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Rearguard or Vanguard? A New Look at Canada's Constitutional Act of 1791

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Abstract

The Constitutional Act 1791, which provided representative governments to Upper and Lower Canada, has often been regarded as a reactionary document. Here, a comparison with the constitutions of the eastern colonies of British North America as well as the pre-revolutionary constitutions of the Thirteen Colonies reveals a variety of ways in which the 1791 Act was more liberal and more committed to the popular element of the constitution than its comparators. The significance of the statutory form of the 1791 Act is emphasized and contrasted with the much less secure position of the popular element under prerogative constitutions. Significant concessions in favour of the assembly’s powers during the debate on the Act in Parliament are reviewed, illustrating this point. While the 1791 Act did not embody an explicit bill of rights, its provisions for quadrennial elections based on a broad franchise without distinctions of race, religion or even gender marked a significant advance over prerogative constitutions, as did its commitment to representation by population and its implicit recognition of the French language as a language of political debate in Lower Canada. The movement from prerogative to statutory constitutions, it is argued, was a response to, rather than a reaction against, the constitutional contestation arising from the American and French revolutions.

Keywords: British North America; 1791 Constitutional Act; William Knox; Upper Canada; Lower Canada; colonial constitution; William Grenville

Introduction

The 1791 Constitutional Act that created a government for the newly established colony of Upper Canada and reorganized the government of Lower Canada, formerly Quebec, has long been overshadowed by the better-known constitutions of 1787 and 1791 resulting from the American and French Revolutions respectively. The 1791 Act contains no stirring declarations of the rights of man, no confident assertion of the inauguration of a more enlightened form of government. It is a 'who-does-what' kind of constitution, setting out in some detail the various institutions of the new governments and their relationships to one another. The absence of a declaration of the rights of citizens, the provision for the creation of clergy reserves for the support of the established church, and the existence of a power to create titles of honour to which could be annexed a hereditary right to be summoned to the legislative council, have all suggested to historians that the 1791 Act looks backwards, not forwards. It is often seen as representing an attempt by the imperial government to establish a more authoritarian form of government for the second empire, in response to the received wisdom of the day that the American colonies were lost because of an excess of democracy in their constitutions. Thus for David Milobar, the 1791 constitution derived from the imperial government's own 'conservative perception of the needs of a subordinate colonial society.'[1] For Pierre Tousignant, the Act embodied the aristocratic values of eighteenth-century England and was thus, implicitly, unsuited to the North American context.[2] Some historians of colonial America can barely contain their distaste for the 'illiberal' content of the 1791 Act, while others, such as Alan Taylor, continue to label it as 'counter-revolutionary.'[3] It has also been interpreted as an anti-Catholic measure, creating in Upper Canada 'a Protestant counterweight to the growing Catholic presence in the East' that institutionalized the 'segregation of French and English Canada.'[4]

Other historians, such as Gerald Craig and Vincent Harlow, have been more even-handed, regarding the Act as initially appropriate for the society in which it was meant to function, even if it did not age particularly well.[5] Few have embraced it as enthusiastically as Helen Taft Manning, who lamented that its demise due to the rebellions of 1837-38 'served to obscure the real importance and extreme generosity of the measure.' Speaking of Quebec, she

continued: 'Never again until the twentieth century was Great Britain to confer such extensive powers of self-government on a population so completely alien in race and religion.'[6]

More recently, Canadian historians Jeffrey McNairn and Michel Ducharme have reoriented the discussion around the 1791 Act by characterizing it as a product of the Enlightenment, and not a reactionary attempt to restore authoritarianism in Britain's remaining North American colonies. McNairn emphasizes the 'free' elements of the 1791 constitution, though he notes that the 'robust concept of public opinion developing in [Upper Canada]' helped ultimately to undermine it.[7] Ducharme distinguishes between two forms of liberty, classical liberty grounded in ideas of popular sovereignty, which motivated the American revolution, and modern liberty, exemplified by British ideas of parliamentary sovereignty. The 1791 constitution, he argues, fits squarely in the latter tradition, and is in no way reactionary, 'conservative,' or counter-revolutionary.[8] Maya Jasonoff, too, sees the 1791 Act as 'post-revolutionary' rather than counter-revolutionary, 'forged in part from the lessons of the war in America.'[9] Elizabeth Mancke's recent contribution suggesting a replacement of the Age of Revolutions paradigm with an Age of Constitutionalism, though not analysing the 1791 Act in detail, locates and valorizes it within a tradition of incremental and negotiated constitution-making.[10]

The present contribution builds on the work of Ducharme, Jasanoff, McNairn and Mancke but aims to refocus this debate by looking at the Act through the lens of legal history as opposed to political history, culture, or theory. Looking at the Act as constitutional law brings out some features of it that have been ignored or inadequately analysed by previous commentators, who tend to focus on a few of its provisions and do not consider it in detail or as it operated in both Upper and Lower Canada. It also answers the call of Jeffrey McNairn for a better integration of the legal history of the Canadas into existing debates.[11] A traditional focus on the points of friction between governors and assemblies tends to obscure the areas where the new constitution worked smoothly, helping to school British North Americans in the ways of parliamentary government. My argument is that the 1791 Act was a novel experiment within the British constitutional tradition—a starter constitution, to put it more colloquially—one that was more influenced by the American Revolution than has traditionally been admitted. This influence

can be seen in both the form and substance of the 1791 Act. In form, it was a statute, but it was also a single public document setting out the basic institutions of Upper and Lower Canada, recognizing new ideas of what a constitution should be. It had a lengthy and boring formal title, but it soon became popularly known as the Constitutional Act 1791, recognizing its true nature.[12] In content, it will be argued that it strengthened the popular and liberal elements of the constitution, moderating the more apparently illiberal aspects of the Act upon which previous commentators have focused, even though it stopped short of adopting a full-blown theory of popular sovereignty. The argument will proceed in three parts. First, the background to the Act will be considered through a brief review of the constitutional developments following the British conquest of Quebec, focusing particularly on the Quebec Act 1774, to which the 1791 Constitutional Act was technically an amendment. The second part analyses the immediate genesis of the Act in the later 1780s and its passage through Parliament, during which important amendments to the Act were effected, enhancing the role of the popular element in the Canadas' new constitution. Part three compares the provisions of the 1791 Act on various topics with those of some pre-revolutionary constitutions in the thirteen colonies, some post-revolutionary constitutions in the US, and the Maritime colonies of British North America in the late eighteenth and early nineteenth centuries. A brief conclusion follows.

The Conquest of New France: The Constitutional Aftermath, 1760-1774

The conquest of New France in 1758-60 presented enormous challenges for the victor, especially with regard to the new province of Quebec with its nearly 80,000 French-speaking Catholic inhabitants and minuscule British Protestant population.[13] The long enmity with France had led to a portrayal of its people as the opposite of everything the British stood for: where British Protestants were supposedly progressive, enlightened and liberty-loving, French Catholics were reactionary, superstitious and devoted to absolutism. How could the British govern so as to retain the loyalty of their new subjects, when Catholics in Britain and Ireland were subject to all manner of legal disabilities? To what extent did these legal disabilities operate in this new colony, and if they did, should they be moderated? These questions would shape debates about the constitution of Quebec on both sides of the Atlantic for decades. A period of military law until 1764 more or less preserved the status quo while the authorities in London decided what form a new civilian government might take following the conclusion of the Treaty

of Paris in February 1763. The Treaty allowed freedom of worship to the Catholic population 'as far as the laws of Great Britain permit' (itself an ambiguous concession given the extent of the penal laws in Britain) and permitted the King's 'new Roman Catholic subjects' to retain their property, but it was then up to the British to establish some form of governmental machinery.

A new constitution in statutory form for the province was considered, but in the end it was an instrument under the royal prerogative, hurriedly thrown together, that set out the terms for new governments in the former French possessions. The Royal Proclamation of October 1763 blithely directed that the governors of these territories should, 'so soon as the State and Circumstances of the said Colonies will admit thereof … summon … General Assemblies … in such Manner and Form as is used … in those Colonies and Provinces in America, which are under Our immediate government.' How an assembly comprising the representatives of only a few hundred British Protestant 'old subjects' (Catholics not being entitled to vote) could be seen as legitimate by the French-Canadian population whose loyalty the British government desired and needed, was a problem that did not seem to trouble the drafters of the Proclamation. Nor, indeed, most of the British population in Quebec itself, who insisted on just such an assembly. Recourse to the American colonial model of governance seems to have been almost automatic at this time, however. Consider far-off Senegal, also ceded to Britain by the Treaty of Paris and joined with British Gambia to form the new colony of Senegambia. An act of Parliament of 1765 vested the territory in the British crown but left its form of government to be determined under the prerogative. An order-in-council accordingly issued, declaring that the colony should be governed along American lines 'as far as differences of circumstances will permit,' despite an almost total absence of permanent settlers.[14]

The unwise promise of American-style colonial government, once made, could only be withdrawn by act of Parliament. Lord Mansfield's 1774 decision in *Campbell v Hall* dealing with Grenada had confirmed that the Crown could not legislate for a colony once the promise of an assembly had been made, making the passage of the Quebec Act a constitutional necessity. While the Act's guarantee of the continuity of French civil law, its reiteration of the Treaty of Paris's guarantee of freedom of worship 'subject to the King's supremacy,' and its affirmation of the Catholic church's ability to collect tithes were important elements of the emerging constitution of Quebec, here it is the form of government that is of most interest. Backtracking

on the promise of representative government, the Act instituted a conciliar form of government wherein an appointed council of between seventeen and twenty-three members would advise the governor and, with his consent, 'make Ordinances for the Peace, Welfare and Good Government of the said Province.' Although the Act did not so direct, élite members of the Canadien population, mostly seigneurs, were soon named to some positions on the council, providing a representative element if not a democratic one to the province's governance.[15]

The Act also instituted a new form of oath shorn of the anti-Catholic elements of the traditional Test Act oaths, one that could be taken by Canadien office-holders. And indeed, soon after the Act came into force, Canadien justices of the peace and judges were appointed. In this respect the Act merely extended an existing practice, rather than instituting a complete innovation, given that the Test Acts had previously been applied as narrowly as possible by the British in Quebec. Court and parish officials, notaries, and advocates were not required to take the oaths and continued to carry on as they had before 1760, maintaining a 'French face' in the administration of justice and in the daily practice of law, while a more English atmosphere with some French elements prevailed in the highest court, the Court of King's Bench. Metropolitan ideological differences between British and French ran up against the practicalities of governing post-Conquest Quebec, requiring a considerable amount of mutual accommodation.[16] The availability, moreover, of the bilingual *Quebec Gazette* from 1764, a periodical that covered the emerging political and constitutional controversies in the American colonies, France, and Britain itself, provided an avenue for the literate francophone population to learn about the British constitution and the nature of the rights and liberties they had supposedly now acquired as British subjects. Through petitioning the governor and the Crown with various demands, politically active elements of the Canadien population began to act on this knowledge, sometimes on their own, sometimes in concert with groups within the British population seeking reforms of various kinds.[17]

While much scholarship on the Quebec Act has been devoted to its content, rather less attention has been paid to its form, to which we now turn. As noted, only a statute could override the premature and ill-advised promise of an assembly contained in the Royal Proclamation 1763 and substitute a new form of government. In a sense, then, the statutory form proceeded from

negative motivations: it was a kind of legal work-around. Yet in the end, the Quebec Act provided a statutory constitution, albeit a rudimentary one, for Quebec, and this within a British tradition that prided itself on having an unwritten constitution. Some background is needed to appreciate the significance of this innovation.

Prior to the Quebec Act (and the Massachusetts Government Act of the same year), colonial constitutions were generated under the royal prerogative and took one of three forms: royal charters, as in most of the seventeenth-century seaboard colonies; proprietorships, where the Crown granted a large territory to a magnate along with the power to govern it; or governor's commission-and-instructions type constitutions in what were known as royal colonies. The first created a rudimentary set of institutions but delegated most power to the settlers to flesh out the scheme and govern themselves. The second ended up being a variation on the first, given that once the proprietor had summoned an assembly, it tended to arrogate more and more power to itself, leaving the proprietor largely a figurehead with only residual powers.[18]

The third, meanwhile, reflected a new, more top-down attitude in Whitehall, whereby a royally appointed governor, paid by the Crown, was to be the lynch-pin in the constitutional scheme. The governor's commission was a public document, but it typically said little besides appointing him to the post. The important details were contained in the governor's instructions, which were drafted in London, were not considered public documents, and did not even need to be shared with the governor's council. These instructions typically contained directions about calling an assembly, setting up courts, appointing various officials, granting land, and the like. They might be skeletal or they might be more detailed, but they left a good deal of discretion with the governor himself, who was formally accountable only to London and not to the local populace through the legislature. This form might be called a 'hip-pocket constitution,' in the sense that it could be carried by a new governor, figuratively speaking, in his hip pocket when he went off to begin administering a colony. I use this neologism as a convenient shorthand, but it also functions as a useful metaphor: a constitution secreted in a governor's hip-pocket is not available to the citizenry, and thus in no way conformed to later eighteenth-century ideas of what a constitution should be.

Nova Scotia was given such a constitution when it was acquired after the Treaty of Utrecht in 1713, while seven of the thirteen colonies had such constitutions by the time of the revolution, some, such as South Carolina and Georgia, having started as proprietorships or chartered colonies and then become royal colonies with hip-pocket constitutions. Prince Edward Island was given such a constitution when it was separated from Nova Scotia in 1769, described by the Island's first historian as follows in 1806:

> The Commission or patent under the great seal of Great-Britain granted to our first governor, … forms the constitution of the Island, and the instructions received therewith, are explanatory of the patent and regulate the governor's conduct in almost all the common routine of public business incident to his situation. The instructions are pretty voluminous, they are changeable at the king's pleasure, and additional instructions are sent as circumstances may require.[19]

Although Stewart was not openly critical of this form of constitution, others prior to the Revolution were—and not just revolutionaries. William Knox, one of the two undersecretaries in the newly created (1768) department of secretary of state for the colonies, expanded on these defects, which he believed to be one of the major causes of the American Revolution, in 1779:

> [T]he Crown Lawyers have given opinions that the Instructions being referred to in the Commission become a Constitution and part of the Commission itself, and of equal authority. So that while the People who settled [under] Charters were allowed to stand secure in all their privileges and to have Constitutions, those in the King's Governments were deemed not only without any Constitution at all, and could have no permanent form of Government, but might have one secretly modelled by the King's Ministers and privately introduced, without their ever being able to know what it was. Is it any Wonder then that sensible Men who were informed of these Doctrines should look with Envy on the Charter Governments, and with Jealousy and Distrust upon the Royal Authority.[20]

Knox's prescription was that all the revolting colonies should be offered a constitution in the form of a parliamentary statute, and if they accepted it, they would be welcomed back into the empire. It is not suggested that Knox was the only person to emphasize the importance of statutory constitutions in North America, but his personal familiarity with the continent, his long association with American affairs (nearly a quarter-century by 1779) and influential position in

imperial policy formation, and his various publications on the subject, including a pamphlet vigorously defending the policy of the Quebec Act, make him a key interlocutor in this debate.[21]

It was implicit in Knox's argument that only a statute would provide the security and stability that the colonists had a right to expect, an argument he had made as early as 1763 when asked to advise Lord Shelburne about American affairs after the acquisition of the French possessions. Indeed, if he had had his way, it is likely that the Royal Proclamation of 1763 would have taken the form of a statute rather than a prerogative measure. Parliament should be involved, he had asserted then,

> not only because the Crown can neither revoke its Charters, nor abrogate Laws, which have received the Royal Assent, but because no other Authority than that of the British Parliament will be regarded by the Colonys, or be able to awe them into acquiescence.[22]

While Knox's early advocacy of the use of statute stressed its more effective coercive power, by the 1770s his thinking was more nuanced. In his view, only a statute would provide—to use two modern buzz-words—the necessary transparency and accountability to reassure the colonists that the provisions of their constitutions were clear and could not be arbitrarily changed. It is true that parliamentary sovereignty could ultimately be used to operate a change in the constitution of a colony, but only after debate in parliament, not in the back corridors of Whitehall. From 1775, these debates became public when Parliament ceased to punish those who reported them.

It was too late for Knox's idea to resolve the American crisis, but it would resurface after the Loyalist migration forced some alteration to the constitutional arrangements in the colonies that chose to remain under the king. The resulting Constitutional Act 1791 would become, in Maya Jasanoff's words, 'a foundation stone in modern British imperial government.'[23] We now turn to its origins and passage.

Towards the Constitutional Act 1791

The Loyalist influx of the 1780s necessitated new constitutional arrangements, but what form these would take was unclear. When New Brunswick and Cape Breton were split off from

Nova Scotia in 1784, colonial administrators reached for the familiar hip-pocket constitution in each case. What would happen in the Canadas was up in the air. Lower Canada might have been given a statutory constitution based on an amended Quebec Act while the new colony of Upper Canada was offered a hip-pocket constitution like its Loyalist twin, New Brunswick. While the division of Quebec was pretty much a given by 1786-87, the working assumption of imperial officials and politicians until quite late in the day was that the two provinces would have different constitutions: the new Lower Canada would retain a conciliar type government without an assembly under a modified Quebec Act, while the new province of Upper Canada would have the usual apparatus of governor, appointed council, and assembly, though whether under a statutory or hip-pocket constitution remained undecided.[24]

The issue of local taxation is generally agreed to have been the deciding factor tipping the balance in favour of endowing Lower Canada with an assembly, even though that meant granting the franchise to the Canadiens and creating a body in which they would decidedly outnumber the British. As William Wyndham Grenville, the drafter of the 1791 Act, noted soon after his appointment as Home Secretary (with responsibility for the colonies) in 1789,

> [a] Government cannot be supposed to exist in any country for any considerable length of time which is defective in so essential a power as that of assessing, levying & applying the contributions of individuals in order to execute those objects which are of general necessity, or advantage to the Community.[25]

In 1778, Parliament had ‘abandoned forever’ its power to tax its colonies to raise revenue, while committing to use any levies imposed to regulate commerce in the colony in which they were raised.[26] And under a longstanding constitutional rule, no colonist could be taxed except by a local assembly. Thus, Britain had been subsidizing the government of Quebec to the tune of between 150,000 and 300,000 pounds annually in the 1780s, exclusive of the pay of the troops stationed in the province, a sum it could ill afford in light of its enormous post-war debts.[27] However, the decision to grant an assembly to both provinces did not have to be implemented by statute, as noted earlier.

There is little direct evidence bearing on the decision to embody both constitutions in a statute. Certainly, Parliament was asserting more authority over colonial affairs in the 1780s after the American debacle, as Pitt's India Act of 1784 demonstrated. Yet, casting a colony's constitution in statutory form was still far from the norm, as the New Brunswick and Cape Breton examples illustrated. In part, resort to a statute in the case of the Canadas was a result of its higher profile in London in the wake of the American Revolution. As Vincent Harlow observed, their 'importance was immensely enhanced in British estimation as the intended substitute for the United States in the imperial economy.'[28] Grenville seems to have assumed from the outset that the Canadas would receive a statutory constitution. When sending the first draft of the Act to governor general Dorchester for comment, he observed apropos of the taxation question that '[s]uch Authority can be conferred only by Parliament.'[29]

If Grenville was giving a legal opinion it was clearly wrong, as the example of New Brunswick indicated, where the assembly—elected in 1785 pursuant to the royal instructions granted to Governor Thomas Carleton—had the power to impose taxes. Grenville probably meant something like, 'under present circumstances it is not desirable to confer such authority otherwise than by parliamentary sanction.' In discussing the future of Quebec with Lord Dorchester, Grenville provides proof of Linda Colley's point that the British did not see the American constitution as radically different from their own.[30] Although she does not put it this way, the main difference in British eyes was as much one of form as of substance. In his letter to Dorchester, Grenville conceded that the separation of such vast dominions from the mother country was probably inevitable. The best that could be done was to attempt to retain their loyalty by means of a 'free' constitution. As Grenville observed later in the same letter, '[t]he neighbourhood of the American states & even of the remaining British colonies seems to make it impossible that the people of Canada should acquiesce … in the continuance of a system at all resembling that under which they are now governed.'[31] In other words, what a 'free' constitution entailed had now been upgraded by the Americans. While the Canadas would be based on constitutional monarchy and parliamentary government as then understood, they needed, indeed deserved, some type of assurance of their basic contract with the mother country. Only a statute could provide that assurance in a clear and unambiguous way. It would not be generated and adopted by 'the people,' as the new American constitutions were, but it would be based on a

similar idea, that a constitution needed to be a foundational document that spelled out the terms of the compact between governors and governed.

Unlike the New Brunswick constitution, which evolved in some haste in the wake of the 1783 Treaty of Paris and the Loyalist exodus from the new republic, the governance of Quebec and what if anything should be done about it was discussed at length in imperial circles in the years following the treaty, with plenty of input from various groups in Quebec itself. With the war in America ended, the French Revolution not yet begun and Ireland relatively quiet, the issue could be discussed in a less pressured political environment. Guy Carleton, newly ennobled as Lord Dorchester and reappointed governor of Quebec in 1786, favoured the existing system and opposed division of the province, as did the King, although Dorchester conceded that if division were to occur, the new western province might be granted an assembly.[32] Meanwhile, the radicals in Parliament, led by Charles Fox, favoured a more liberal constitution with an elected upper house, whether Quebec remained as one colony or was divided into two. Grenville's draft Act came up the middle, breaking with the existing tradition of conciliar government in Quebec but not going as far as the radicals wanted. During the debate in parliament, however, the radicals did succeed in scoring some important points, securing amendments to the Act that strengthened its popular component when compared to Grenville's plan, to the existing constitutions of Nova Scotia, New Brunswick and Prince Edward Island, and to those of some of the pre-revolutionary American colonies.

The Constitutional Act 1791 compared to other British American constitutions

Comparing the Canadas' constitution of 1791 to others in British America illustrates two related points: the advantage of having a range of voices in Parliament consider a colonial constitution, in contrast to having one provided by imperial bureaucrats; and the significant advances made to the popular component of the 1791 constitution when compared with the hip-pocket constitutions of the Maritimes, advances that have been obscured by the longstanding focus on the provisions for aristocracy and clergy reserves. These contrasts are evident in several areas, to be examined in turn: the degree of detail provided with regard to the assembly's existence and functioning; the frequency of elections; the delimitation of constituencies; the role of the speaker; the relationship of religion and language to political representation; and the extent

of the franchise.

The position of the assembly in the 1791 constitution is considerably more secure and better elaborated than in the hip-pocket constitutions of the Maritimes. There are some twenty articles out of the fifty in the Act that deal with elections and the powers of the assembly, compared to essentially a single article in Thomas Carleton's New Brunswick instructions of 1784 directing him to call one 'as soon as the situation and circumstances of our said Province will admit.'[33] All other articles in his instructions dealing with the assembly impose limitations on its power. The provisions in the Act of 1791, by contrast, are structural and enabling, setting out in great detail how and when elections are to be carried out but also giving to the assembly itself the power to create additional constituencies in future.

Prior to the revolution, the imperial government kept the colonies on a very tight leash with regard to these matters. In September 1767 a general instruction was issued to all colonial governors forbidding their assent to any law 'by which the number of the assembly shall be enlarged or diminished, the duration of it ascertained, [or] the qualification of the electors or the elected fixed or altered.'[34] Virginia's attempts to pass a septennial act were vetoed twice, in 1762 and 1769.[35] The calling of elections and the duration of assemblies was thus a matter within the governor or lieutenant-governor's discretion. In New Brunswick, it was a decade after the assembly's creation before legislation regulating elections was finally approved in London, including a provision for septennial elections.[36] Nova Scotia's notorious 'Long Parliament' lasted nearly fifteen years without an election (1770 to 1784), and as late as 1790 lieutenant-governor Parr of Nova Scotia declined to assent to a septennial act put forward by the assembly. He declared that such a measure was contrary to his instructions, presumably referring to the 1767 order, though his successor did assent to such an act in 1792. In Prince Edward Island, however, it was 1806, over thirty years after the first election in 1773, before an act dealing with the franchise and setting a seven-year limit on parliamentary duration was successfully passed.

Grenville's draft act provided for elections every seven years, as had been the norm in Britain since 1716; this was already an advance over the pre-revolutionary situation in the royal colonies in that it provided at least some limit to the governor's discretion in this regard. A 1784

petition from Quebec had requested triennial parliaments, while the radicals in Parliament sought to reduce the seven years to four.[37] The government's acceptance of their amendment was thus a significant concession, forcing the governors of the Canadas to face the electorate with reasonable frequency. The Act was more explicit in this regard than its successor, the Act of Union 1840, which said simply that the governor-general should summon the legislature 'from time to time' and mandated no particular frequency, while the British North America Act 1867 would set the maximum duration of parliaments at five years.

The four-year limitation was a default provision, in that the governor could dissolve the assembly early if he felt dissatisfied with its conduct. Aside from two automatic dissolutions related to the demise of the Crown in 1820 and 1830, this occurred only once in Upper Canada's experience prior to the 1837 rebellion.[38] Lieutenant-governor Bond Head went to the people two years early in 1836, correctly predicting that he could secure a majority of members opposed to reform. Otherwise, elections followed the expected quadrennial rhythm from 1792 to 1834. The governors of Lower Canada, by contrast, resorted to premature dissolution four times during this period, meaning that Lower Canadians went to the polls on average every three years between 1792 and 1837. Meanwhile, as a result of two premature dissolutions and the inconveniently timed death of George III in 1820, less than two years after the election of 1818, Nova Scotians went to the polls on average every five years between 1793 and 1840, when a law providing for elections every four years was passed. In New Brunswick, elections were held on average every five years between 1785 and 1843, in spite of the septennial ceiling, though this average is somewhat misleading as it includes the 'premature' elections of 1820 and 1830 owing to the demise of the crown; in fact, five elections during this period occurred seven years apart and one six years after its predecessor, covering 70% of this period. While in practice the duration of parliaments across the provinces was not dissimilar, the septennial horizon in the Maritimes provided the executive with significantly more control over the timing of elections than existed in the Canadas.

Elections were required to be held more frequently than quadrennially in some of the new states of the republic, but this does not mean that a four-year horizon was somehow undemocratic as has been argued by some commentators.[39] Especially in Upper Canada, with a

small, scattered population and undeveloped transportation infrastructure in its early decades, there were good reasons for avoiding too-frequent elections. Elections every one or two years would have strained the resources of the colony and likely been resented rather than applauded by much of the population. When the British North American assemblies eventually took control of the duration of their legislatures, they generally adopted the quadrennial pattern originally contained in the 1791 Act, suggesting that there was little appetite for more frequent trips to the polls. Annual election of representatives, as in some states, reflected a distrust of government that was not widely shared in British North America.

On the issue of constituencies, the 1791 Act marked a significant change in the imperial stance. In 1754, for example, the Board of Trade had struck down thirteen North Carolina statutes creating electoral districts, and in 1765 it disallowed a Nova Scotia statute that had attempted to alter representation in the assembly.[40] Down to 1781, all new constituencies in Nova Scotia were created by the governor and council. After the revolution the Board seems to have altered its position, writing to the lieutenant governor of Nova Scotia that while

> The power of erecting Counties in all parts of His Majesty's Dominions is undoubtedly within His Royal Prerogative, nevertheless in Colonies like Nova Scotia where the Legislature is compleat, we are of opinion that this power ought not to be exercised in any other Mode than by general Act of the whole Legislature, subject to the pleasure of the Crown.[41]

The new policy did not deny that the royal prerogative still governed; it merely stated what would be acceptable within its limits. In New Brunswick and Prince Edward Island, the change in direction did not make much difference. The size of their legislatures had been determined by their governors at the outset to be twenty-six and eighteen members respectively, and these figures did not budge for many decades. Only in 1828 were two more members added in New Brunswick, and four more again by 1835.[42] In Prince Edward Island it was a similar story, with eighteen members in the first assembly of 1773, a quota that did not increase until 1839, when it jumped to twenty-four.[43] By the time of the rebellions the Upper Canadian assembly had sixty-two members and the Lower Canadian ninety, though of course their populations had grown much more quickly. In both provinces each member represented 7,200 persons, a relatively favourable ratio. Slow growth in New Brunswick and Prince Edward Island meant that their assemblies still maintained a more favourable ratio of population to members than the Canadas

in spite of the size of their assemblies remaining frozen. Importantly, however, the power to enlarge their assemblies was for decades a matter of grace rather than an undoubted right guaranteed by an imperial statute, as in the Canadas.

As for the size of the assemblies in the Canadas, in the initial draft of the 1791 Act Grenville proposed thirty members for Lower Canada. Again the radicals won a partial victory, proposing one hundred members for Lower Canada, while the prime minister agreed to fifty as a compromise.[44] Upper Canada would have only sixteen for the moment in light of its small population, but in both colonies the assembly could and did add members as the growth of population required; in this respect their practice was similar to that of New York and other state assemblies. While the 1791 Act allowed the governor to create the initial constituencies in each province, and to appoint the returning officers, these inaugural measures would be valid only for the first election, following which it was up to the assembly to create electoral districts and decide how to appoint returning officers.[45]

The initial setting up of constituencies could have been done in the Act of 1791 itself with the benefit of local advice, but it was not. Grenville decided to leave this to local action, with only general provisions in the Act. In Upper Canada this process was reasonably straightforward but in Lower Canada it was inevitably linked to the issue of ethnicity.[46] The British merchants lobbied for an over-representation of Montreal and Quebec, the main centres of the British population, as a safeguard for their minority position in the province, and Dorchester agreed with them. The plan he proposed to London, based on the draft bill's total of thirty seats for the province, would have given those two cities plus Trois-Rivières one-third of the seats (four each for Montreal and Quebec, plus two for Trois-Rivières), even though they made up less than one-quarter of the population of the province. When the number of seats was increased to fifty, this should have triggered some reallocation of seats to the urban areas if the thrust of Dorchester's plan was to be preserved.

No such change was forthcoming. Adam Lymburner, the representative of Quebec's British merchants in London, argued that the urban areas controlled the commercial interests of the province, and if they did not have adequate weight in the assembly, commerce would suffer

and so would Britain's own interests. Accordingly, Montreal and Quebec needed at least seven members each. Grenville's successor as Home Secretary, Henry Dundas, disagreed strongly with this view but provided no reasons, stating only that 'that arrangement His Majesty's servants entirely disapprove of, and would be sorry that such a distribution should on any account take place.'[47] When Dundas suggested to Dorchester leaving the urban representation as it was and allocating all the 'new' seats to the rural areas, Dorchester did not demur. The final version of the 1792 electoral map allocated only one-fifth of the total seats to the urban centres, roughly in line with their actual proportion of the provincial population. Even though deputies of British descent were over-represented in the first assembly elected in 1792, their numbers, fifteen out of fifty, left them in a minority vis-à-vis the Canadiens.

The imperial government thus made it clear that the principle of representation by population was to be respected in the assembly even though it meant leaving the British element in a minority position. This stance was arguably based on two fundamental errors of political judgment. The first was a patronizing calculus that the Canadiens would become acculturated to British ways when they came face to face with the superior British political and legal culture in the assembly, and thus did not really pose a threat. In one sense the prediction was too accurate: the Canadiens quickly learned the rules of the game, but deployed them in attempts to preserve and advance the interests of the strong French majority in the province, much to the dismay of the British.

The second error lay in Grenville's misjudgement about the French Revolution. Drafting his first version of the bill in the very summer that saw the Tennis Court Oath, the emergence of the National Assembly out of the Third Estate, the abolition of feudalism and the adoption of the Declaration of the Rights of Man, he believed that France would be preoccupied with its own domestic troubles for the foreseeable future and less active on the international stage.[48] This would leave Britain a free hand to pursue its own interests abroad, such that it could run the risk of empowering the Canadiens when their former mère-patrie was in such disarray. While not an unreasonable stance at the time, few predictions about global affairs have been so spectacularly wrong. Within a very few years the authorities in Lower Canada would be wondering why Parliament had handed the Canadiens a stick to beat their governors with, at a time when France

seemed to pose an existential threat to Britain and its empire.[49] Even though based on incorrect political calculations, the drawing of the electoral map of Lower Canada represented a strong commitment to the principle of representation by population, providing a powerful platform for the Canadiens' leaders to air their grievances, mobilize their followers and protect their interests even if they were seldom able to advance them in the years ahead given the intransigence of the British-dominated legislative council. Representation by population was widely departed from in the British Parliament itself, suggesting the clear influence of American-style views in this respect.

Two important silences in the Act were also crucial to its support of the popular element. The first, of interest to both provinces, was the role of the speaker of the assembly. The second, of interest principally to Lower Canada, was the role of language in legislation and the proceedings of the legislature. The Act stated that the governor or lieutenant-governor was to appoint the speaker of the legislative council, but was silent on how the speaker of the assembly was to be named. At Westminster MPs themselves elected the speaker, and in view of the silence of the Act this practice was followed.[50] This posed no particular problem in Upper Canada, but the election of the first speaker of the assembly in Lower Canada presaged many of the disputes of future years. The English put forward three candidates, the Canadiens only one, Jean-Antoine Panet, who was elected by a vote of 28 to 18. The British deputies quickly learned that the Canadiens would not defer to those who were supposedly more familiar with parliamentary procedures, but would use these procedures in their own cause. The bilingual Panet would be re-elected for almost all of the next twenty-two years, until just before his death in 1814.[51] On many occasions he was required to cast the deciding vote, demonstrating how critical it was that the assembly itself decide on the speaker. The re-election of his successor, Louis-Joseph Papineau, caused a major constitutional imbroglio in 1828 when the governor, Lord Dalhousie, refused to accept the assembly's choice given Papineau's role in the growing Patriote movement. When the members elected him a second time, Dalhousie abruptly prorogued the legislature. But it was the assembly that won out, not the Crown: Dalhousie was promoted to commander-in-chief in India, and his successor as governor, Sir James Kempt, accepted the assembly's choice of Papineau without demur.[52]

Such was not the case in the Maritimes, where the election of a speaker by the assembly was considered to be subject to the lieutenant-governor's veto. This aspect of the royal prerogative had been obsolete in England since 1679, when the House of Commons refused to accept the nominee of Charles II as speaker, but had sometimes been invoked by royal governors before the American Revolution. A dispute over who had the final say regarding the naming of the speaker convulsed Georgia for almost two years in 1771-72.[53] Events in Nova Scotia also demonstrated the difference between having a statutory constitution and a hip-pocket constitution. In 1806 the assembly elected William Cottnam Tonge as speaker, albeit by a single vote. Tonge was the leader of a group loosely identified as the 'country' interest which was opposed to many governmental measures. Lieutenant-governor John Wentworth declined to accept Tonge as speaker, but instead of provoking a constitutional crisis, as in Georgia, this action led the assembly to back down and submit another candidate more congenial to Wentworth.[54]

Language was the other issue on which the 1791 Act was silent. The British government had communicated with its new subjects in French since 1760. The Quebec Act's continuance of the Custom of Paris and the ancien droit, which existed only in French, was seen as an implicit confirmation that legal affairs and government would be carried on bilingually. Indeed, the British government at Quebec commissioned and published accounts of the pre-1760 French law in 1772-73, written in French, which had at least semi-official status.[55] The proceedings of the legislative council created under the Quebec Act took place in both languages. While this de facto bilingualism was not elevated to the status of a right in the Act of 1791, the absence of any declaration that English was to be the only official language led to an assumption that both English and French would be allowed in the new legislature.

The government fostered this assumption from the very beginning of the assembly's existence. Lieutenant-governor Alured Clarke invited the members first in English and then in French to elect a speaker as the first order of business and made available to them a bilingual summary of the rules by which the House of Commons governed itself. While some members fought for English to be the only official language, and others for French to have primacy, in the end both the assembly and the legislative council worked out a set of rules that amounted to a

pragmatic recognition of bilingualism.[56] The Act arguably followed previous practice in abstaining from making any declaration about official language(s), but its implicit endorsement of a functional bilingualism was critical for members of the assembly to be able to carry out their representational function in the Lower Canadian context. The Act of Union 1840 declared in s. 41 that all written proceedings of the legislature had to be 'in the English language only' but the imperial government was forced to repeal the section in 1848 given the widespread support for the semi-official bilingualism that had evolved under the 1791 Act.[57]

The franchise and the ability to hold office, elected or otherwise, raised issues of class, religion, race and gender. Grenville was most concerned about the class element; he wanted a five-pound franchise in the 1791 Act but again was put on the defensive by the radicals during the debate, who successfully argued that it should be forty shillings, as in Britain itself. Indeed, that was the requirement in New York state until 1821, when the new constitution of that year instituted universal white manhood suffrage, while retaining a property qualification for Blacks. In the 1790s, only three states, Kentucky, New Hampshire, and Vermont, offered white manhood suffrage without a property qualification.

While manhood suffrage was very extensive in the late 18th and early 19th centuries in British North America given the widespread nature of landholding, significant exceptions existed in the Maritimes relating to Catholics and Blacks.[58] In New Brunswick, Carleton's instructions required members of council, as well as the holders of any 'office, Place of Trust or Profit' to take the state oaths, and an act permitting Catholics to vote was not passed until 1810.[59] In Prince Edward Island such relief had to wait until 1830, while in neither province could Catholics sit in the assembly until 1830. Nova Scotia had extended the franchise to Catholics in 1789, but they were not allowed to sit in the assembly until 1823, when the house voted to allow the Catholic Laurence Kavanagh, elected for a Cape Breton constituency, to take his seat without taking the oath against transubstantiation; the privilege became a right when confirmed by legislation in 1826 and 1830.[60]

The 1791 Act, by contrast, contained a modern oath of loyalty to the monarch with no religious element, one that could be sworn in English or French. Only Quakers could not take it because it required swearing, a gap that, curiously, was addressed much earlier in New Brunswick (1786) and Nova Scotia (1789), than in the Canadas, though in all other contexts where oaths were required, the Canadas had permitted Quakers to affirm rather than swear.[61] What the Quebec Act had begun, the Act of 1791 completed: this was a decisive break with the traditional Protestant constitution, even in Upper Canada where the Protestant ethos was very strong.

Nor did the Act of 1791 contain exclusions from the franchise based on race or gender. The lack of voting records for the early years makes it impossible to know whether Blacks voted in fact, but by the 1820s there is clear evidence of their voting in Lower Canada.[62] In New Brunswick, Blacks were expressly excluded from voting in the first election held in 1785, in spite of the fact that all white males of the age of majority were allowed to vote regardless of property holdings because of delays in granting formal land titles. Nothing in Carleton's instructions stated that Blacks were not to have the franchise, but he directed all sheriffs that 'the votes of Blacks are not be admitted'; the practice continued for decades, until at least 1840 in Saint John.[63] Indigenous persons were excluded from the franchise not because of race but because they seldom held individual property that permitted them to meet the property qualification. Where they held such property, as did the Hurons at Lorette and the Mohawks at Kahnawake in Lower Canada, they voted.[64] As for gender, while the common law exclusion of women from the franchise was generally thought to obtain in Upper Canada after 1791, there were not insignificant numbers of women who voted in Lower Canada down to 1849, based on the silence of the Constitutional Act on the gender of voters.[65]

The 1791 constitution did not mention indigenous peoples, likely for two reasons. First, they were traditionally dealt with under the royal prerogative, as in the Royal Proclamation of 1763 and the complex of arrangements known as the Covenant Chain; and second, they were expected to continue to be self-governing for the foreseeable future, making the institutions created by the 1791 Act somewhat irrelevant to them. Colonial legislatures in fact took very little

legislative action with respect to indigenous peoples under the 1791 constitution, as they were seen to be principally an imperial responsibility.[66]

Conclusion

The 1791 constitution was not perfect, far from it, but it was part of the reconceptualization of governance evident in the Atlantic world, which involved a shift from ruling subjects to empowering citizens. These were not mutually exclusive categories, however, and 'subjects' could be empowered in constitutional monarchies in ways similar to citizens in republics, as examples in the Low Countries and Scandinavia would also show in subsequent years. John Graves Simcoe's well-known declaration that Upper Canada had received 'the very image and transcript of the British constitution' should not be taken at face value, as many historians have. At a very general level, the 1791 Act was definitely in the British tradition of parliamentary governance. But the Act of 1791 innovated on the British model in many ways, most notably by setting out in public, statutory form how the two colonies would be governed, rather than leaving these matters to customary practice and secret instructions in a governor's pocket. Specifically, the Act innovated by guaranteeing more frequent elections; dispensing with religiously oriented tests for the franchise and for most kinds of public service; providing an opening for the bilingual functioning of the Lower Canadian legislature and the administration of justice; and generally broadening and securing the role of the assembly, especially with regard to the creation of new constituencies and the selection of the speaker, even if it was not yet made equal partner with the upper house.

These conclusions sit uneasily with Alan Taylor's account of Upper Canada's political culture, which harks back to traditional American views of Canada's 'counter-revolutionary' nature, views effectively critiqued in Elizabeth Mancke's recent work. Taylor argues that British officials asked little of its Upper Canadian subjects, pacifying them with low taxes and cheap land, while 'they restricted electoral power and tightly controlled the press.'[67] The theme of a politically disengaged populace may have some validity in the first decade of the colony's existence, when its population was very small and preoccupied with the basic tasks of survival and establishing an economy. But Taylor's account conflates politics with electoral politics, and ignores the myriad interactions between the colonial state and the populace, from petitioning to

school provision to statute labour to militia service, that characterized colonial life in both Canadas.[68] These interactions ran in both directions, with the state demanding services of various kinds and having demands made on it for land, pensions, official positions and other benefits.

Taylor is not alone in overlooking the innovations in the 1791 constitution or the ways in which these played out in the Canadas. In part the Act has been under-examined, and assumed to be a 'failure,' because it was replaced with the Act of Union 1840 after the rebellions. This assumes, however, that constitutions are supposed to be permanent, or at least very long-lived. Recent scholarship has strongly challenged this view, arguing that the American constitution is an almost unique outlier among world constitutions, the 'average' duration of world national constitutions since 1787 being just under two decades.[69] It is not surprising that a constitution aimed at introducing representative institutions to some 150,000 French-speaking Catholic subjects in Lower Canada and providing for the governance of a lightly populated, poor and undeveloped Upper Canada would need replacing in two generations. That replacement, however, the Act of Union 1840, was based on unstable foundations arising from the rebellions.

In many respects the 1791 Act is the true forerunner of the constitution of 1867, while the Act of Union amounted to a deviation. The 1867 constitution either returned to or improved upon key provisions of the 1791 Act which had been departed from in 1840. The Act of Union united the two colonies in order to ensure the assimilation of French Canadians, which was to be facilitated by undoing representation by population and giving Canada West (former Upper Canada) the same number of seats as the larger Canada East (former Lower Canada), and by making English the official language of legislative instruments, among other measures. It also removed the guarantee of quadrennial elections, stating merely that the governor-general should summon the legislature 'from time to time.' The 1867 constitution undid the union, restored representation by population, and made legislative bilingualism a right in Quebec and at the federal level, while setting the maximum duration of parliaments at five years. It also created a less powerful upper house with life appointees (still in existence as the modern Canadian Senate, albeit with compulsory retirement at 75 for senators), after a hybrid (partly elected) upper house was experimented with during the Union period. After a generation under the 1840 constitution,

the Act of 1867 returned to the basic choices of the 1791 constitution, thus laying the constitutional foundation of modern Canada.

Notes

[1] Milobar, "Conservative Ideology," 45.

[2] Tousignant, "Constitution de 1791," 181.

[3] Spector, *The American Department*; Taylor, "Northern Reflections," 2.

[4] Harland-Jacobs, "Incorporating the King's New Subjects," 204.

[5] Craig, *Upper Canada*, 771; Harlow, *Second British Empire*, II, 771.

[6] Manning, *British Colonial Government*, 332-33.

[7] McNairn, *The Capacity to Judge*, 16.

[8] Ducharme, *The Idea of liberty*, 51-60.

[9] Jasanoff, *Liberty's Exiles*, 202-03.

[10] Elizabeth Mancke, "The Age of Constitutionalism and the New Political History."

[11] McNairn, "Tsunami of Histories," 408.

[12] Note the title of Heney, *Commentary*.

[13] The figures traditionally given are 60,000 to 70,000 but Calloway, *Scratch of a Pen*, 113, states that a census of 1762 gave a population of 79,000.

[14] Madden and Fieldhouse, *Select Documents*, III, 491-92.

[15] Muller, *Subjects and Sovereign*, chap. 4.

[16] Fyson, "The Conquered and the Conqueror."

[17] Morin, "Discovery and Assimilation." The Gazette was a privately run newspaper but it was also the "official vehicle for the publication of governmental documents such as ordinances, proclamations, imperial statutes, etc." (at 588). On petitioning, see Muller, *Subjects and Sovereign*.

[18] Tomlins, *Freedom Bound*, 156-190.

[19] Stewart, *Prince Edward Island*, 267-68.

[20] Greene, "William Knox's Explanation," 301-02.

[21] On Knox's career, see Bellot, *William Knox*. Knox lived in Georgia from 1756 to 1762, where he was provost marshal and much involved in the colony's governance. Hence, his views carried great weight with colonial administrators and politicians in London.

[22] Barrow, "Project for Imperial Reform," 118.

[23] Jasanoff, *Liberty's Exiles*, 201.

[24] Harlow, *Second British Empire*, II, 754.

[25] Grenville to Lord Dorchester, 20 Oct. 1789, in Shortt and Doughty, *Constitutional History of Canada*, 969, 974.

[26] 18 Geo III, c 12 (U.K.).

[27] Harlow, *Second British Empire*, II, 754-55.

[28] Ibid., 724.

[29] Grenville to Dorchester, 20 Oct. 1789, Shortt and Doughty, *Constitutional History of Canada*, 975.

[30] Colley, "Empire of Writing," 243**.**

[31] Grenville to Dorchester, 20 Oct. 1789, , Shortt and Doughty, *Constitutional History of Canada*, 987.

[32] Harlow, *Second British Empire*, II, 748-50.

[33] Carleton's instructions can be found at <http://archives.gnb.ca/exhibits/forthavoc/html/Royal-Instructions.aspx?culture=en-CA>.

[34] Labaree, *Royal Instructions to British*, 107.

[35] For Virginia, see Greene, *Quest for Power*, 384-85.

[36] The legislation was passed in 1791 but held up in London until 1795.

[37] Hare, *Aux origines*, 20 (re triennial parliaments); Harlow, *Second British Empire*, II, 768-71 on the debate in Parliament.

[38] By 1836 all provinces had passed legislation providing that the demise of the Crown did not dissolve the legislature, so that the death of William IV in June 1837 did not trigger elections.

[39] Taylor, "Northern Reflections," 15.

[40] Greene, *Quest for Power*, 181; Beck, *Government of Nova Scotia*, 55.

[41] Board of Trade to Andrew Snape Hamond, 22 Feb. 1782, cited in Beck, *Government of Nova Scotia*, 45.

[42] Numbers derived from the *Journal of the House of Assembly of New Brunswick*, relevant years.

[43] Numbers derived from the *Journal of the House of Assembly of Prince Edward Island*, relevant years.

[44] Grenville having been raised to the peerage in order to strengthen the government position in the Lords, Pitt was obliged to defend the legislation in the House of Commons.

[45] 31 Geo III, c 31, s 15 (UK).

[46] This and the next paragraph rely on Hare, *Aux origines*, 47-49.

[47] Dundas to Dorchester, 16 Sept. 1791, reproduced in Brymner, *Canadian Archives, 1890*, 38-39.

[48] Jupp, *Lord Grenville 1759-1834*, 90.

[49] Manning, *British Colonial Government*, 336-37.

[50] Milobar, "Conservative Ideology," 63 states that the Act empowered the lieutenant-governor to appoint the speaker of the assembly, but this is in error.

[51] Hare, *Aux origines*, 64-65; Wallot and Tousignant, "Panet, Jean-Antoine," *DCB* online.

[52] Heney, *Commentary*, 20.

[53] Greene, *Quest for Power*, 433-36.

[54] Tulloch, "Tonge, William Cottnam," *DCB* online.

[55] Girard, Phillips and Brown, *History of Law in Canada*, I, 327-29.

[56] Hare, *Aux origines*, 85-107.

[57] Girard, Phillips and Brown, *History of Law in Canada*, I, 518-19.

[58] Ibid., 190-92.

[59] SNB 1810, c 36; see generally Garner, "Enfranchisement of Catholics," 203.

[60] Beck, *Government of Nova Scotia*, 51-52. For more on Kavanagh, see Kehoe, "Catholic Relief in Nova Scotia," 8-15.

[61] Godfrey and Godfrey, *Search out the Land*, 154.

[62] Mackey, *Done with Slavery*, 218.

[63] Cited in Spray, *The Blacks in New Brunswick*, 34.

[64] Girard, Phillips and Brown, *History of Law in Canada*, I, 191-92.

[65] Picard, "Les femmes et le vote."

[66] See generally Girard, "Contrasting Fates."

[67] Taylor, "Northern Reflections," 3-4.

[68] Johnson, *In Duty Bound*.

[69] Elkins, Ginsburg and Melton, *Endurance of National Constitutions*.

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