

Doing Provincial Constitutions Differently:
Codifying Responsible Government in the Era of Executive Dominance

by

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Abstract

This paper examines the changing nature of provincial constitutions in Canada. Provinces are granted the right to have their own constitutions by Sections 58-90 of the *Constitution Act, 1867*, and various sections of the *Constitution Act, 1982*. The substance of provincial constitutions includes various Acts of provincial parliaments, long-standing constitutional conventions, unwritten rules and principles and common law. With respect to the practice of responsible government, the provinces have long relied on the traditionally “flexible” nature of their largely unwritten constitutions. Using the case studies of statutes dealing with the executive and legislative branches of government in the provinces of British Columbia, Quebec, and Newfoundland and Labrador, this paper analyzes recent changes in the statutes (and therefore constitutions) of the provinces. The analysis shows that there have been many changes in provincial constitutions on the subject of responsible government. The constitutions increasingly recognize the role of the Premier and cabinets, to the detriment of the traditional roles of Lieutenant Governors and the legislatures. This is in line with general trends in Canada’s provinces toward increased executive dominance. The practice of codifying changes in provincial constitutions is also more in line with how constitutional change happens in the states of comparable federations such as Australia and the United States.

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Introduction

Provincial constitutions form a very important part of the constitutional apparatus of Canadian federalism. Yet they remain surprisingly understudied by political science. The reasons for this are numerous. Since the 1970s and 1980s constitutional politics have revolved around three separate but somewhat interrelated concerns: the accommodation of Quebec as a distinct society or nation within Canadian federalism; the patriation of the Constitution; and the entrenchment of a Charter of Rights and Freedoms. Additionally, provincial constitutions, despite their integral role in provincial politics, are not often sites of political confrontation or controversy. As Nelson Wiseman notes, there is a lack of “constitutional consciousness” regarding provincial constitutions in Canada because they are “too opaque, oblique, and inchoate to rouse much interest, let alone passion.”¹ However, provincial constitutions are very important since they govern, among other things, the relationship between the executive and legislative branches of government in Canada’s provinces. As such, they regulate and affirm the practice of responsible government, a constitutional architecture that depends heavily on the assumed fusion of the executive and legislative branches and the responsibility of the former to the latter. In turn, this principle is guided and regulated as much by unwritten constitutional convention as it is by written constitutional law.

Canada’s provinces do not have constitutional documents that equate to the kind of constitutional or basic law that requires entrenchment through referenda, supermajorities, amending formulas or other mechanisms. Rather, those laws that may be considered to form part of what we recognize as provincial constitutions tend to be

¹ Nelson Wiseman, “Clarifying Provincial Constitutions,” National Journal of Constitutional Law 6 (1996), 270.

normal statutes or Acts of provincial legislatures (or parts thereof) which are amendable by a simple vote in the unicameral legislative assemblies of the provinces. These statutes and Acts, like conventions, orders-in-council, common law, and other parts of provincial constitutions, are numerous and difficult to summarize or list. When definitions of provincial constitutions were requested by Wiseman, the Alberta Attorney General's Office listed twenty-three Acts of the provincial legislature that could be considered part of that province's constitution, and British Columbia's Deputy Attorney General listed forty-five constitutional documents which included everything from provincial statutes to the *Statute of Westminster*.² Both cautioned however that the provided lists were neither comprehensive nor definitive given that they did not include the numerous unwritten parts of those province's constitutions such as conventions and principles.

Every province has statutes that deal with responsible government in some form or another. For instance, each province tends to have an Act that deals with the functioning of the provincial legislative assembly and the executive council, or both combined. Until recently however, each of these Acts, like the *Constitution Acts* of 1867 and 1982, read as though the provinces have powerful governors and *representative* rather than *responsible* government.³ These documents, of course, must be read with an understanding of how constitutional conventions inform the practice of these constitutions.

² F.L. Morton, "Provincial Constitutions in Canada," presentation to the Conference on "Federalism and Subnational Constitutions: Design and Reform," *Center for the Study of State Constitutions*, Rockefeller Center, Bellagio, Italy, March 22-26; and Wiseman, 289-290.

³ As described later in the paper, the key difference between these two styles of government is that under *representative government* the appointed Governor is the sole chief executive who chooses his own ministers, whereas under *responsible government* the Governor's powers are largely in the hands of an Executive Council (or cabinet) of ministers who are usually elected to the legislature, and which are responsible to the legislature rather than to the Governor; see R. MacGregor Dawson, *The Government of Canada* (Toronto: University of Toronto Press, 1970), 11-12.

For a variety of reasons however, responsible government and its tenets are increasingly codified in provincial constitutions. The statutes dealing with responsible government under consideration in this paper have over the past twenty years specified hitherto assumed roles in responsible government such as the position of Premier and various cabinet ministers. The process of formally amending provincial constitutions resembles a trend which, comparatively speaking, typifies constitutional development in American states where state constitutions are more frequently amended and very expansive in length and scope.⁴ In some cases, these Acts appear to place limits on seemingly powerful Lieutenant Governors, regulate the responsibility of the executive council (or, cabinet) to the assembly, or even enhance the powers of cabinet and Premier vis-à-vis both the assembly and the Lieutenant Governor.

The goal of this paper is to define how the provinces have been doing this, and why responsible government in the provinces is evolving in this way. This paper analyzes evidence of ten variables relating to responsible government, constitutional conventions and provisions relating to executive dominance in the provincial constitutions of three provinces: Newfoundland and Labrador, Quebec, and British Columbia. Formal written amendments and changes to the statutes relating to responsible government in those three provinces over the past twenty-five years suggest momentum towards a constitutionalization of responsible government and executive dominance in the provinces. The increasingly codified nature of provincial constitutions and the dominance of the Premier and cabinet in provincial governments (and its consequent effects on responsible government) is at least partially attributable to the nature of the Crown in provincial politics, Canada's unique system of executive federalism, the increased social,

⁴ G. Alan Tarr, Understanding State Constitutions (Princeton: Princeton University Press, 1998), 9-11.

cultural, political and constitutional assertiveness of the provinces, and new and changing demands for various reforms on provincial governments.

History of Responsible Government

Responsible government is a system of government that predates Confederation. Its roots are in the sporadic and gradual development of English constitutionalism. In Walter Bagehot's famous study of the English Constitution, he describes the evolution of the relationship between the three primary components of British parliamentary government: the monarchy, the House of Lords (representing the aristocracy), and the House of Commons (representing the people as a whole). He suggested that the interplay of these three components over time has resulted in a system of government in which the brunt of power rests with the House of Commons. An ancillary legislative role rested with the Lords, and the Monarch represented the "dignified" or ceremonial aspect of the English constitution. So weakened had become the Monarch and the Lords even by the time Bagehot published his thesis in 1867 that Britain had become what he called a "disguised republic."⁵ In all Westminster parliamentary democracies where responsible government is practiced, it is usually the end result of a transition from what is often termed *representative government*, a system of government whereby an elected legislature shares power with an active, rather than passive, monarch or governor.⁶

In Britain and its colonies, the usefulness of the monarchy was being relegated to its pageantry rather than the constitutional exercise of its executive powers. Instead, these powers could only be exercised by a cabinet: a group of ministers who acted on behalf of the Crown, tended to be members of the House of Commons, and were responsible to it

⁵ Walter Bagehot, *The English Constitution* (Ithaca: Cornell University Press, 1966), 15-16, 97, 262.

⁶ Alan Ward, "Exporting the British Constitution: Responsible Government in New Zealand, Canada, Australia, and Ireland," *Journal of Commonwealth & Comparative Politics* 25 (1987), 4.

by way of confidence votes and motions, or, the “confidence convention.”⁷ From this cabinet, a Prime Minister was also selected. This use of a cabinet of ministers and a prime minister in place of the direct interference of the Crown was termed the “efficient secret” of the English constitution. Aucoin, Smith, and Dinsdale stress that responsible government, while often confused with other similar or congruent political phenomena, means one thing and one thing only: “the government [must] have the support of the majority of elected MPs in the House of Commons.” Other constitutional conventions govern what happens when a government loses the confidence of parliament – a new government is formed from the existing parliament, or a new election is called.⁸

Britain’s colonies in what is now Canada adopted similar constitutional and political arrangements in the 18th and 19th centuries. In the colonies of British North America, the first colony to be granted constitutional status was Nova Scotia as a result of Royal Prerogative in 1749.⁹ Representative institutions were established there in 1758.¹⁰ Colonial constitutions and popularly elected assemblies soon materialized in the other British North American colonies of Prince Edward Island, New Brunswick, Lower and Upper Canada, and Newfoundland as a result of “Commission and Instructions” to colonial governors, Letters Patent, Orders-in-Council, or Acts of the British Parliament. This established the abovementioned system of *representative government*. More importantly, the establishment of responsible government soon followed. In Phillip Buckner’s analysis of the transition from representative to responsible government in pre-

⁷ Peter Aucoin, Jennifer Smith, and Geoff Dinsdale, Responsible Government: Clarifying Essentials, Dispelling Myths and Exploring Change (Ottawa: Canadian Centre for Management Development, 2004), 11.

⁸ Aucoin, Smith, Dinsdale, 10-11.

⁹ Wiseman, 275.

¹⁰ Janet Ajzenstat, The Canadian Founding: John Locke and Parliament (Montreal: McGill-Queen’s University Press, 2004), 114.

Confederation British North America, he suggests the inherent dysfunction of the “old representative system” lay in the fact that the only means for the locally elected assemblies to hold the imperial governors to account was to withhold revenue. This in turn caused a great deal of tension between the local assemblies and the London-appointed executives, and resulted in demands for self-government by supplanting executive powers to local executive councils and minimizing the functional role of both the monarch itself and its governors.¹¹

The British soon recognized the problems of representative government and sought to rectify those problems when the practice of responsible government in Canada was first described and recommended by Lord Durham in his *Report on the Affairs of British North America* in 1839. The purpose of his investigation and report was to establish the causes of the rebellions in Lower and Upper Canada in 1837 and 1838. He stressed that responsible government, unlike the American separation of powers, would better equip the colonies in dealing with the political deadlocks and economic problems they faced.¹² By this point, Britain had been using responsible government for some time,¹³ and by 1848 Nova Scotia, New Brunswick, and the Province of Canada established the concept in their respective colonial legislatures.¹⁴ As such, by the time the first four provinces of Canada joined to form the new dominion in 1867, they each

¹¹ Phillip Buckner, *The Transition to Responsible Government: British Policy in British North America, 1815-1850* (Westport, CT: Greenwood, 1985), 9.

¹² Aucoin, Smith and Dinsdale, 17-18.

¹³ A.H. Birch, *Representative and Responsible Government* (Toronto: University of Toronto Press, 1964), 237, as quoted in Aucoin, Smith, and Dinsdale, where they note “Durham also claimed the British had been practising responsible government since the Glorious Revolution of 1688... although the concept of responsible government had been evolving since 1780, most historians agree that it was not adopted in Britain until 1832 – certainly not before then,” 18.

¹⁴ Wiseman, 275.

already had a wealth of experience with not only self-government but the principles of responsible government.

The Quebec Conference of 1864 resulted in seventy-two principles agreed upon by delegates from the first four provinces, among which were allusions to the principles of responsible government and references to the establishment of Lieutenant Governors in the provinces. As such, Canada's founding fathers specifically adopted a responsible government model for the new federation which entrenched the legislative and executive role of the institution of the Crown in Canadian government. While some scholars suggest this had much to do with the prevailing sense of loyalty to the British monarchy at the time,¹⁵ others have suggested that the delegates to the Quebec Conference specifically sought to entrench the role for the Crown in the Canadian Constitution in order to provide a counterweight to the diffusive imperative of the federal principle.¹⁶ David Smith for instance takes note of what was at the time a quintessentially Canadian innovation by merging federalism "which is centrifugal and disperses power... [and] the monarchical principle, which is centripetal and concentrates power."¹⁷ Certainly, the use of the Crown (an ambiguous term which can refer directly to the monarchy or in Canadian parlance serves as a catch-all term for the apolitical nature of those parts of executive branch of government associated with the monarchy) according to Smith, served as an integral element of the legislative and executive functions of government. It once served the goal of creating a "common allegiance" among Canadians but presently

¹⁵ Ward, 9-10.

¹⁶ Aizenstat, 32; Ward, 10; and David Smith, The Invisible Crown: The First Principle of Canadian Government (Toronto: University of Toronto Press, 1995), 8.

¹⁷ David Smith, Invisible Crown, 8.

has been a vital causal factor in establishing executives at both levels of government (but especially the provinces) which are largely “unrestrained by institutional checks.”¹⁸

The *British North America Act* of 1867 and no constitutional document thereafter made any explicit references to the nature of responsible government at either the provincial or federal level – this was left to constitutional conventions. But it was important in establishing the rights of the provinces to have separate constitutions. The *British North America Act* (renamed the *Constitution Act, 1867* by the *Constitution Act, 1982*), contained the constitutions of Ontario and Quebec and to a lesser extent those of Nova Scotia and New Brunswick as part of the confederation settlement.¹⁹ However, the Act also allowed the “Amendment from Time to Time... of the Constitution of the Provinces, except as regards the office of the Lieutenant Governor.”²⁰ This conferred upon the provinces great latitude in adjusting and amending their own constitutions. In the *Constitution Act, 1982*, this was supplemented by various sections including section 45 which concerns the abilities of provinces to amend their own constitutions on any issue with the exception of the use of the English and French languages and the role of the Lieutenant Governor. Also, sections 38 and 41 to 43 concern the primacy of provincial legislatures in authorizing amendments to the Constitution of Canada.

The amorphous and confusing nature of Canada’s system of dual constitutionalism is evident. On the one hand, provinces are free to write their own constitutions and amend them accordingly so long as they do not interfere with or contravene relevant aspects of the Constitution of Canada, yet, provincial constitutions

¹⁸ David Smith, *Invisible Crown*, 11.

¹⁹ W.H. McConnell, *Commentary on the British North America Act* (Toronto: Macmillan, 1977), 119.

²⁰ Section 92(1) of the Constitution Act, 1867, as discussed in Donald Smiley, *The Federal Condition in Canada* (Toronto: McGraw-Hill Ryerson, 1987), 48.

emanate from and seem to include the federal constitution (or parts thereof). Several constitutional scholars including Nelson Wiseman and Margaret Banks have commented on the ambiguous nature of this constitutional conundrum.²¹ Campbell Sharman has listed six ways in which the Constitution of Canada encroaches on the provinces, including the rarely used reservation and disallowance powers, the establishment of the Lieutenant Governor such that provinces are incapable of abolishing that institution alone, and through empowering the Supreme Court of Canada to “affect the conduct of government” in the provinces through rulings based on the Charter of Rights and Freedoms, among others.²²

F.L. Morton points out that even if provinces had totally codified and entrenched constitutions, their ultimate judicial arbiter would be the Supreme Court of Canada. This has the effect of limiting provincial “self-government and democratic accountability” not only because the Supreme Court of Canada is a national rather than provincial institution but because its make-up, as well as the composition of provincial Courts of Appeal, are determined by the Prime Minister of Canada.²³ Nevertheless, provinces are free to create, change, or adjust their own “constitutions” but within numerous limits placed on it by the Constitution of Canada. Smiley notes that the courts have not had many occasions to delve into the nature of the Canada’s constitutional duality,²⁴ and certainly not its effects on responsible government as practiced at either level of government. This lack of

²¹ Wiseman, 283, and Margaret Banks, Understanding Canada’s Constitution (London, ON: M.A. Banks, 1991), 35.

²² Campbell Sharman, “The Strange Case of a Provincial Constitution: The British Columbia Constitution Act,” Canadian Journal of Political Science 17 (1984), 89-90.

²³ Morton, “Provincial Constitutions.”

²⁴ Smiley, 48.

attention to provincial constitutions by the courts as well as the disparate and multi-faceted sources from which they emanate has contributed to their obscure reputation.

But, in those instances where courts have ruled on the status of provincial constitutions, their rulings have tended to strengthen the freedom of the provinces to pursue their own types of responsible government (within the confines of the Sections 58 to 90 and 92(1) of the 1867 Act and Section 45 of the 1982 Act). For instance, in the pivotal 1892 case *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, the Judicial Committee of the Privy Council (JCPC), then Canada's highest court of appeal, ruled in favour of the provinces and the federalized nature of the Crown.²⁵ Alfred Thomas Neitsch describes the case:

“...After the Maritime Bank went bankrupt, the New Brunswick government, eager to regain its funds, argued that the Lieutenant Governor was the representative of the monarch and possessed all of the prerogative powers of the Crown. This meant that the government of New Brunswick could use Crown prerogative as a basis for claiming priority over other creditors seeking to recover funds from the liquidators of the Maritime bank. The court agreed with this argument.”²⁶

The appellants – the Liquidators for the Maritime Bank – had argued that the British North America Act, 1867 “[severed] all connection between the Crown and the provinces... [and made] the government of the Dominion the only government of Her Majesty in North America.” The JCPC's reason for the ruling was that the objective of the British North America Act was:

²⁵ Smith notes that “...the Crown had assumed a dual personality: it had, in Canadian fashion, been federalized”, in *Invisible Crown*, 9-10, and 13. In contrast, earlier Supreme Court of Canada decisions by John A. Macdonald appointed centralists such as Chief Justice John Wellington Gwynne who noted that Confederation created a “quasi-Imperial” dominion where provinces were “subordinate divisions”; see Paul Romney, “The Nature and Scope of Provincial Autonomy: Oliver Mowat, the Quebec Resolutions, and the Construction of the British North America Act,” *Canadian Journal of Political Science* 25 (1992), 17.

²⁶ Alfred Thomas Neitsch, “Tradition of Vigilance: The Role of Lieutenant Governor in Alberta,” *Canadian Parliamentary Review* 20 (2007), 19.

“...neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy.”

Further, within the limits of the distribution of federal and provincial powers in the Constitution’s Sections 91 and 92 respectively, the court ruled that provincial legislatures have “the same authority as the Imperial Parliament, or the Parliament of Dominion,” and that the Crown’s prerogative powers was “indivisible throughout the Empire.”²⁷

The *Liquidators* case was the first of many important cases heard by the JCPC which, between the late 1800s and early 1900s, came down in favour of the provinces on questions of federalism.²⁸ The case was important because it effectively invalidated the original centralist intent of many of Canada’s founding fathers including John A. McDonald, that Lieutenant Governors were surrogates of the Governor General (and perhaps the federal government). The lasting effect of the ruling was that Canada’s constitutional duality resulted in what some observers have called a system of “compound monarchies” where the Crown can at once represent two tiers of equally sovereign levels of government within the one country.²⁹ As stated, the combination of the divergent forces of parliamentary supremacy and federalism has strengthened the autonomy of provincial constitutionalism and has also resulted in an evolution towards executive dominance given that prerogative powers were strengthened at the provincial level.

²⁷ D.P. O’Connell, “The Crown in the British Commonwealth,” International and Comparative Law Quarterly 6 (1957), 106.

²⁸ Smith, Invisible Crown, 10, 13.

²⁹ Smith, Invisible Crown, 11, 156-173.

Yet, in the 1919 *Reference re the Initiative and Referendum Act* the JCPC ruled that Manitoba legislation designed to introduce direct policy-making powers to electors was *ultra vires* because it circumvented the powers of the Lieutenant Governor.³⁰ The Act, according to Arthur Berriedale Keith, gave electors not less than 8 per cent of the votes recorded in the previous general election,

“...the power of initiating legislation, even dealing with supply... the Legislature was given the opportunity of passing the proposed Bill at the session during which it was submitted, but, if it failed to do so, the Bill fell to be submitted to a referendum held contemporaneously with the next general election, or, if desired by the petitioners, to a special referendum. If passed by a majority of voters at the referendum, it was to take effect without any intervention of the Legislature, ‘subject, however, to the same powers of veto and disallowance as are provided in the *British North America Act* or as exist in law with respect to any act of the Legislative Assembly, as though such law were an Act of the said Assembly.’ Similarly, electors, numbering not less the 5 per cent of the votes cast at the last election, might petition for the repeal of any measure, when the same procedure would apply, with the difference that, if a referendum were held and a majority of voters favoured repeal, the Act would automatically be repealed.”³¹

According to Keith, the JCPC avoided ruling on the question of whether or not it was within the powers of provincial legislatures to set up alternative or parallel deliberative or legislative bodies or mechanisms such as the use of referenda in place of the provincial legislatures themselves. They did however rule that sections of the *Initiative and Referendum Act* forcing legislation to become law through non-parliamentary means had the effect of usurping the Lieutenant Governor and hence were unconstitutional. This entrenched the role of the Lieutenant Governor as a key component within the already well established tradition of parliamentary supremacy in the provinces. It also confirmed the limits placed on the ability of the provinces to amend their own constitutions as outlined in the *Constitution Act, 1867*. To that end, the ruling also solidified the

³⁰ Wiseman, 284.

³¹ Arthur Berriedale Keith, “The Initiative and Referendum in Canada,” *Journal of Comparative Legislation and International Law* 2 (1920), 113-114.

somewhat subordinate status of the flexible and largely undefined provincial constitutions to that of the Constitution of Canada.

The result of this ruling within the context of the *Liquidators* case was that although both the provincial and federal levels of government had independent spheres regarding responsible government and prerogative powers, neither level of government (in this case, the provinces) could abrogate or threaten the institution of the Crown and its integral role in the executive and legislative branches of government. The consequences became clear. Provinces would be free to pursue the amendment of their own constitutions as outlined in the *Constitution Act, 1867*, and as such were free to practice their own variation of responsible government. However, there are indeed limits to this as the institution of the Crown in the provinces (the Lieutenant Governor) may not be usurped or evaded. This was later codified in Section 41 of the *Constitution Act, 1982* which requires that any changes to or abolition of the offices of the Governor General or the Lieutenant Governor be agreed upon by “the Senate and House of Commons and of the legislative assembly of each province.”

The roles of constitutional conventions are integral to any discussion of responsible government as practiced in Canada’s provinces. Very few of the ways in which Canada’s executive and legislative branches of government evolved were formalized in a written constitution. Those aspects of the Canadian constitution dealing with responsible government and the responsibility and accountability of the executive to the legislative branch of government are a matter of constitutional convention, principle and custom. Marian Bryant defines conventions as “unwritten rules established by the institutions of government themselves and for which there are no legal sanctions for

breach.”³² While constitutional conventions are central to the functioning of responsible government, they are in the realm of political institutions rather than courts. As such, even though they are not justiciable, their breach is nevertheless unconstitutional.³³ In Alan Ward’s thorough examination of the practice of responsible government in Britain’s former dominions, he finds that with few exceptions, only the former Irish Free State took the step of comprehensively writing the practice of responsible government into their Constitution. As tenets of Canada’s constitutional fabric, conventions, principles and customs heavily inform the nature of responsible government at both levels of government. Their evolution since 1867 is as complex and relevant for provincial constitutions as the Constitution of Canada. Indeed, in Canada’s system of compound monarchies, constitutional conventions enlighten not only the practice of parliamentary and responsible government but federalism as well.³⁴

Aucoin, Smith and Dinsdale describe four important constitutional conventions which have evolved around responsible government in the Canadian context. First, the Crown appoints the political leader that is capable of commanding the confidence of a majority of Members of Parliament (MPs) in the House of Commons. Second, those powers formally attributed to the Governor General (and also the Lieutenant Governor) in the Canadian Constitution are in practice exercised only on the advice of the Prime Minister (or Premier) or the cabinet as a whole. Third, the cabinet and its individual

³² Marian Bryant, “Constitutional Law (Title 32)” in Canadian Encyclopedic Digest: A Complete Statement of the Federal Laws of Canada and the Provincial Laws of Alberta, BC, Man, and Saskatchewan as Derived from the Cases and Statutes (Toronto: Thomson Carswell, 2007), 146.

³³ A. V. Dicey, Introduction to the Study of the Law of the Constitution (London: Macmillan, 1959), 422, 439-440.

³⁴ The Supreme Court of Canada recognized this in *Reference re Amendment of the Constitution of Canada* (1981) by noting that “A federal constitution provides... a fertile ground for the growth of constitutional conventions between those legislatures and governments,” as cited in Geoffrey Marshall, Constitutional Conventions: The Rules and Forms of Political Accountability (Oxford: Clarendon, 1984), 227.

ministers are “continually responsible to the House of Commons.” Finally, a government that loses the aforementioned “confidence convention” through a parliamentary vote resigns in order for a new government to be summoned by the Governor General or a new election is called.³⁵

All of these conventions are shared by both the federal government and the provinces. The federal cabinet must be accountable to Canada’s lower house, the House of Commons, rather than the Senate or both houses at once. As all Canadian provinces have only unicameral legislatures, governments there are beholden only to one legislature. The trend towards unicameralism in the provinces (which itself is testament to the power of the provinces to adjust their own constitutions³⁶) further reduced any remaining “institutional checks” on executive power. As Smith suggests, Australia shared the Canadian traditions of federalism and responsible government but unlike Canada also had rigid state constitutions and bicameralism at the state level.³⁷ The only things regulating the nature of the provincial executives in Canada were the *Constitution Acts* of 1867 and 1982, provincial statutes, and constitutional convention. Constitutional conventions, in tandem with common law, jurisprudence from the *Liquidators* case and the *Initiative and Referendum* reference, have contributed to executive dominance. In a system with largely unwritten constitutions, where Premiers and cabinets are beholden only to a largely weak Lieutenant Governor (whose prerogative powers the Premier possesses and exercises), Canadian provinces have become exceptionally powerful in their own right.

³⁵ Aucoin, Smith and Dinsdale, 21.

³⁶ Ronald Cheffins and Patricia Johnson, The Revised Canadian Constitution: Politics as Law (Toronto: McGraw-Hill, 1986), 95.

³⁷ Smith, Invisible Crown, 11.

A Comparative Approach to Provincial Constitutions

There are a variety of similarities between the Canadian Constitution and provincial constitutions with respect to responsible government. For instance, neither level of government has gone so far as to entrench the numerous principles of responsible government. Such a task would be, of course, monumental but not impossible. As noted by Alan Ward, the Irish Free State attempted the constitutionalization of the principle of responsible government and its various tenets. Both Canadian federal and provincial governments have opted to avoid doing this, as have a number of ex-British colonies including Australia.³⁸ In Australia, state constitutions are codified or “rigid,” and some even include a variety of sections and amendments specific to the nature of responsible government. Western Australia for example had constitutional provisions dealing with the size of cabinets and provisions that seemed to require that cabinet ministers sit in the state legislature.³⁹ Likewise the national Constitutions of Australia and New Zealand require Ministers to sit in parliament or if they do not, to win a by-election within a prescribed period of time.⁴⁰ With the possible exception of the British Columbia *Constitution Act* which once made explicit references to responsible government, the Canadian Constitution and the various provincial constitutions have not been near as explicit in outlining the responsibility of the various Canadian executives to the respective legislatures, or in limiting the roles of the Governor General and Lieutenant Governors by defining the conventions that regulate their duties.

³⁸ Ward, 8, 20-21.

³⁹ Campbell Sharman, “The Constitution of Western Australia, 1890 and 1990,” in The House on the Hill: A History of the Parliament of Western Australia, 1832-1990 Ed. David Black (Perth: Parliament of Western Australia, 1991), 291.

⁴⁰ Heard, 49.

Yet, a variety of differences exist between provincial statutes and federal statutes and the Constitution of Canada with respect to the codification of responsible government. The provinces, having each written their own statutes on the legislative and executive branches of government, are an interesting smorgasbord of constitutional innovation. Appendix A gives a list of provincial statutes which contain provisions that regulate the structure and functioning of the executive and the legislative branches of government. While many of the Acts of provincial legislatures mirror the *Constitution Acts* of 1867 and 1982 in describing a system of government that looks far more like the colonial system of “representative government” rather than responsible government, for a number of reasons the provinces have sought to enunciate and further define the roles and functions of the Premier and Cabinet. Provincial constitutions are also unlike their counterpart at the national level in that they are not entrenched. Given that the statutes that comprise provincial constitutions are alterable by a simple majority vote in provincial assemblies, any majority government with a modicum of party discipline that wishes to make changes can easily make the changes it wishes.

Three provinces were chosen as case studies for the following comparative analysis. British Columbia was chosen specifically in order to follow up on Sharman's pivotal 1984 article which analyzed that province's unique *Constitution Act*. The remaining provinces appear to fall into two broad categories. The first category includes Alberta and Quebec, where citizens and politicians have recently speculated about the option of creating comprehensive, rigid and possibly even entrenched constitutions for

those provinces.⁴¹ Given the heightened awareness of provincial constitutions and the general desire for their reform in those two provinces, Quebec's existing constitution was chosen in order to discern whether or not the unique popular consciousness of constitutional issues in that province effected codification of norms and conventions there. In the remaining seven provinces, each have a constitution where responsible government is loosely dealt with in an Act respecting the legislature and a separate Act respecting the cabinet or "Executive Council" (not to mention Elections Acts).⁴² Newfoundland and Labrador is an example of a province where separate Acts concerning the legislative and executive branches of government exist and the content of those statutes is broadly representative of the remaining seven provinces. This third category of provinces is important. A hypothesis is that provinces such as Alberta and Quebec and perhaps even British Columbia – arguably having a greater interest in matters pertaining to provincial constitutions – will have more codification of the conventions of responsible government. Provinces such as Newfoundland and Labrador where there is less of a "constitutional consciousness" are predicted to exhibit less codification, or to the extent that amendments and constitutional reforms have taken place they are more likely to happen by stealth rather than by deliberate or active attempts at constitutional change.⁴³

Appendices B, C and D, concerning Newfoundland and Labrador, Quebec and British Columbia respectively, list sections of the relevant statutes of those provinces and

⁴¹ See Morton, "Provincial Constitutions"; Josee Legault, "Quebec needs its own constitution." Montreal Gazette April 8, 2000, B.7; and James McHugh, "The Quebec Constitution," Quebec Studies 28 (1999), 3-26.

⁴² Saskatchewan, like Alberta, combines both Executive Council and Legislative Assembly related matters into one statute, but also has another Act titled the *Government Organization Act*. Nevertheless, the Government Organization Acts of Saskatchewan and Alberta noted in *Appendix A* cover subjects that are generally found in the legislative and executive Acts of the other provinces.

⁴³ In other words, changes to provincial constitutions in these provinces are assumed to be due more often to parliamentary, electoral, ethical or other reforms to the relevant statutes rather than intentional attempts to revise or change the "constitution" of the province.

the presence (or lack thereof) of ten variables. These include constitutional conventions, tenets of responsible government, the duties of the Lieutenant Governor, possible amendments establishing executive dominance in the three provinces, and other pertinent references. The variables included are: the presence of the words "Premier", "Cabinet", and "Ministers"; rules regarding the appointment of cabinet ministers (such as who decides which cabinet minister gets appointed - the Lieutenant Governor or the Premier?); who appoints the Premier and how is their appointment decided?; the convention that cabinet ministers and the Premier must first be elected to sit in the legislature; limits on cabinet size; constitutional recognition of political parties and party allegiance of cabinet and cabinet committees; the judicial and bureaucratic appointment powers of the Cabinet, the Premier, and/or the Lieutenant Governor; the convention that the Lieutenant Governor must act on the advice of the Premier or Cabinet as a whole, and the rules regarding when they are allowed to withhold assent to bills or suspend a sitting government or dissolve the legislature; any references to the requirement that a government have the confidence of the legislature; the delegation of negotiation powers to the Premier and specific cabinet ministers; and other variables that are pertinent to the discussion of responsible government but are otherwise unique given their general absence from both the federal and provincial constitutions. The presence of these variables in the constitutions of the three provinces can be found in Table 1 which summarizes the results found in Appendices B, C, and D:

Table 1: The Presence of Variables in Provincial Constitutions

Variable	Provincial Constitutions		
	Newfoundland and Labrador	Quebec	British Columbia
(1) The words “Premier”, “Cabinet”, and “Minister.”	●	●	●
(2) Appointment of cabinet ministers	●	●	●
(3) Appointment of Premier	○	●	●
(4) Cabinet Minister or Premier must be in legislature	○	◐	○
(5) Limits on Cabinet size	○	○	○
(6) Recognition of parties	●	●	●
(7) Appt. powers of cabinet, premier, or Lieutenant Governor	●	○	●
(8) Lieutenant Governor must/can act on advice of Premier or cabinet	●	●	●
(9) Anything about confidence convention	○	◐	○
(10) Delegating of negotiation powers to Premier or cabinet	●	●	●



No presence of variable



Partial presence of variable or variable is alluded to



Direct reference to variable

Findings

The first variable is the presence of the terms "Premier", "Cabinet" and "Ministers". So uncodified are the principles of responsible government in the constitutions of various ex-British colonies that even these basic terms appear very rarely. According to Andrew Heard, "No Constitutional document or statute creates the Cabinet, determines who should sit in it, or details its powers."⁴⁴ Heard's 1991 monograph could not have foreseen what was to come, though even by then Newfoundland and Labrador, British Columbia and Quebec had each made amendments to their legislation which at least generously referenced these institutions. The cabinet, its members, and the role of the Premier, are all institutions of federal and provincial government that have loose connection with the written word of the Constitution. By convention, the Governor General or Lieutenant Governor must first appoint a Prime Minister or Premier, usually leader of the largest party in the legislature, who in turn recommends members of his or her cabinet. Also by convention, the Governor General or Lieutenant Governor accepts the advice of the Premier.⁴⁵ Nevertheless, a remarkable amount of responsible government is at least implied in provincial constitutions, and much of this is due to the sporadic citing of these otherwise convention-based features of provincial government.

The only parts of the Canadian Constitution that allude to the Prime Minister, the cabinet and its ministers, are in Sections 11 and 12 of the *Constitution Act, 1867* which assert that the Governor General of Canada shall exercise his or her powers either on the advice of the Queen's Privy Council or alone. By convention, the only members of the Privy Council from whom the Governor General can accept advice are current

⁴⁴ Heard, 48.

⁴⁵ Heard, 16-47.

ministers.⁴⁶ Sections 58 through 90 relate to provincial constitutions and the powers of the Lieutenant Governor. No section suggests anything pertaining to responsible government, but Sections 63, 83 and 134 are notable for allocating particular positions to the Executive Councils of Ontario and Quebec such as Attorney General, Treasurer, several Commissioners, and others. There is no stipulation that these positions be filled by Executive Council members who also hold seats in provincial legislatures. Nor is the position of a Premier or any first minister outlined in the 1867 Act.

In Newfoundland and Labrador's *Executive Council Act* and *House of Assembly Act*, the British Columbia *Constitution Act*, and Quebec's *National Assembly Act* and *Executive Power Act*, the word Premier (or in Quebec, Prime Minister) and references to other ministers more generally, appear frequently. The term "cabinet" appears less frequently, as the term Executive Council is used. The term "cabinet" appears, as in the *Executive Council Act* and the British Columbia *Constitution Act*, in the headings of various subsections dealing with issues that are not entirely relevant to any discussion of responsible government such as the title to Section 26.1 in the British Columbia *Constitution Act* which deals with the "Use of vehicles by Cabinet members." The presence of the terms is nevertheless notable given that Premiers and provincial cabinets, as with comparable institutions in the federal government, are understood to be matters of convention and as such are normally 'read into' provincial constitutions. Additionally, Section 9 of the British Columbia *Constitution Act* and Section 6 of the *Executive Power Act* define the Premier as "President of the Executive Council."

Additionally, references to Premiers and ministers are quite frequent in other statutes. Typically however these references are in the context of Elections Acts or

⁴⁶ Banks, 27.

legislation dealing with ethics and conflict of interest rules regarding legislators and members of the cabinet. Nevertheless, specific references to Ministers and the Premier are important. They can have the effect of limiting, specifying, or expanding the various powers of these parts of provincial governments.

The second and third variables concern the appointment of cabinet ministers and the Premier.

When responsible government first started to develop in the pre-Confederation dominions of British North America, Governors typically had more powers than Governors General did later. Further, the powers of the Governor General have also changed dramatically since 1867. For instance, one of the original conventions regarding the Governor General was that he was expected to nominate Senators where the Senate obstructed a government that had the confidence of the House of Commons.⁴⁷ This convention has fallen into disuse with the passage of time. Over time, various conventions have developed which changed the role of the Governor and later the Governor General and reduced the scope of their executive powers and their capacity to act independent of the advice of their first ministers. A longstanding convention is that First Ministers are usually but not always head of the largest party in the legislature. Finally, the Head of Government (Prime Minister or Premier) has the chief role in selecting cabinet ministers.

The requirement that ministers had to sit in the legislature, usually in the assemblies rather than Legislative Councils (upper houses which existed in many Canadian provinces until the last was abolished in Quebec in 1968) developed in tandem with the convention that the Premier was free to choose the make up of the cabinet. The

⁴⁷ Ward, 11.

statutes being considered treat this issue very loosely. The British Columbia *Constitution Act* is notable for using the term "Lieutenant Governor in Council" (meaning Lieutenant Governor acting on the advice of the Executive Council) instead of just "Lieutenant Governor" (as in Section 3 of the *Executive Power Act*) in describing who officially appoints cabinet ministers. The effect, however, is the same. In all provinces, the Lieutenant Governor has no say in who gets appointed to cabinet and accepts the advice of the Premier.

The Newfoundland and Labrador and Quebec statutes are quite important with respect to the second and third variables. Sections 4 and 6 of the *Executive Power Act* specifically mandate the Lieutenant Governor with appointing a Premier, though the legislation is silent on the prerequisites for appointment, such as whether or not the Premier must be the leader of the largest political party in parliament. The *Executive Council Act* goes furthest in enshrining the convention of who appoints the Premier by noting, somewhat redundantly, that the Lieutenant Governor in Council acts "on the advice of the Premier" regarding Cabinet appointments in Section 5. Acting on the advice of the Premier is something that is read into the term Lieutenant Governor in Council;⁴⁸ it is apparent then that Section 5 of the *Executive Council Act* was written to make sure it was not unclear about who had the power in choosing cabinet ministers. Section 3 of that Act is the clearest attempt at formalizing this convention and its roots in the Premier's use of the Royal Prerogative powers of the Crown when it suggests that "Nothing in this Act affects a traditional prerogative of the Premier respecting the organization and composition of, appointments to and dismissals from, the Executive Council."

⁴⁸ For a brief discussion of this practice in a comparative context, see Sharman (1991), 291.

The fourth variable is the requirement that both cabinet ministers and the Premier sit in the legislature. This convention is one that has been recognized in court rulings. In the 1979 *Arseneau* Case, Justice Ritchie formally recognized the "generally accepted practice" in Canada of ministers being responsible to, and members of, legislatures. And in the 1981 case of *Attorney-General of Quebec v. Peter Blaikie et al.*, the court accepted that the Executive Council must comprise of persons who, because of "constitutional principles of a customary nature", must be or become members of the legislature.⁴⁹

Only the *Executive Power Act* and *National Assembly Act* provide much insight into provincial attempts to enshrine this particular convention. Section 11 of the *Executive Power Act* provides that the government may temporarily transfer powers and responsibilities between ministries and to new cabinet ministers so long as those ministers be or become Members of the National Assembly (MNAs). This is a rare example in the provinces of an attempt to ensure the cabinet is both responsible to and comes from the legislature in the relevant statutes. Notably however, the requirement that cabinet ministers sit in the National Assembly is only alluded to in Section 11, and not for example in Section 3 which simply suggests that the cabinet "shall consist of such persons as the Lieutenant-Governor may appoint." Therefore there is no written requirement in the *Executive Power Act* that Ministers sit in the National Assembly; this is only provided for in Section 11 and in the case of temporary replacements for sitting ministers. The implication however is that this rule is meant to apply generally to all cabinet ministers which is the case in practice.

The *National Assembly Act* also contains provisions dealing with this convention. Section 10 requires that members of cabinet committees sit as an elected member of the

⁴⁹ Heard, 51.

National Assembly, and Section 58, in contrast to Section 83 of the *Constitution Act, 1867*, suggests that membership in both the cabinet and the National Assembly are “not incompatible.” Section 83 of the 1867 Act enshrines the now dated custom of preventing members of provincial legislatures from also holding a public office “at the Nomination of the Lieutenant Governor” such as cabinet positions. The effect of this provision was to force cabinet ministers who sat as members of provincial legislatures to later seek re-election through a by-election, even shortly after a general election was held. This was custom up until roughly the 1920s when the practice was gradually phased out.⁵⁰

In terms of limits on cabinet size, Section 4 of the *Executive Power Act* lists twenty-one specific cabinet ministries and also “Ministers of State” and “Ministers delegate.” This would seem to require something of a static number of cabinet ministries and in turn cabinet ministers. But Section 9 allows the “Government” to shift responsibilities for certain portfolios between cabinet members. In August 2008, as noted in Table 2, Quebec had a cabinet of eighteen ministers.

⁵⁰ Eugene Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (Toronto: University of Oxford Press, 1968), 226-227.

Table 2: Sizes of Provincial Executive Councils (August 27th, 2008)

Province	Size of Cabinet	Government Caucus Size	Seats in Legislature	% of Caucus in Cabinet	% of Leg. In Cabinet
NL	17	44	48	39	35
NS	18	22	52	82	35
PEI	11	24	27	46	40
NB	20	32	55	63	36
QU	18	48	125	38	14
ON	28	71	107	39	26
MA	18	36	57	50	32
SK	18	38	58	47	31
AB	24	72	83	33	29
BC	24	46	79	52	30
Federal	32	127	308	25	10
Prov. Avg.				(49)	(31)
Total Avg.				(47)	(29)

Data compiled from the Executive Council and Parliamentary websites of the provinces and federal government.

There are no limits in the Newfoundland and Labrador and British Columbia statutes on the sizes of cabinet.⁵¹ This is not surprising, given the general lack of codification of responsible government in the provincial statutes and the comparative rarity of provisions limiting cabinet size. The non-existence of such provisions tells us quite a bit about provincial constitutions. Provincial legislatures are quite small in size, and the impact of a large executive council can have certain effects on how responsible government is practiced. Given the small size of provincial legislatures and the relatively large size of provincial cabinets, cabinets can come to dominate not only the governing caucus but the whole legislature. This reduces the capacity for dissent within party caucuses, especially the governing caucus. It also increases the likelihood that the governing parties will be exceptionally cohesive and obedient to the whims of the party

⁵¹ Until 1980, British Columbia's Constitution Act limited the size of cabinet; see Sharman (1984), 101-103.

leadership.⁵² In terms of responsible government, it can become – and indeed has become – progressively more difficult in the era of strict party discipline and large cabinets for provincial legislatures to hold provincial executives to account.⁵³ Excluding the assemblies of Canada’s northern territories, the smallest provincial assembly as shown in Table 2 is that of Prince Edward Island where, as of August 2008, the size of the legislature is 27. Christopher Dunn notes that the small size of provincial legislatures and the “growing size of provincial cabinets relative to the size of the legislative assemblies” have detrimental effects to the function of responsible government.⁵⁴

It is very telling that none of the provinces under consideration contain provisions in their statutes that effectively limit the size of cabinets vis-à-vis the rest of the legislature, and certainly not compared to the rest of the governing caucus. After all, parties and party caucuses within provincial legislatures are largely ignored in the statutes except in rare instances which will be discussed later. The effect of this has allowed the size of cabinets to balloon. Nova Scotia’s governing Progressive Conservative Party under Premier Rodney MacDonald is in the unusual circumstance of a minority government where the members of the executive council outnumber the government backbench 9:2. Nevertheless, even New Brunswick’s Liberal government of Premier Shawn Graham, which enjoys a comfortable majority, has a cabinet that makes up a little under two thirds of the whole governing caucus.

While the Atlantic Provinces are unique due to their small populations and small assemblies, cabinet size is quite large in the other provinces as well. British Columbia

⁵² Christopher Dunn, “Executive Dominance in Provincial Legislatures,” *Canadian Parliamentary Review* 13 (1990), 11.

⁵³ As Sharman notes, “...once the ratio of ministers to backbenchers in the governing party or coalition exceeds 50 per cent the institutional logic changes dramatically,” (1984), 102.

⁵⁴ Dunn, 11.

and Manitoba currently have executive councils that make up half or more of governing caucuses. Finally, Prince Edward Island has the unusual honour of having an Executive Council that comprises 11 of the 27 MLAs in the assembly, or, 40% of the provincial parliament. Quebec, which has the largest assembly among the provinces, has the smallest cabinet given that only 14% of MNAs are part of Liberal Jean Charest's minority government. That province also has the second lowest cabinet/backbecher ratio after Alberta which is unusual given that Quebec's government is in a minority position. Again, only the *Executive Power Act* alludes to cabinet size in Section 4 when it lists the many ministries for which cabinet ministers may be responsible, but Section 9 allows the cabinet to shift responsibilities for various ministries between and among ministers. Therefore, the twenty-one ministries listed in the Act are not a required static number of ministers but rather a list of possible ministries of which several may come under the responsibility of one minister. According to the Quebec provincial Executive Council's website as outlined in Table 2, there are only eighteen members of the cabinet, the same number shared by the much smaller provinces of Nova Scotia, Manitoba and Saskatchewan.

As noted, the existence of parties, party discipline, party caucuses within provincial legislatures, and the role of parties in cabinet government is not something that is stressed or even mentioned in either the Constitution of Canada or the main parts of provincial constitutions dealing with responsible government.⁵⁵ However, provincial and federal legislation does regulate political parties in other contexts. The Newfoundland

⁵⁵ John Courtney stresses that the conventional view that parties do not and should not be recognized in the Canadian Constitution does not reflect the reality of the multiple ways in which Canada's parliamentary and constitutional system recognizes the role of parties; see "Recognition of Canadian Political Parties in Parliament and Law," Canadian Journal of Political Science 11 (1978), 33-60.

and Labrador *House of Assembly Accountability, Integrity, and Administration Act* requires the make-up of the House of Assembly Management Commission to be distributed among the various political parties in the legislature. Section 18 of that Act specifically requires that representation on the Commission be made up of members of cabinet, backbenchers within the governing caucus, members of the main opposition party, and also members of a third opposition party. The legislation was clearly designed to accommodate Newfoundland and Labrador's party system and to reflect the realities of the competing forces in that province's House of Assembly. In addition, certain sections of the Act stress the integral role of party leaders such as Section 45 which allows the Auditor General to contact parliamentary party leaders in cases where Members of the House of Assembly are involved in the "improper retention of public money."

The recognition of political parties and party leaders as institutions in the constitutions of the provinces is significant. Party discipline has had the effect of transforming the tradition of "parliamentary supremacy" and responsible government into one of cabinet government and specifically cabinet dominance. In a 1923 debate in the House of Commons over a motion to reform the confidence convention, William Irvine, a Progressive Party MP at the time decried this transition as "autocratic". He suggested that the rise of political parties and party discipline forces "the government party [to be] left with the alternative of supporting the issue or saving the administration." His proposed remedy was to follow up all votes where the government loses confidence with a secondary confidence vote on whether or not the government should fall.⁵⁶ Clearly, the

⁵⁶ William Irvine, Mackenzie King, and Arthur Meighen, "Round Table: Party Discipline and the Confidence Convention in Historical Perspective," Canadian Parliamentary Review 16 (1993), 13-15.

effect of parties on the performance of responsible government is monumental, and the debates about these effects are almost as old as confederation itself.

The Newfoundland and Labrador *House of Assembly Accountability, Integrity, and Administration Act* is one example of where the bulk of references to the constituent units of responsible government (Premier, cabinet, specific ministers, parties, and others) can be found in Canadian statutes. A variety of accountability and ethics related laws have come to fruition in recent times at both levels of government. The goal of these laws is to establish greater cabinet responsibility and to hold governments accountable in cases of corrupt or unethical behaviour. The legislation, in general, has the effect of both codifying and placing limits on those institutions within Canada's system of parliamentary government that have long been unwritten conventions of Canadian constitutionalism.

While the purpose of legislation such as Newfoundland and Labrador's *Accountability, Integrity and Administration Act*, not to mention the recent federal *Accountability Act*, is to increase government responsiveness and accountability to the general public on a much broader scale, the effect is also to entrench previously assumed or unwritten institutions into the letter of the law, and to boost government responsibility to the public by way of the legislative branch. One of the features of such accountability legislation is to create, for instance, parliamentary or executive institutions which oversee government performance. These include positions such as an Ombudsman in some jurisdictions, ethics commissioners, and the Auditor General. This can play into the hands of opposition parties, and even backbenchers with governing caucuses, in holding cabinet government to account for its decisions. The reports of figures such as the Auditor

General provide “cannon fodder” for opposition members. But it also plays into the hands of cabinet committees where backbenchers may have an upper hand as committee chairs.⁵⁷ In fact, there is a rule in the Standing Orders of the House of Commons that the federal Standing Committee on Access to Information, Privacy and Ethics – and several other Standing Committees of Parliament – be chaired by opposition members. This has the potential to greatly increase the responsibility of the executive branch of government to the legislative branch. Trends in provincial constitutions demonstrate this.

The seventh variable under consideration is the general appointment powers of the crown. The appointment powers and the extensive use of patronage by Canadian governments in the past are rooted in the prerogative powers of the Crown.⁵⁸ This enormous power in the hands of provincial executives was, from an early stage, practiced by cabinets and Premiers, but never formally recognized in the Constitution of Canada or the provincial constitutions.⁵⁹ Donald Savoie notes that the appointment powers used by the federal government and sanctioned by royal prerogative are formally managed by the Prime Minister’s Office (PMO) and the Privy Council Office (PCO). Yet, most non-public service appointments (such as Senators, Supreme Court judges, ambassadors and

⁵⁷ On the other hand, while it is clear that bodies such as the Office of the Auditor General and others charged with the task of oversight have potentially “limiting” effects on the powers of cabinets, they may also limit the traditional oversight role of elected representatives in the legislative branches of provincial and federal parliaments. Sharon Sutherland has popularized the view that these independent offices can have deleterious effects on responsible government given that they often take power away from both branches, but especially the legislative branch, in “The Unaccountable Federal Accountability Act: Goodbye to Responsible Government?” *Revue Gouvernance* 3 (2006), 30-42, “The Politics of Audit: The Federal Office of Auditor General in Comparative Perspective,” *Canadian Public Administration* 29 (1986), 118-148, “Responsible Government and Ministerial Responsibility: Every Reform is its Own Problem,” *Canadian Journal of Political Science* 24 (1991), 91-120.

⁵⁸ David Smith, “Bagehot, the Crown and the Canadian Constitution,” *Canadian Journal of Political Science* 28 (1995), 622, 624-625.

⁵⁹ David Smith, “Empire, Crown and Canadian Federalism,” *Canadian Journal of Political Science* 24 (1991), 460.

deputy ministers) are handled by the Prime Minister.⁶⁰ The situation is mirrored at the provincial level where Premiers and cabinets have great authority over appointments to positions within crown corporations, of deputy ministers, and other key figures. This is not to mention the much larger machinery of government at the provincial level as a result of the interpretation of the division of powers in Sections 91 and 92 in the Constitution Act, 1867 which has largely benefited the provinces.⁶¹

The provincial constitutions of British Columbia, Newfoundland and Labrador, and Quebec all reveal a number of rules regarding the appointment powers of the provincial governments. The previously uncodified prerogative powers of appointment are gradually becoming formalized in legislation. Section 5 of British Columbia's *Constitution Act* stipulates that all appointments to public offices under the Great Seal of the Lieutenant Governor are done so on the advice of that province's executive council. Section 9 of the *Executive Council Act* grants the cabinet the right to select and appoint deputy ministers and assistant deputy ministers, and that province's *Accountability* legislation grants appointment powers to cabinet over parliamentary staff as well.

Quebec's *Elections Act* is unusual because it has a unique appointment procedure for that province's Chief Electoral Officer. As a result of a 1989 amendment to the Act, Section 526 requires that the Chief Electoral Officer be appointed by the Premier of that province and with the approval of two thirds of the National Assembly. It appears from this amendment that the majority needed for approval was set sufficiently high so as to both recognize the prerogative power of Quebec's Premier and to ensure unanimity or at

⁶⁰ Donald Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999), 263-264.

⁶¹ Alan Cairns, "The Judicial Committee and its Critics," *Canadian Journal of Political Science* 4 (1971), 301-345; and Romney, 4-5.

least a great deal of agreement among the various parliamentary parties in the National Assembly on the chosen nominee. This is to prevent blatantly partisan appointments to an office requiring a certain degree of independence and impartiality.

The eighth variable under consideration is the requirement that Lieutenant Governors act on the advice of either the Premier or the whole cabinet and the ninth variable covers any section or amendment dealing with the confidence convention. Together, these two variables form the essence of the principle of responsible government as practiced in Canada. Much of the debate over constitutional conventions deals with the eighth variable: when exactly are Her Majesty's surrogates allowed to refrain from acting on the advice of executive councils of the provinces or of the federal government? For example, there exists a constitutional convention that even though the Lieutenant Governor must not arbitrarily dismiss a government or withhold assent from legislation that has the support of a majority of legislators, he or she may dismiss a government if it behaves illegally or is corrupt. Edward McWhinney and Peter Hogg have suggested that Lieutenant Governors and Governors General should not remove a government for such reasons, while others such as R. MacGregor Dawson have argued that they would be well within their rights to dismiss governments which blatantly violate the Constitution of Canada or provincial constitutions.⁶²

Therefore, the eighth variable was included in order to determine whether or not provincial constitutions have made reference to when the Lieutenant Governors should and should not accept the advice of the Premier and cabinet and when they may grant and deny royal assent. Provincial constitutions provide a mixed bag. Each of the Acts under consideration use the terms "Lieutenant Governor" and "Lieutenant Governor in

⁶² Heard, 27.

Council” interchangeably, or, neither of the terms are used. The Quebec legislation also tends to use the term “Government” quite frequently, which has the same meaning as cabinet or “Lieutenant Governor in Council.” Further, Lieutenant Governors are expected to act on the advice of either the Premier alone, the executive council, or more unusually the entire legislature, as in Section 17 of the British Columbia *Constitution Act* which suggests that the Lieutenant Governor of that province acts on the advice of the Legislative Assembly (rather than on the advice of cabinet or the Premier) in describing the general role of the Lieutenant Governor in making laws in the province. The already noted Section 6 of the *Executive Council Act* uses the seemingly redundant phrase “Lieutenant-Governor in Council on the advice of the Premier” in describing the ability to appoint temporary or replacement ministers.

The effect of the congruence of these increasingly indistinguishable phrases is to negate any conceivable differences between the terms “Lieutenant Governor” and “Lieutenant Governor in Council” across provincial constitutions. For instance, in Section 4(1)(a) of the *Constitution Act*, the British Columbian Lieutenant Governor alone has the power to appoint members of the Executive Council. In practice however members of the cabinet of that province, as in every province, are nominated by the Premier, whose nominations are generally “rubber stamped” by the Lieutenant Governor. Section 9(1) again suggests that the Lieutenant Governor alone appoints cabinet members, but does not suggest how or on what basis. But Section 9(2) gives the “Lieutenant Governor in Council” the power to allot government portfolios to members of cabinet. A literal reading of the Act would seem to suggest that the Lieutenant Governor appoints (and possibly even nominates) the cabinet’s members, and that once the cabinet (or

“Lieutenant Governor in Council”) convenes the ministers themselves are free to delegate portfolios accordingly. This of course is not the case in practice. The distinction between Lieutenant Governor and Lieutenant Governor in Council appears to be at best muddled or context dependent, and at worst functionally meaningless. The convention that the Lieutenant Governor acts on the advice of the Premier in most or nearly all cases is uniform across provinces, regardless of the terminology used in the statutes.

The British Columbia *Constitution Act* however requires the Lieutenant Governor to announce the introduction of money bills to the Legislative Assembly and authorizes him or her to return bills to the Assembly with his or her own amendments or revisions. This is unique among the legislation under consideration as it appears to confer unique positive rights to the Office of the Lieutenant Governor, an institution that has steadily faced erosion of its executive powers since 1867 or in the case of British Columbia, since 1871.

The Quebec legislation, while far from codifying the principles of responsible government, come closest to regulating the responsibilities and duties of the Lieutenant Governor and his or her obligation to act on the advice of the Quebec Premier or cabinet. Section 1 of the Executive Power Act notes that powers exercisable by the Crown in Quebec are vested in the “Lieutenant-Governor or Administrator for the time being of Quebec, in the name of Her Majesty or otherwise as the case may require” but then goes on to suggest that these powers are subject to “royal prerogative as heretofore.” This is a rare instance where provincial constitutions recognize prerogative powers and by implication their exercise by cabinet. Section 29 of the *National Assembly Act* succinctly states that the “National Assembly passes the legislative Acts and the Lieutenant-

Governor gives assent to them.” Neither the *Executive Power Act* nor the *National Assembly Act* expand on or codify the complex nuances of constitutional conventions dealing with the Quebec Lieutenant Governor’s right to withhold royal assent or dissolve the National Assembly. But Section 29 of the *National Assembly Act* alone goes further than any other provincial piece of legislation under consideration in specifying the duties of the Lieutenant Governor in the context of the other parts of the executive and legislative branches of government in the provinces. The section does not expressly limit or usurp any of the Lieutenant Governor’s powers but clarifies and delegates the basic duties of both the Lieutenant Governor and the National Assembly. So too does Section 4 of the *National Assembly Act* which concisely and clearly obliges the National Assembly to “[supervise] over all the Acts of the Government and of its departments and agencies” – coming close to codifying the confidence convention. It should also be noted that it appears to be implicit within Section 29 that whereas the legislature votes on laws and the Lieutenant Governor sanctions them, the laws themselves must originate in a cabinet.

Another striking part of the Quebec legislation can be found in Section 5 of the *National Assembly Act* which, like Sections 20(2), 21(2), and 23(1) of the British Columbia *Constitution Act*, grants the Lieutenant Governor the power to convoke, prorogue and dissolve the Assembly. It does not, however, indicate when or why the Lieutenant Governor performs this function. But Section 6, like Section 4 of the *Charter of Rights and Freedoms*⁶³ limits the lifespan of governments to five years.⁶⁴ Section 29, as stated, appears to have limiting effects on the Lieutenant Governor’s powers as

⁶³ The applicability of Section 4 of the *Charter* to the House of Commons is annulled due to the federal fixed election date provision (Bill C-16) which was passed in 2006, amending Section 56 of the *Canada Elections Act* such that the life span of a federal parliament is now four years instead of five.

⁶⁴ Unlike Newfoundland and Labrador and British Columbia, Quebec does not have fixed election date provisions or 4-year time limits on the life of governments in its provincial constitution.

described in Section 5 by indicating that he or she merely “provides assent” to bills passed by the legislative assembly. Arguably, the Quebec legislation goes furthest in reflecting the contemporary reality of the Lieutenant Governor’s powers. This is particularly so when compared to the lofty language of the British Columbia *Constitution Act* and the comparatively intrusive powers of that province’s Lieutenant Governor contained therein.

Nevertheless, the Newfoundland and Labrador legislation comes a close second to Quebec’s bold simplicity. Section 4 of the *Executive Council Act* explicitly requires the Lieutenant Governor to appoint members of cabinet on the advice of the Premier and the Act compels both to ensure the appointment of an Attorney General and a Registrar General. Like the *National Assembly Act*, the Lieutenant Governor is tasked with proroguing or dissolving the House of Assembly by Section 3 of the *House of Assembly Act*, but unlike the Quebec legislation he or she is formally allowed to do so when he or she “sees fit.” Like the *National Assembly Act*, the only recognized limit to this dissolution powers of the Lieutenant Governor is the lifespan of the provincial parliament, but unlike in Quebec, Newfoundland and Labrador’s legislation is complicated by that province’s fixed election date requirements highlighted in Section 3(2) of the *House of Assembly Act*. Further, Section 3.1 of the *House of Assembly Act* is an unusual 2004 amendment which requires Premiers to call an election within a 12 month period if they replace a sitting Premier who has resigned. This came about after a minor controversy in the province where three years earlier Liberal Premier Roger Grimes took over from former Premier Brian Tobin when he resigned and stayed in power for two years without facing an election.

The final variable deals with executive dominance and executive federalism and the trend towards formally recognizing the negotiating powers of individual ministers in agreements with other provinces, the federal government, and even foreign governments. Executive federalism is a characteristic of those federal societies where relationships between levels of government are principally in the hands of the executive branch of government. According to Ronald Watts and others, this type of relationship is particularly common among parliamentary democracies.⁶⁵ Provincial constitutions increasingly reflect a tradition of intergovernmental relations in Canada which is largely the purview of cabinet ministers and Premiers. Since 2003, first ministers' conferences and meetings have become ever more formalized through, for instance, the annual Council of the Federation meetings of provincial premiers. The effect of such institutions is to provide Premiers or specific ministers with broad mandates to represent their respective provinces. This in turn increases the duties and powers of cabinet ministers, but also increases the supremacy of provincial executives over provincial legislatures. Dunn notes that some provinces operate in an environment where "part-time legislators confront full-time governments."⁶⁶ This has the effect of significantly advancing executive dominance, and Dunn further suggests that it has drastic implications for the concept of executive responsibility to the legislature. This tenth and final variable was included to evaluate whether or not provincial constitutions have dealt with the changing environment of executive federalism.

All three provinces under consideration have included measures that grant or delegate to ministers or Premiers the powers to negotiate with other governments on

⁶⁵ Ronald Watts, "Federalism, Federal Political Systems, and Federations," Annual Review of Political Science 1(1998), 130.

⁶⁶ Dunn, 11.

behalf of their respective provinces. Yet, there are minute differences between the provinces in how their constitutions deal with the delegation of ministerial powers and rights to negotiate with other governments. Section 17 of the *Executive Power Act* is unique in that it allows the “government” to provide a mandate to the Minister of Health and Social Service – no other minister is mentioned – to make “agreements which it deems conformable to the interests and the constitutional rights of Québec, for the joint execution of any project tending to safeguard and improve public health.” The other sections of Division IV of the *Executive Power Act* deal generally with municipalities, but the Section applies to agreements with other provinces and the federal government as well. While there are no congruent sections authorizing other cabinet ministers to perform similar functions, there also does not exist any section which effectively limits the government’s abilities to authorize, for instance, the Quebec Environment Minister to enter into negotiations either.

The *Executive Council Act* and the British Columbia *Constitution Act* are more similar with respect to this variable. Section 12 of the *Executive Council Act* and Section 15 of the *Constitution Act* both authorize ministers to delegate their duties, subject to certain limits, to those in the employ of the “executive government” (as the *Constitution Act* notes). No mention is made of the tradition of ministerial responsibility, but these sections appear to recognize the importance of delegation to bureaucrats and assistants, such as Deputy Ministers. More importantly however are Section 11 of the *Executive Council Act*, which was amended in 2005, and Section 16 of the *Constitution Act* which cover ministerial agreements. Section 11(1) allows a minister to enter into agreements “for the purpose of exercising or discharging his or her powers, functions or duties” and

Section 16 of the *Constitution Act* authorizes a person under Section 9 of the same Act (“Executive Council”) to do the same.

Sections 11(2) and 11(3) of the *Executive Council Act* stipulate that the Lieutenant Governor in Council may require a minister to consult and “obtain the approval of” the cabinet before committing to or ratifying an agreement. This clause does not exist in the *Constitution Act* or in the *Executive Power Act*. This however does not indicate that the practice of consulting the rest of cabinet before a minister finalizes an agreement does not exist in British Columbia or Quebec for that matter, but that the more recent amendments to the *Executive Council Act* in Newfoundland and Labrador are more comprehensive in formally regulating the behaviour of ministers in signing agreements. It also appears that Section 11 of the *Executive Council Act* tries to ensure that agreements entered into by ministers are still formally sanctioned by cabinet. Notably, no provincial constitution requires agreements of this nature to be approved by the entire legislature (or a Committee of the Whole).

Analysis

There has been renewed interest in provincial constitutions starting with Cheffins and Tucker (1976),⁶⁷ Sharman (1984), and Wiseman (1996). But most of the pertinent sections in provincial constitutions dealing with responsible government are relatively recent amendments, and judging from evidence from the three case studies, many tenets of responsible government have become gradually more outlined in the provinces. Certainly, no province's constitution specifically uses the phrase "responsible government" (even though the British Columbia *Constitution Act* once did),⁶⁸ and the Acts fall short of defining comprehensively or at an in-depth level those traditions which comprise responsible government. Over the past twenty-five years however there has been a remarkable amount of change in provincial constitutions which allude to the many tenets of responsible government and help define its practice.

In sum however, loose and ambiguous references to the precepts of responsible government remain. The trend in the past twenty-five years has been to articulate the changes in responsible government that the provincial executives desire. Those aspects of responsible government that remain unclear or forgotten in provincial constitutions such as the main duties of Lieutenant Governors, the confidence convention, the requirement that cabinet ministers be elected members of provincial legislatures, and limits on cabinet size, tend to come under the purview of unwritten constitutional conventions. They are not clarified in provincial constitutions, and to the extent that they are, references to them remain oblique and vague.

⁶⁷ Ronald Cheffins and Ronald Tucker, "Constitutions" in The Provincial Political Systems: Comparative Essays Eds. David Bellamy, et al. (Toronto: Methuen, 1976).

⁶⁸ Sharman (1984), 100.

The causes of these divergent changes are numerous. Quebec's unique culture and history have resulted, since the 1960s, in ever more assertiveness at the provincial and national levels in expressing its independence and unique character. Since 2000, there has been increased attention within Quebec towards the idea of creating a codified and entrenched Quebec Constitution. The current leader of the Parti Québécois, Pauline Marois, introduced Bill 195 (the *Quebec Identity Act*) in 2007 which set forth how a new, codified and entrenched Constitution for that province could come about. The Act also deals with recognition of Quebec as a nation and protection of the French language. Moves toward new forms of provincial constitutions appear to be on the horizon, and the impetus for this change in Quebec is as much related to the desire among that province's citizens to express their will through a concise constitutional document that outlines its identity and culture as it is for a desire to regulate the branches of government.⁶⁹

But the change in the relationship between the executive and legislative branches of government in Quebec, as outlined in the present constitution, is part of this process. Much of the reform to Quebec's governance has come about in periods of provincial nationalism. In 1968, after almost a decade of intense cultural and social change in the Quiet Revolution, Quebec unilaterally abolished its upper house, the Legislative Council, and the Legislative Assembly of the province became known as the National Assembly. In 1982, the long-standing *Legislature Act* of Quebec was repealed and replaced with the

⁶⁹ Quebec's (and to a lesser extent Alberta's) drive toward renewal and changes to their provincial constitutions could possibly be explained by Tarr's "attitudinal change" and political culture-oriented hypothesis as noted in *Understanding State Constitutions* (1998), 30-34. He does caution however that such explanations reveal causal and tautological problems when he notes that "Formal constitutional changes are alleged to occur, or fail to occur, because of popular attitudes toward constitutional change. However, often the primary evidence of these attitudes is the presence or absence of constitutional change" (34). Nevertheless, the relatively strong public and elite concern with constitutional matters in Quebec is well-documented (see Morton) and appears to at least be part of the explanation for the *Quebec Identity Act* by the separatist Parti Québécois.

National Assembly Act by the government of Parti Quebecois leader Rene Levesque in a time of heightened interest in parliamentary and constitutional reform but also nationalist sentiment in the province.⁷⁰ As noted, the *National Assembly Act* contains some of the strongest and clearest enunciations of the roles of the Lieutenant Governor, the cabinet, and the assembly of any part of the constitutions of the provinces.⁷¹

Changes in the Newfoundland and Labrador legislation also had roots in a variety of parliamentary reforms in the past two and a half decades. Indeed, efforts to reform provincial legislatures, which have steadily increased in number over the past twenty-five years, are often the catalyst for changes to provincial constitutions.⁷² Unlike Quebec, these changes and amendments did not happen in tandem with greater cultural or nationalist sentiment but certainly with a general desire for greater parliamentary and constitutional reform. The first major set of reforms was in the 1993-1995 period. In 1993, the Liberal government of Clyde Wells, as part of sweeping agenda of streamlining government services and making the machinery of government work more efficiently and ethically, introduced a series of amendments contained in Part II of the *House of Assembly Act* covering conflict of interest rules. In 1995, the *President of the Council Act* was repealed and replaced by the *Executive Council Act*. Like Quebec's archaic

⁷⁰ Mathieu Proulx, "The Evolution of the National Assembly," Canadian Parliamentary Review 6 (1983), 14-15.

⁷¹ Quebec's sweeping changes to its governmental and constitutional structure and apparatus with the establishment of the National Assembly in 1968 and the formal ratification of these changes through the passing of the *National Assembly Act* were apparently ignored by Ivo Duchacek who asserted that "even Quebec... has not devoted much time or energy to provincial constitution making." To the extent that Duchacek is correct, he is only partly so, since his definition of a sub-national constitution is one that is more suited to the American state constitutional model as evidenced by his dubious assertion that "Canada, Australia [et al.]... do not endow their constituent states or provinces with locally initiated and enacted constitutions" in "State Constitutional Law in Comparative Perspective," Annals of the American Academy of Political and Social Science 496 (1988), 137-138.

⁷² In stressing the far-reaching effects of parliamentary reform, C.E.S. Franks notes that parliamentary reform tend not to be merely simplistic, technical or procedural matters; instead, reform to parliamentary institutions is also a "question of the purposes for which political power is to be used in Canada..." in The Parliament of Canada (Toronto: University of Toronto Press, 1987), 6.

Legislature Act, the *President of the Council Act* was outdated by 1995 and contained few references to any of the constituent parts of responsible government, their definitions, or their interrelationship within the context of the of the constitutional structure of that province's government. The new Act contained many of the amendments described in the *Findings* section of this paper, such as the explicit use of the word Premier (rather than President of the Council), allusions to the Premier's use of prerogative powers, frequent use of the phrase "Lieutenant Governor in Council" instead of just Lieutenant Governor, and so forth.

The second major set of reforms came about in the 2004-2007 period. Shortly after getting elected, Progressive Conservative Premier Danny Williams fulfilled an electoral promise to require fixed election dates which required amendments through Sections 3 and 3.1 of the *House of Assembly Act*. This had serious consequences for constitutional conventions such as the traditional prerogative of the Premier to advise the Lieutenant Governor on the dissolution of the House of Assembly when the Premier saw fit. In 2005, amendments were made to the *Executive Council Act* establishing the rights of ministers to negotiate with other governments. Finally, in 2007, in response to a constituency allowance spending scandal by MHAs and the subsequent publication of the Green Report, the *House of Assembly Accountability, Integrity and Administration Act* was passed. This Act was designed to prevent ethical and legal breaches of MHA spending limits, and as such sought to regulate the activities of MHAs, cabinet ministers, Premiers, and parliamentary officers and staff of the House of Assembly. As such, while in the spirit of other provincial statutes dealing with the civil service, employment standards, financial administration, and assembly management commissions, this

particular piece of legislation went quite far in governing the make up of House committees and recognizing political parties, for instance.

The British Columbia *Constitution Act*, and to a lesser extent the other statutes under consideration in the British Columbia case study also provide us with evidence of provincial attempts at constitution making in line with the contemporary realities of responsible government and executive federalism. As Sharman notes, the early establishment of a so-called “Constitution Act” in that province was as much an “accident of history”⁷³ than the founding of any genuinely rigid constitutional apparatus that fundamentally differed from the rest of the provinces. Historically however it was an unusual construct. As noted, it initially contained a lengthy preamble which directly mentioned “responsible government” and quoted the unique Terms of Union by which British Columbia joined Canada.⁷⁴ Prior to 1871, British Columbia was a very typical colonial settler society with weak representative institutions.⁷⁵ Confederation in 1871 was seen as an opportunity not only to move towards a responsible government model but also an opportunity to modernise the new province’s constitutional and political status. The *Constitution Act* of the new province was designed in a context where British Columbia was among the first provinces after the initial four founding provinces to sign on to the *British North America Act*. Being left out of the Schedule V (“Provincial Constitutions”) of the Canadian constitution gave the new province an opportunity to express its preferred model of government independently through the codification – but

⁷³ Sharman (1984), 91.

⁷⁴ Sharman (1984), 99-100.

⁷⁵ John Saywell, *The Office of Lieutenant-Governor: A Study in Canadian Government and Politics* (Toronto: University of Toronto Press, 1957), 60, 79-87.

not the entrenchment – of a new Act that outlined the principal features of the provincial government.

Sharman notes that there have been three major changes over time since the British Columbia *Constitution Act* came into fruition. First, the *Constitution Act* initially placed a limit on the size and composition of cabinet. As the size of government and the bureaucracy grew and social demands on the state expanded over time, the cabinet was expanded from an original three to eighteen by 1967. In 1973, all references to specific portfolios were removed, and by 1980, limits on cabinet size were removed altogether.⁷⁶ Eliminating these limits allowed executive dominance to flourish unencumbered, whereas the limits had previously strengthened responsible government by making small cabinets dependent on large numbers of MLAs.

Surprisingly for a document that originally made explicit reference to responsible government and was far more comprehensive than comparable statutes in other provinces for much of Canada's early history, the British Columbia *Constitution Act* originally did not contain the term "Premier." This is the second major change. The position was briefly mentioned in the Act as a result of an extraneous 1921 amendment. In 1973, the position was defined as *President of the Executive Council*, and in 1979 – through a roundabout reference to payment of party leaders – the "partisan underpinnings of the Premiership" was outlined in the Act.⁷⁷

The final major change according to Sharman is the removal of references to responsible government. It is apparent that British Columbia's *Constitution Act* came about for modernization and province-building reasons, was amended in order to remove

⁷⁶ Sharman (1984), 101.

⁷⁷ Sharman (1984), 103-104.

limits on the executive by the Act (such as the removal of limits on cabinet size), and more recently references to ministerial responsibilities, delegation, and negotiation powers, all reflect attempts at reforming provincial government by doing so through provincial constitutions. The peculiar sections dealing with many of the now spent duties of the Lieutenant Governor and the superfluous references to what happens during the “Demise of the Crown” are testament to the Act’s age, and are surprising given the semi-regular purging of much of the Act’s contents through statutory consolidations.

More important than the specific causes of these changes however are the effects. The partial codification of responsible government in the provinces serves several purposes. The ambiguity of a constitutional structure where the royal prerogative is exercised largely by cabinet and where occasionally vague or complex constitutional conventions inform the day-to-day functions of provincial government serves the interests of provincial cabinets and Premiers well. But so too does partial codification. From a comparative perspective, sub-state constitutions are opportunities for the constituent units of federal societies to express their political authority and unique characteristics vis-à-vis the federal government as well as other provinces or states within a federation. For instance, all three case studies in this analysis show how provinces set out the means by which intergovernmental relations and negotiations are conducted. Both Newfoundland and Labrador and British Columbia have used their provincial constitutions recently to provide for fixed election dates. Finally, provincial constitutions are the sites of parliamentary, electoral, and ethical reform for the executives and legislatures of the provinces.

It is telling that none of these changes of behaviour were left to convention or to be “assumed” or “implied” in provincial constitutions; nor have they been mandated solely by other parts of provincial constitutions such as Orders in Council or Royal Prerogative powers. The very fact that provincial governments over time are more inclined to use the relevant Acts for reforming or codifying the way responsible government is practiced suggests an enhanced constitutional impulse to assert their own authority and modify the day-to-day machinery of government to suit their needs.

Partial codification serves the interests of provincial governments in two ways. It has the effect of creating limits on the scope of executive action, but in other contexts to strengthen the executive branch. The unusual and comparatively large mandate given to British Columbia’s Lieutenant Governor by that province’s *Constitution Act* is at once a relic from one of the oldest provincial constitutions but also an example of a province designing its constitution in order to retain limits to the powers of the cabinet and Premier. Section 5 alludes to the right of the Lieutenant Governor to reserve legislation for the “signification of the Governor General” and Sections 17, 46, and 48 of the Act give the Lieutenant Governor a role to play in the legislative process. The fixed election date provisions and conflict-of-interest regulations found in provincial constitutions have obvious limiting effects as well. Yet, Sections 10 and 11 of British Columbia’s *Constitution Act* provide enormous leniency to the cabinet in its appointment powers and in the creation and shifting of ministerial responsibilities. All three provincial constitutions under consideration make liberal use of the term Premier, frequently cite ministers and ministries, and occasionally specify the functions and roles of cabinets

(“Executive Councils”). Quebec’s provincial constitution is remarkably frank and succinct about such matters.

The net effect of these two divergent trends is that to the extent that provincial constitutions are strengthening executive dominance, they are doing so by enunciating the powers of cabinet and Premier and through substantial use of terms like “Lieutenant Governor in Council.” And, to the extent that provincial constitutions increasingly evince limits on executive power, it is telling that governments have seen the provincial Acts as the route for change, rather than leaving such matters to more amorphous mechanisms such as through establishing new customs or conventions.⁷⁸ Finally, while executive or cabinet dominance is evident in provincial constitutions and while the existing limits to that dominance does not necessarily imply an inverse increase in powers of the legislature, the role of provincial legislatures does indeed appear to be increasingly formalized in the constitutions (although certainly not to the same extent as executive councils). Provincial constitutions over the past twenty-five years are more likely to refer to such things as cabinet committees and the roles and responsibilities of individual legislators which suggest recognition on the part of provincial constitutions of the still vital place of legislatures in the principle of responsible government.

In order to understand the practice of responsible government in Canada’s provinces, the relevant Acts regulating the executive and legislative branches of government in the provinces are an important place to look, as are the *Constitution Act, 1867*, the *Constitution Act, 1982*, and constitutional conventions. But as Sharman argues with regard to British Columbia’s *Constitution Act*, provincial constitutions can be

⁷⁸For more on how conventions come to be established in the first place and how they can be established and used by governments, see Heard, 10-15, Marshall, 8-10 and 210-216, and Dicey, 439-473.

understood independent of the Canadian constitution.⁷⁹ Yet, these Acts are statutes rather than rigid and entrenched constitutional documents. To what extent are these Acts relevant, or even constitutional, given the ease with which they may be changed or amended? In other words, if these statutes are amendable by a simple parliamentary vote, does the codification of previously unwritten principles hold any constitutional weight?

Canada and its provinces have a long tradition of constitutional development based on statutes and acts of parliaments. Canada is unique in that in addition to this mode of constitutional development it has entrenched Constitution Acts which are alterable only through a rigid amending formula. But Britain has a “flexible” and largely unwritten constitution which is based primarily on royal proclamations, orders in council, common law, constitutional conventions, and statutes. Likewise, in Canada sections of various statutes such as the federal *Elections Act* can be described as being constitutional in scope.

Furthermore, while there are benefits to entrenchment, and Morton has convincingly argued that provincial constitutions are better served if they had amending formulas, entrenchment does not appear to be a barrier to change. In fact, changes to sub-state constitutions, whether they comprise of parliamentary acts or entrenched constitutional documents, appears to be the result of influences that are unconnected to whether or not such constitutions have legal and constitutional obstacles to change. In spite of the numerous recent amendments and changes to provincial constitutions in the direction of an executive-dominated variant of responsible government, the changes have not been nearly as numerous or expansive as changes in comparable jurisdictions such as American states. It is telling that American state constitutions are, according to Tarr,

⁷⁹ Sharman, (1984), 88.

frequently amended and revised,⁸⁰ and yet the legal and constitutional hurdles for these amendments and revisions are typically higher and by Canadian provincial standards seemingly insurmountable.⁸¹ Entrenched state constitutions are frequently amended and yet provincial constitutions which are not entrenched are – until recently – infrequently changed or revised.

The existence of entrenched constitutions or types of amending mechanisms is not fundamental in explaining these differences. It appears that changes to provincial constitutions are not as frequent or as robust in scale as those in American states due to the nature of how sub-state constitutional change is initiated and controlled in the two federations. It is proof of the unique admixture of parliamentary supremacy and executive/cabinet dominance in Canada's provinces that constitutional change in the provinces is the domain of legislators and more typically cabinets and Premiers (or at the federal level, Prime Ministers). Yet in American states, while amending formulas are often more stringent, the means of initiating state constitutional change are more radical and diffuse. Changes to state constitutions may be the result of grassroots and popular initiatives and referenda, either or both houses of legislature, a special constitutional committee or convention, or the Governor, depending on the state. By contrast, the slow pace of constitutional change in provinces and the weak interest in such matters by most provinces is understandable given a constitutional environment almost entirely in the purview of unicameral, cabinet-dominated legislatures. Simply, while Morton's call for more rigid, entrenched forms of constitutions at the provincial level are novel and

⁸⁰ Tarr, 23-24.

⁸¹ Tarr describes these hurdles on pages 34-37, but does note that eighteen states have roughly the same procedure as Canada's provinces – that is, a simple majority vote in both houses of state legislatures.

exciting, the statutory nature of provincial constitutions does not necessarily reduce their constitutional weight and importance.

Conclusion

Canadian constitutional theory and practice have gone through dramatic changes since 1867. The pertinent changes that have been described in this paper are: first, the transition from a tradition of responsible government to a model of cabinet government where the executive is dominant; and second, an evolution over the past twenty-five years in Canada's provinces towards an increased degree of codification of executive dominance in provincial constitutions (and to a lesser extent those of a more traditional, legislative branch oriented version of responsible government).⁸²

The causes of these changes are manifold. The unique structural and institutional constraints of small legislatures and large cabinets in the provinces, the growth of party discipline and the institutionalization of political parties, and the centralization of state power and bureaucratic and administrative functions into the hands of cabinets and first ministers are all causes of executive dominance. But the unique nature of the Crown in Canada's provinces as well as a flexible, amorphous constitutional tradition based on sources as disparate as constitutional conventions, customs, principles, Canada's Constitution Acts, royal proclamations and royal prerogative powers, all serve the interests of executive councils which are naturally loathe to limit their own powers.⁸³

However, the evidence from the provincial constitutions (in this case, the various legislative Acts dealing with responsible government) of the three case studies of Newfoundland and Labrador, Quebec, and British Columbia show that provincial

⁸² Mark Sproule-Jones describes the changes to the tradition of responsible government as one in which Canada's governments have replaced British colonial masters with a "new, indigenous set," where cabinets and first ministers are dominant, and a distinction can be drawn between responsible government and what he terms the *Westminster Model*, in "The Enduring Colony? Political Institutions and Political Science in Canada," *Publius* 14 (1984), 93-94.

⁸³ Campbell Sharman, "Electoral Reform as a Proxy for Constitutional Change," Center for the Study of Democratic Institutions Working Paper on Constitutional Governance No. 2 (2007), page 2, accessed from <http://democracy.arts.ubc.ca/index.php?id=9974>.

governments have indeed implemented limits to executive power. Over the past twenty-five years, constitutions show signs of increased limits to power such as the creation of oversight bodies, ethic reforms, and fixed-election dates. But provincial constitutions also increasingly contain provisions which have the effect of expanding executive power, or, recognizing executive power that by convention has long existed in practice but not in the constitutions themselves. The recognition of appointment and intergovernmental negotiation powers of cabinet ministers, as well as the more frequent usage of terms such as “Lieutenant Governor in Council” instead of “Lieutenant Governor” better reflects the reality of a constitutional and federal environment based on cabinet dominance and executive federalism.

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Appendices

Appendix A: List of “Responsible Government” Related Statutes of Provincial Constitutions

Province	Statutes	Most recent consolidations, or, on-line version			Comments
Alberta	Legislative Assembly Act	2000	R.S.A.	L-9	
	Government Organization Act	2000	R.S.A.	G-10	
	Election Act	2000	R.S.A.	E-1	
British Columbia	Constitution Act	1996	R.S.B.C.	66	
	Referendum Act	1996	R.S.B.C.	400	
	Election Act	1996	R.S.B.C.	106	
Manitoba	Executive Government Organization Act	1987	R.S.M.	E170	
	Legislative Assembly Management Commission Act	1987	R.S.M.	L114	
	Legislative Assembly Act	1987	R.S.M.	L110	
	Legislative Assembly and Executive Council Conflict of Interest Act	1987	R.S.M.	L112	
	Elections Act	2006	C.C.S.M	E-30	
New Brunswick	Executive Council Act	2008	R.S.N.B.	E-12	
	Legislative Assembly Act	2008	R.S.N.B.	L-3	

Province	Statutes	Most recent consolidations, or, on-line version			Comments
New Brunswick	Elections Act	2008	R.S.N.B.	E-3	
Newfoundland and Labrador	Executive Council Act	2007	S.N.L.	E-16.1	Was: <i>President of the Council Act</i> (rep. 1995)
	House of Assembly Act	2007	R.S.N.L.	H-10	
	House of Assembly Accountability, Integrity and Administration Act	2007	S.N.L.	H-10.1	
	Elections Act	1991	S.N.L.	E-3.1	
Nova Scotia	Executive Council Act	1989	R.S.	155	
	House of Assembly Act	1989	R.S. (1992 Supp.)	1	
	Elections Act	1989	R.S.	140	
Ontario	Executive Council Act	1990	R.S.O.	E-25	
	Legislation Act	2006	S.O.	21 (Sched. F)	
	Legislative Assembly Act	1990	R.S.O.	L-10	
	Election Act	1990	R.S.O.	E-6	
Prince Edward Island	Executive Council Act	2003	R.S.P.E.I.	E-12	
	Legislative Assembly Act	2004	R.S.P.E.I.	L-7	
	Election Act	2008	R.S.P.E.I.	E-1.1	
Quebec	Government Departments Act	2008	R.S.Q.	M-34	
	Election Act	2008	R.S.Q.	E-3.3	
	Executive Power Act	2008	R.S.Q.	E-18	Was: <i>Executive Council Act</i>

Province	Statutes	Most recent consolidations, or, on-line version			Comments
Quebec	National Assembly Act	2008	R.S.Q.	A-23.1	Was: <i>Legislature Act</i> (rep. 1982)
	Referendum Act	2008	R.S.Q.	C-64.1	
Saskatchewan	Legislative Assembly and Executive Council Act	2007	R.S.S.	L-11.3	
	Government Organization Act	1986-87-88	R.S.S.	G-5.1	
	Election Act	1996	R.S.S.	E-6.01	

Appendix B: Presence of Variables in Newfoundland and Labrador Constitution

Variable	Newfoundland and Labrador		
	<i>House of Assembly Act</i>	<i>Executive Council Act</i>	<i>Other statutes</i>
(1) The words “Premier”, “Cabinet”, and “Minister.”	All three; “Executive Council” is used instead of cabinet; “Minister” is defined as “minister of the crown.”	All three	All appear in <i>House of Assembly Accountability, Integrity, and Administration Act</i> .
(2) Appointment of cabinet ministers (Premier? Lieutenant Governor? Collective and individual responsibility?)		Section 3 (“Premier’s Prerogative”) and Section 5 (“Presiding over Departments”).	
(3) Appointment of Premier? (By Lieutenant Governor? By House? Both?)		The term Premier is used in the Act but undefined; his/her appt. is also undefined.	
(4) Cabinet Minister or Premier must be in legislature	Section 20(d) (“Definitions: Minister”)	Section 2(c) (“Definitions: Minister”)	
(5) Limits on Cabinet size			
(6) Party Allegiance of Cabinet, cabinet committees, etc.			Section 18 of <i>Accountability Act</i> (“House of Assembly Management Commission”) and Section 45 (“Improper Retention of Public Money”).
(7) Appt. powers of cabinet, premier, or Lieutenant Governor (courts, civil service)		Section 9 (“Departmental Staff”)	Section 7 (“House Officers”) of <i>Accountability Act</i> .
(8) Lieutenant Governor must/can act on advice of Premier or cabinet		Section 4 (“Members of Executive Council”).	
(9) Anything about confidence convention or duration of parliament	Section 3 (“Duration of House of Assembly”) and Section 3.1 (“Election on change of Premier”)		
(10) Delegating of negotiation powers to Premier or cabinet ministers		Section 11 (“Agreements Generally”) and Section 12 (“Delegation of Ministerial Powers”)	
(11) Other			Section 36 of <i>Accountability Act</i> (“Request for Opinion”) empowers Premier rather than Lieutenant Governor

Appendix C: Presence of Variables in Quebec Constitution

Variable	Quebec		
	<i>Executive Power Act</i>	<i>National Assembly Act</i>	<i>Other statutes</i>
(1) Presence of the words “Premier”, “Cabinet”, and “Ministers”	Premier appears as “Prime Minister”; Cabinet appears as “Conseil exécutif.”	No reference to cabinet but premier appears as “Prime Minister” and ministers are references.	Ministers are referenced and Premier appears as “Prime Minister” in Referendum Act, Election Act, etc. No mention of cabinet.
(2) Appointment of cabinet ministers?	Section 3 (“Composition of Conseil exécutif”)		
(3) Appointment of Premier? (By Lieutenant Governor? By confidence of House? Both?)	Sections 4 (“Portfolios”) and 6 (“President of Conseil exécutif”)		
(4) Cabinet Minister or Premier must be in legislature	Section 11(1) (“Temporary Transfer”) requires new, temporary members of cabinet to be MNAs, but this requirement does not appear in Section 3 (“Composition of Conseil exécutif”)	Section 10 (“Committees”) and Section 58 (“Incompatibility”)	
(5) Limits on Cabinet size	Section 4 (“Portfolios”) and Section 9 (“Defining duties and changing name of Departments or Ministers” and “Transfer of Powers”)		
(6) Party Allegiance of Cabinet, cabinet committees, etc.		Sections 86-88 (“Establishment”, “Composition”, and “Designation” of Office of the National Assembly)	
(7) Appt. powers of cabinet, premier, or Lieutenant Governor (courts, civil service)			Section 526 and 532 of Elections Act.
(8) Lieutenant Governor must/can act on advice of Premier or cabinet	Section 1 (“Powers vested in Lieutenant Governor”)	Section 5 (“Lieutenant Governor”) & 6 (“Term of Legislature”)	
(9) Anything about confidence convention		Section 4 (“Power of Supervision”)	
(10) Delegating of negotiation powers to Premier or cabinet ministers	Section 17 (“Agreements Authorized”)		
(11) Other		Section 29 (“Adoption and Assent”)	

Appendix D: Presence of Variables in British Columbia Constitution

Variable	British Columbia	
	<i>Constitution Act</i>	<i>Other statutes</i>
(1) Presence of the words “Premier”, “Cabinet”, and “Ministers”	Premier and Ministers appear frequently. “Cabinet” appears once.	
(2) Appointment of cabinet ministers?	Section 10 (“Transfer of Powers and Duties”), 11 (“Acting Ministers”), 12 (“Parliamentary Secretaries”) and 13 (“Organization of Executive Government”)	
(3) Appointment of Premier? (By L-G? By confidence of House? Both?)	Section 9 (“Executive Council”)	
(4) Cabinet Minister or Premier must be in legislature		
(5) Limits on Cabinet size		
(6) Party Allegiance of Cabinet, cabinet committees, etc.	Section 1 (“Definition: Leader of a Recognized Political Party”)	
(7) Appt. powers of cabinet, premier, or L-G (courts, civil service)	Section 4 (“Appointment to Public Office”)	
(8) L-G must/can act on advice of Premier or cabinet	Section 17 (“Legislative Assembly”), 46 (“Lieutenant Governor may Initiate Bills”), 47 (“Appropriation by Message of Lieutenant Governor”), and 48 (“Lieutenant Governor May Return Bills”).	Election Act Sections 4 and Section 9
(9) Anything about confidence convention		
(10) Delegating of negotiation powers to Premier or cabinet ministers	Sections 15 (“Delegation by Official”) and 16 (“Agreements with Others”)	
(11) Other	Section 5 (“Assent or Signification Date for Legislation”) regarding reservation powers. Section 7 (“Executive Power”) notes that the Act is subject to Constitution Act, 1867. Section 20 (“Demise of the Crown”) Section 23 (“General Elections”).	Referendum Act empowers the “Lieutenant Governor in Council” to initiate referenda pending the sufficient display of a desire for one among the public.