enable his Majesty's subjects, of whatever persuasion, to testify their allegiance to him*, 18 George III c. 60 (U.K.)

- Roman Catholic Relief Act 1791*, enacted as *An Act for the Relief of His Majesty's Popish, or Roman Catholic, Subjects*, 31 George III. c. 32 (Ireland)
- The Catholic Relief Act 1793*, enacted as *An Act for the Relief of His Majesty's Popish, or Roman Catholic, Subjects of Ireland*, SI 1310-1800 (1786-1801), vol. xvi, 685-692 (Ireland)
- Acts of Union 1800*, enacted as *An Act for the Union of Great Britain and Ireland* and registered in short title as:
- (i) *Union with Ireland Act 1800*, 39 and 40 George III, c.67 (Great Britain)
  - (ii) *Act of Union (Ireland) 1800*, 40 George III, c.38 (Ireland)
- Slave Trade Act 1807*, enacted as *An Act for the Abolition of the Slave Trade*, 47 George III, c. 36 (U.K.)
- Importation Act 1815*, 55 George III, c. 26 (U.K.)
- Roman Catholic Relief Act 1829*, enacted as *An Act for the Relief of His Majesty's Roman Catholic Subjects*, 10 George IV, c.7 (U.K.)
- Reform Act 1832*, also known as the *Representation of the People Act 1832*, enacted as *An Act to amend the representation of the people in England and Wales*, 2 & 3 William IV, c.45 (U.K.)
- Judicial Committee Act 1833*, enacted as *An Act for the better Administration of Justice in His Majesty's Privy Council*, 3 & 4 William 4, c.41 (U.K.)
- Slavery Abolition Act 1833*, enacted as *An Act for the Abolition of Slavery throughout the British Colonies; for promoting the Industry of the manumitted Slaves; and for compensating the Persons hitherto entitled to the Services of such Slaves*, 3 & 4 William IV, c. 73 (U.K.)
- British Settlements Act 1843*, enacted as *An Act to enable Her Majesty to provide for the Government of Her Possessions acquired by Settlement*
- Importation Act 1846*, 9 & 10 Victoria, c. 22 (U.K.)
- Colonial Laws Validity Act 1865*, enacted as *An Act to remove Doubts as to the Validity of Colonial Laws*, 28 & 29 Victoria, c. 63 (U.K.)
- Parliament Act 1911*, enacted as *An Act to make provision with respect to the powers of the House of Lords in relation to those of the House of Commons, and to limit the duration of Parliament*, 1 & 2 George V, c. 13 (U.K.)

## **Acts, Bill and Motions of the Canadian Parliament and Provincial Legislatures**

(in chronological order)

- An Act introducing English Civil Law into Upper Canada*, 1792, enacted as *An Act to repeal certain parts of an Act passed in the fourteenth years of His Majesty's Reign, intituled, 'An Act for making more effectual Provision for the Government of the Province of Quebec, in North America', and to introduce the English law, as the Rule of Decision in all matters of Controversy, relative to Property and Civil Rights*, 32 George III, c.1 (Upper Canada)
- An Act Establishing Trial by Jury in Upper Canada*, 1792, 32 George 111, c.2

- Upper Canada Abolition Act*, 1793, enacted as *An Act to Prevent the further Introduction of Slaves and to limit the Term of Contracts for Servitude within this Province* (Upper Canada)
- An Act for altering and changing the name of this Island, from Saint John to that of Prince Edward Island*, 1799, 39 George III, c.1 (PEI)
- Canada Tenures Act*, 1825, enacted as *An Act to provide for the extinction of feudal and seigniorial rights and burthens on lands held a titre de fief and a titre de cens in the province of Lower Canada: and for the gradual conversion of those tenures into the tenure of free and common soccage, and for other purposes relating to the said province*, 6 George IV, c.59 (Lower Canada)
- Party Processions Act and the Secret Societies Act*, 1843, Disallowed (Canada)
- An Act to provide for the payment of Claims arising out of the Rebellion and Invasion in Upper Canada, and to appropriate the duties on Tavern Licences to local purposes*, 8 Victoria, c.72 (Canada)
- Simultaneous Polling Act*, 1847, 10 Victoria, c.1 (Nova Scotia)
- Rebellion Losses Act*, 1849, enacted as *An Act to provide for the Indemnification of Parties in Lower Canada whose Property was destroyed during the Rebellion in the years 1837 and 1838* (Canada)
- An Act to increase the number of Members to serve in the General Assembly and to consolidate and amend the Laws relating to Elections*, 1856, 19 Victoria, c.21 (Prince Edward Island)
- An Act to change the Constitution of the Legislative Council, by rendering the same Elective*, 1862, 25 Victoria, c.18 (Prince Edward Island)
- An Act further securing the independence of Parliament*, 1868, 31 Victoria, c.25 (Canada).
- An Act to provide for the appointment of Legislative Councillors in the Province of Nova Scotia*, 1872, 35 Victoria, c.13 (Nova Scotia).
- An Act to abolish the office of Law Clerk of the Legislative Council*, 1879, 42 Victoria, c.35 (Nova Scotia).
- An Act to make the first day of July a Public Holiday by the name of Dominion Day*, RSC 1886, c.3 (Canada).
- An Act respecting the Representation of the People*, 1890, 53 Victoria, c.1 (Prince Edward Island)
- An Act respecting the Legislature*, 1890, 53 Victoria, c.4 (Prince Edward Island)
- An Act relating to the Legislative Council*, 1891, 54 Victoria, c.9 (Nova Scotia).
- An Act respecting the Legislature*, 1893, 56 Victoria, c.1 (Prince Edward Island).
- Legislature Act 1917*, 8 George V, c. 3 (Newfoundland)
- An Act to amend Chapter 2, Revised Statutes, 1923, "Of the Constitution, Powers and Privileges of the Houses"*, 1925, 15-16 George V, c.16 (Nova Scotia).
- Diamond Jubilee of Confederation Act*, 1927, more formally known as *An act to incorporate a National Committee for the celebration of the Diamond Jubilee of Confederation*, 17 George V, c.6 (Canada)
- An Act Abolishing the Legislative Council and Amending the Constitution of the Province*, 1928, 18 George V, c.1 (Nova Scotia)

- Canadian Bill of Rights*, enacted as *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms*, SC 1960, c.44 (Canada)
- An Act respecting the Legislative Council*, 1968, 17 Elizabeth II, c.9 (Quebec)
- Supreme Court Act*, enacted as *An Act respecting the Supreme Court of Canada*, RSC 1985, c. S-26 (Canada)
- Ministries and Ministers of State Act*, enacted as *An Act to provide for the establishment of Ministries of State and the appointment of Ministers of State*, RSC 1985, c.M-8 (Canada)
- Constitutional Questions Act*, enacted as *An Act for Expediting the Decision of Constitutional and Other Provincial Questions*, RSNS, 1989, c.89 (Nova Scotia)
- An Act respecting Constitutional Amendments (regional veto)*, SC 1996-1998, c.1 (Canada)
- Senate Tenure Bill, which would have been entitled, if adopted and given Royal assent, as *An Act to amend the Constitution Act, 1867 (Senate tenure)*.
- 1) Introduced in the Senate on May 30, 2006, 1<sup>st</sup> Session 39<sup>th</sup> Parliament as Bill S-4;
  - 2) Introduced in the Commons on November 13, 2007, 2<sup>nd</sup> Session, 39<sup>th</sup> Parliament as Bill C-19;
  - 3) Introduced in the Commons on March 3, 2010, 3<sup>rd</sup> Session, 40<sup>th</sup> Parliament as Bill C-10.
- Senate Motion No. 6, 2<sup>nd</sup> Session, 39<sup>th</sup> Parliament, 2007: “Motion to Urge Governor-in-Council to Prepare Referendum on Whether the Senate Should be Abolished”.
- Senate Appointment Consultation Bill, which would have been entitled, if adopted by both chambers and given Royal assent, as *An Act to provide for consultations with electors on their preferences for appointments to the Senate*.
- 1) Introduced in the Commons on December 13, 2006, 1<sup>st</sup> Session, 39<sup>th</sup> Parliament, as Bill C-43;
  - 2) Introduced into the Commons on November 13, 2007, 2<sup>nd</sup> Session, 39<sup>th</sup> Parliament, as Bill C-43;
- Senatorial Selection Bill, which would have been entitled, if adopted by both chambers and given Royal assent, as *An Act respecting the Selection of Senators*.
- 1) Introduced into the Senate on March 3, 2010, 3<sup>rd</sup> Session, 40<sup>th</sup> Parliament, as Bill S-8
- Senate Reform Bill, which would have been entitled, if adopted by both chambers and given Royal assent, as *An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits*.
- 1) Introduced into the Commons on June 2, 2011, 1<sup>st</sup> Session, 41<sup>st</sup> Parliament, as Bill C-7.

## Judicial Decisions

(in alphabetical order)

- Campbell v. Hall*, 1 Cowp [1774] 204 (King’s Bench, England)
- Knight v Wedderburn* [1778], Dictionary of Decisions, vol.xxxiii, p.14545 (Court of Session, Scotland)
- Liquidators of Maritime Bank v. Receiver General* [1892], AC 437 (Judicial Committee of the Privy Council)
- R v Knowles, ex parte Somersett* [1772] 20 State Tr 1 (King’s Bench, England)
- Re: Authority of parliament in relation to the Upper House*, 1 S.C.R. [1980] 54 (Supreme Court of Canada).
- Re: Reference of certain matters respecting the Legislative Council of Nova Scotia* [1926] (Supreme Court of Nova Scotia, c.no.7565).
- Re: Reference of certain matters respecting the Legislative Council of Nova Scotia* [1927] AC 41 (Judicial Committee of the Privy Council)

*Re: Resolution to amend the Constitution*, 1 S.C.R. [1981] 753 (Supreme Court of Canada).  
*Re: Objection by Quebec to a resolution to amend the Constitution*, 2 S.C.R. [1982] 793  
 (Supreme Court of Canada).

## **Treaties**

(in chronological order)

*Treaty of Utrecht*, 1713, more formally known as *The Treaty of Peace and Friendship between the most Serene and most Potent Princess Anne, by the grace of God, Queen of Great Britain, France, and Ireland, and the most Serene and most Potent Prince Lewis, the XIVth, the most Christian King, concluded at Utrecht, the 31st day of March and the 11th day of April, 1713.*

*Treaty of Paris*, 1763, more formally known as *The definitive Treaty of Peace and Friendship between his Britannick Majesty, the Most Christian King, and the King of Spain. Concluded at Paris the 10th day of February, 1763. To which the King of Portugal acceded on the same day.*

*The Paris Peace Treaty*, 1783, more formally known as the treaty signed: *In the name of the most holy and undivided Trinity. It having pleased the Divine Providence to dispose the hearts of the most serene and most potent Prince George the Third, by the grace of God, king of Great Britain, France, and Ireland, defender of the faith, duke of Brunswick and Lunebourg, arch-treasurer and prince elector of the Holy Roman Empire etc., and of the United States of America, to forget all past misunderstandings and differences that have unhappily interrupted the good correspondence and friendship which they mutually wish to restore, and to establish such a beneficial and satisfactory intercourse, between the two countries upon the ground of reciprocal advantages and mutual convenience as may promote and secure to both perpetual peace and harmony.*

*Treaty of Paris*, 1814, more formally known as the treaty signed: *In the Name of the Most Holy and Undivided Trinity, His Majesty, the King of the United Kingdom of Great Britain and Ireland, and his Allies on the one part, and His Majesty the King of France and Navarre on the other part, animated by an equal desire to terminate the long agitations of Europe, and the sufferings of Mankind, by a permanent Peace, founded upon a just repartition of force between its States, and containing in its Stipulations the pledge of its durability, and His Britannic Majesty, together with his Allies, being unwilling to require of France, now that, replaced under the paternal Government of Her Kings, she offers the assurance of security and stability to Europe, the conditions and guarantees which they had with regret demanded from her former Government, Their said Majesties have named Plenipotentiaries to discuss, settle, and sign a Treaty of Peace and Amity.*

*Oregon Treaty*, 1846, more formally known as the *Treaty between Her Majesty and the United States of America, for the Settlement of the Oregon Boundary.*

*Anglo-French 'Entente cordiale'* (1904), includes four memoranda of understanding (and is not actually a treaty):

1. A Declaration respecting Egypt and Morocco.
2. A Convention respecting Newfoundland and West and Central Africa.

3. An Exchange of Notes agreeing to the Mutual Appointment of Consuls at St. John's, Newfoundland, and at St. Pierre.
4. A Declaration concerning Siam, Madagascar and the New Hebrides.

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