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THE EARLY PROVINCIAL CONSTITUTIONS*

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I. *General Principles of Colonial Constitutional Law*

The early provincial constitutions were established during the colonial regime, when the British Empire was a unitary state. It was recognized that the new settlements could not be governed effectively from Westminster and that a measure of local representative government was needed. At the same time there was no room for rival sovereignty. The colonial government had to be limited to local matters and be subordinate to the central government and parliament.

There were two types of colonial constitution, prerogative and statutory. No doubt ever existed about the competence of Parliament to provide a constitution for a colony; but there was, at first, serious doubt as to the extent of the authority of the Crown.

The question arose for the first time in the case of *Campbell* v. *Hall* [1] after the surrender of Granada by France to Britain in 1763. After the Proclamation of October 7th, 1763, which authorized the summoning of a representative legislative assembly, and after the appointment of the governor but before he summoned an assembly, the Crown imposed a 4½% export duty on sugar, thus placing Granada on the same basis as the other British Leeward Islands.

The action was brought by Campbell, a British planter, to recover duties paid, upon the ground that the export duty was illegal. Two contentions were put forward: first, that the Crown could not make laws for a conquered country; and, second, that, before the duty was imposed, the Crown had divested itself of authority to legislate for the colony.

*One of four Canadian Club Lectures delivered at the University of British Columbia in November 1947. A second address was published in the March 1948 issue of this Review beginning at page 520.

[1] (1774), Cowp. 204; Lofft 655.

On the first point, it was decided that the Crown had the power to make laws for a conquered country. This power was subject to the terms of the capitulations or treaty of peace and subordinate to the authority of the King in Parliament. Lord Mansfield in the course of a masterly judgment stated:

> The only question then on this point is, whether the King had a power to make such change between the 10th of February, 1763, the day the treaty of peace was signed, and the 7th October, 1763? Taking these propositions to be true which I have stated; the only question is, whether the King had of himself that power?
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> It is left by the constitution to the King's authority to grant or refuse a capitulation: if he refuses, and puts the inhabitants to the sword or exterminates them, all the lands belong to him. If he receives the inhabitants under his protection and grants them their property, he has a power to fix such terms and conditions as he thinks proper. He is intrusted with making the treaty of peace: he may yield up the conquest, or retain it upon what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted that the King might change part or the whole of the law or political form of government of a conquered dominion.

On the second point it was decided that the Crown had divested itself of authority to legislate for the colony by making provision for the establishment of a local representative legislature. It was the authorization of the legislature and not its actual establishment that divested the Crown of its power. This doctrine had no application to statutory constitutions. The King in Parliament could not divest himself of the power to make laws for His dominions, a principle inherent in sovereignty, but the King in Council was not sovereign and accordingly was subject to the law as laid down in *Campbell* v. *Hall.*

The question whether the Crown could make laws for a colony established by settlement did not arise in *Campbell* v. *Hall.* It was dealt with, among other questions, in a judgment of the Judicial Committee of the Privy Council, in *Kielley* v. *Carson.*[2] Baron Parke, after observing that Newfoundland was a settled, not a conquered country, added:

> . . . to such a colony there is no doubt that the settlers from the mother-country carried with them such portion of its Common and Statute Law as was applicable to their new situation, and also the rights and immunities of British subjects. Their descendants have, on the one hand, the same laws, and the same rights (unless they have been altered by Parliament); and on the other hand, the Crown possesses the same prerogative and the same powers of Government that it does over its other subjects: nor has it been disputed in the argument before us, and, therefore, we consider it as conceded, that the Sovereign had not merely

[2] (1842), 4 Moo. P.C. 63.

> the right of appointing such magistrates and establishing such Corporations and Courts of Justice as he might do by the Common Law at home, but also that of creating a local Legislative Assembly, with authority, subordinate indeed to that of Parliament, but supreme within the limits of the colony, for the government of its inhabitants.

This statement was cited with approval by Willes J. in *Phillips* v. *Eyre*.[3]

There were definite legal limitations upon colonial legislative power.

The first relates to constituent power. Even in the case of the prerogative constitutions, the Crown could, notwithstanding the doctrine in *Campbell* v. *Hall*, revoke a colonial constitution and annex the territory to another colony;[4] or amend the constitution by revising the royal instruments in which it was embodied. In the case of statutory constitutions, there could be no doubt as to the power of Parliament to repeal or amend its own Acts. Consequently, constituent power remained in the Crown or in Parliament.

The second legal limitation was a direct consequence of parliamentary sovereignty. Colonial law was void and inoperative if it was repugnant to legislation of the British Parliament, applicable to the colony by virtue of express words or necessary intendment. This was not a constitutional limitation in the strict sense, but rather an impediment to the exercise of power. The colonial law was not *ultra vires*, it was inoperative. There were British statutes, which, by their terms, were applicable throughout the King's dominions, and no colonial legislature could enact effective legislation repugnant to their provisions. This doctrine had no application to the part of the British statute law which was in force in the colony under the rule in *Uniacke* v. *Dickson*.[5]

The third legal limitation was territorial. It was doubtful whether the colonial legislature could make laws having extra-territorial operation.

In addition to these legal limitations, there were political controls, which restrained the local legislature even more. Legislation was subject to effective control by the governor's veto, and the reservation of bills and disallowance of laws. The governor was a servant of the British Government and exercised progressively diminishing influence upon colonial legislation and government. Vitally important and extensive fields were covered by British legislation and administration. While the matters

[3] (1870), L.R. 6 Q.B. 1.
[4] *Re Cape Breton* (1846), 5 Moo. P.C. 259.
[5] (1848), 2 N.S. 287.

dealt with by the colonial governments and assemblies were steadily increasing in extent and importance, they did not, at any stage, cover more than a modest part of the "publick peace welfare & good government" of the colonies.

Too close attention to legal and political limitations upon colonial power may give a misleading picture. In order to be understood, they should be looked at with the broader political and economic movements in the colonies as a background.

Colonial constitutional law was clarified by the Colonial Laws Validity Act, 1865. The occasion for the enactment was political and legal trouble in South Australia, but advantage was taken of the need for specific legislation to enact a measure dealing with a number of important constitutional issues.

There were three provisions dealing with repugnancy. The first concerned the view that a colonial law was invalid if repugnant to the English common law. This view found support in the language used in granting legislative power. For example, in the Cornwallis Commission, following the grant of power, were the words, "which said Laws, Statutes and Ordinances are not to be repugnant to the Laws and Statutes of this our Kingdom of Great Britain". In South Australia, the Supreme Court carried this view so far as to invalidate Acts of the legislature on the ground of repugnancy to the English common law. Those of you who are familiar with the opinion of Halliburton C. J. in *Uniacke* v. *Dickson* (*supra*) will have some doubt as to whether a Canadian court would have accepted this doctrine. It was necessary to enact legislation to prevent the concession of colonial legislative power from being rendered nugatory by the extreme application of this view. In section 3 it was provided:

> (3) No Colonial Law shall be or be deemed to have been void or inoperative on the Ground of Repugnancy to the Law of *England*, unless the same shall be repugnant to the Provisions of some such Act of Parliament, Order, or Regulation as aforesaid.

After this measure had become law, the only repugnancy that could invalidate a colonial law was repugnancy to a British statute, extended to the colony.

In the second place, the effect of repugnancy to British statutes was restricted:

> (2) An Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such

> Act, Order, or Regulation, and shall, to the extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

It was no longer possible to contend that repugnancy to a British Act would invalidate the entire colonial statute.

The third provision was the very important one in section 1, the interpretation section:

> An Act of Parliament, or any Provision thereof, shall, in construing this Act, be said to extend to any Colony when it is made applicable to such Colony by the express Words or necessary Intendment of any Act of Parliament.

This rule of construction had already been adopted for Canada in the Union Act, 1840.

The Act also dealt with constituent power. No colonial legislature could amend its own constitution. Further, the decision in *Kielley* v. *Carson* had made it clear that the colonial assemblies did not possess the rights and privileges that the House of Commons enjoyed by virtue of ancient usage and prescription, but only those that were necessary to secure free exercise of their legislative functions. It was doubtful whether more extensive privileges could be established by colonial legislation. The legal position in these matters, and also in respect of the constitution of courts, was settled by section 5:

> (5) Every Colonial Legislature shall have, and be deemed at all Times to have had, full Power within its Jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the Constitution thereof, and to make Provision for the Administration of Justice therein; and every Representative Legislature shall, in respect to the Colony under its Jurisdiction, have, and be deemed at all Times to have had, full Power to make Laws respecting the Constitution, Powers and Procedure of such Legislature; provided that such Laws shall have been passed in such Manner and Form as may from Time to Time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the Time being in force in the said Colony.

Under this provision, the colonial legislature could amend a prerogative, but possibly not a statutory, constitution, make laws concerning legislative privilege, and establish, abolish or reconstitute courts.

The provision in section 4 of the Act, whereby no colonial law was to be invalid by reason of any royal instructions given to the governor, other than those that were included in the letters patent or commission authorizing him to assent to or concur in the passing of laws by the legislature, was not important. It weakened the machinery of imperial control over colonial legislative power, but it is not so closely connected with subsequent

Canadian constitutional history as the other provisions of the Colonial Laws Validity Act.

At this stage of constitutional development, the position can be summarized in the words of Sir James Shaw Willes (*Phillips* v. *Eyre, supra,* at page 20):

> We are satisfied that it is sound law, and that a confirmed act of the local legislature lawfully constituted, whether in a settled or conquered colony, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the imperial parliament.

On the other hand, it was still possible to question a colonial statute upon the grounds of contravention of the statutory or prerogative constitution of the colony, or of repugnancy to a British statute made applicable to the colony by express words or necessary intendment; the territorial limitation remained; and the political controls were unaffected by the statutory reforms.

II. *The Early Constitutions*

As a result of this review of the basic principles of colonial constitutional law, it should be possible to understand the early documents. Accordingly, it is time to retrace our steps and look at the Canadian provincial constitutions. The natural starting point is Nova Scotia, not merely because it is the oldest, but because the Cornwallis documents furnished the foundation for later constitutional progress.

The origin of the Nova Scotian constitution is to be found in the Commission and Instructions to Edward Cornwallis. The Commission, by Letters Patent dated May 6th, 1749,[6] included the following elements:

> (a) Appointment of the Governor, with provision that he comply with and perform the requirements of the Commission and Instructions, and also the requirements of later Orders in Council or Special Instructions under the Sign Manual and Signet.
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> (b) Authority to "Chuse nominate & appoint such fitting and discreet persons as you shall either find there or carry along with you not exceeding the number of Twelve, to be our Council in our said Province". It will be noted that the Council had a threefold function. It was a second chamber of the legislature, the Principal Court of Judicature, and an

[6] Akins, Selections from the Public Documents of the Province of Nova Scotia.

executive. Further, it was "Our Council", and not the Governor's Council.

(c) Authority, with the advice and consent of the Council, to summon a General Assembly of the Freeholders and Planters according to the usage of the rest of the Colonies and plantations in America.

(d) Grant of legislative power: "And you the said Edward Cornwallis with the advice and consent of our said Council and Assembly or the major part of them respectively shall have full power and authority to make, constitute and ordain Laws, Statutes and Ordinances for the Publick peace, welfare and good government of our said province and of the people and inhabitants thereof and such others as shall resort thereto & for the benefit of us our heirs and Successors, which said Laws, Statutes and Ordinances are not to be repugnant but as near as may be agreeable to the Laws and Statutes of this our Kingdom of Great Britain".

(e) Provision for disallowance, without limitation as to time.

(f) Provision for veto: "And to the end that nothing may be passed or done by our said Council or Assembly to the prejudice of us our Heirs & Successors We Will and Ordain that you the said Edward Cornwallis shall have and enjoy a Negative Voice in the making and passing of all Laws, Statutes & Ordinances as aforesaid".

(g) Authority to establish Courts of Justice.

(h) Authority to pardon offenders, "Treason and willfull murder" being reserved for the "Royal Pleasure".

(i) Measures concerning militia, defence and naval discipline.

(j) Provision for administration of finance.

(k) Provision for disposition of crown lands.

The Instructions dated April 29th, 1749, are very lengthy.[7] Special mention might be made of those that concern the administration of justice:

(a) The 66th to the 70th Articles provide for the establishment of the General Court, consisting of the Governor and Council, as the Principal Court of Judicature; and authorize the formation of inferior courts.

(b) The 71st to the 81st Articles provide for impartial and speedy justice and liberty of the subject secured by habeas

[7] Public Record Office, C.O. 218/3, pp. 60–73, 80–81.

corpus. With the 82nd Article, they constitute an effective charter of civil liberties.[8]

[8] "71st. And Whereas frequent Complaints have been made of great Delays and undue proceedings in the Courts of Justice in several of Our Plantations, whereby many of Our Subjects have very much suffered, and it being of the Greatest Importance to Our Service and to the Welfare of Our Plantations, that Justice be everywhere speedily and duly administered, and that all Disorders, Delays and other undue Practices in the Administration thereof be effectually prevented, We do particularly require you to take especial Care that in all Courts, where you are authorized to preside; Justice be impartially administered, and that in all other Courts established within Our said Province all Judges and other Persons therein concerned do likewise perform their several Duties without Delay or Partiality.

"72nd. You are to take Care that no Court of Judicature be adjourned but upon good Grounds, as also that no Orders of any Court of Judicature be entered or allowed which shall not be first read and approved of by the Magistrates in open Court, which Rule You are in like manner to see observed with relation to the Proceedings of Our Council of Nova Scotia, and that all Orders there made be first read and approved in Council before they are entered upon the Council Books.

"73rd. Whereas We are above all things desirous that all Our Subjects may enjoy their Legal Rights and Properties, you are to take especial Care that if any Person be committed for any Criminal Matters (unless for Treason or Felony plainly and especially expressed in the Warrant of Commitment) he have free Liberty to petition by himself or otherwise for a Writ of Habeas Corpus, which upon such Application shall be granted and served on the Provost Marshall Goaler or other Officer having the Custody of such Prisoner, or shall be left at the Goal or Place where such Prisoner is confined; And the said Provost Marshall or other Officer shall within three Days after such Service (on the Petitioners paying the Fees and Charges and giving Security that he will not escape by the way) make Return of the Writ and Prisoner before the Judge who granted our the said Writ, and there certify the true Cause of the Imprisonment, and the said Judge shall discharge such Prisoner taking his Recognizance and Security for his Appearance at the Court where the Offence is cognizable, and certify the said Writ and Recognizance unto the Court, unless such Offences appear to the said Judge not bailable by the Laws of England.

"74th. And in Case the said Judge shall refuse to grant a Writ of Habeas Corpus on View of the Copy of Commitment or upon Oath made of such Copy having been denied the Prisoner or any Person requiring the same in his behalf, or shall delay to discharge the Prisoner after the granting of such Writ, the said Judge shall incur the Forfeiture of His Place.

"75th. You are likewise to declare Our Pleasure, that in Case the Provost Marshall or other Officer shall imprison any Person above twelve Hours, except by a mittimus setting forth the Cause thereof, he be removed from his sd. Office.

"76th. And upon the Application of any Person wrongfully committed the Judge shall issue His Warrant to the Provost Marshall or other Officer to bring the Prisoner before him, who shall be discharged without Bail or paying Fees, and the Provost Marshall or other Officer refusing Obedience to such Warrant shall be thereupon remov'd, and if the said Judge denies his Warrant he shall likewise incur the Forfeiture of his Place.

"77th. You shall give Directions that no Prisoner being set at large by an Habeas Corpus be recommitted for the same Offence but by the Court where he is bound to appear, and if any Judge, Provost Marshall or other Officer contrary hereunto shall recommit such Person so bailed or delivered, you are to remove him from his Place, and if the Provost Marshall or other Officer having the custody of the Prisoner neglects to return the Habeas Corpus, or refuse a Copy of the Commitment within Six Hours after Demand made by the Prisoner or any other in his behalf, he shall likewise incur the Forfeiture of his Place.

"78th. You are to take Care that all Prisoners in Cases of Treason or Felony have Free Liberty to Petition in open Court for their Trials that

(c) The 83rd Article provides that "all writs within our said Province be issued in Our Name". Thus, in the administration of justice, as in the executive government, it was the King's Court, and not the Governor's Court, that judged.

(d) the 85th Article provided for appeals from the inferior courts to the General Court; and, in matters involving more than £300, an ultimate appeal to the Privy Council.

(e) The 94th Article provided for reservation of bills "of an unusual and extraordinary Nature and Importance, wherein Our Prerogative or the Property of our Subjects may be prejudiced, or the Trade and Shipping of this Kingdom any ways affected"; unless they contained "a clause inserted therein suspending and deferring the Execution thereon until" the King's pleasure concerning them became known.

The provisions regarding appeals were modified by Additional Instructions to Colonial Governors, including Nova Scotia, dated December 3rd, 1753;[9] whereby provision was made for appeals to the Governor and Council in cases involving upwards of £300; and for ultimate appeal to the Privy Council, in cases involving upwards of £500 and in cases involving revenue matters or future rights even if the amounts involved were less. This measure was later incorporated into the regular Instructions.[10]

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they be indicted at the first Court of Oyer and Terminer unless it appear upon Oath that the Witnesses against them could not be produced, and that they be tried at the second Court or discharged: and the Judge upon Motion made the last Day of the Session in open Court shall discharge the Prisoner accordingly, and upon the Refusal of the said Judge and Provost Marshall or other Officer to do their respective Duties herein they shall be removed from their Places.

"79th. Provided always that no Person be discharged out of Prison who stands-committed for Debt by any Decree of Chancery or any Legal Proceedings of any Court of Record.

"80th. And for the preventing of any Exactions that may be made upon Prisoners you are to declare our Pleasure, that no Judge shall receive for himself or Clerks for granting a Writ of Habeas Corpus more than 2s. 6d. and the like sum for taking a Recognizance, and that the Provost Marshall or other Officer shall not receive more than 5s. for every Commitment, 1s. 3d. for the Bond the Prisoner is to Sign, 1s. 3d. for every Copy of a Mittimus and 1s. 5d. for every mile he bringeth back the Prisoner.

"81st. And further You are to cause this Our Royal Pleasure Signified to You by the Nine Articles of Instructions immediately preceding this to be made publick, and registred in the Council Books of Our said Province.

"82nd. You are to take Care that no Man's Life, Member, Freehold or Goods be taken away or harmed in Our said Province under Your Government otherwise than by Established and known Laws, not repugnant to but as near as may be agreeable to the Laws of this Kingdom, and that no Persons be sent as Prisoners to this Kingdom from our said Province without sufficient Proof of their Crimes, and that Proof transmitted along with the said Prisoners."

[9] P.R.O., C.O. 324/15, pp. 342–346.

[10] *E.g.*, Instructions to Governor Wilmot, March 16th, 1764: Can. Sess. Papers, 1883, No. 70, p. 30.

The constitution of Prince Edward Island can be traced to the Commission of August 4th, 1769,[11] and the Instructions of July 27th, 1769,[12] to Governor Patterson. These documents correspond closely to the Nova Scotian in their essential features. The provisions for legislative power, disallowance, veto and reservation were substantially identical. In the case of judicial institutions there were express instructions to follow the Nova Scotian model. The authority to summon an assembly was different, in that Council Assemblies, rather than General Assemblies, were to be called. Again, in the grant of legislative power, laws were to be made with the "consent of Our said Council and Assembly, or the major part of them", instead of with the consent of our said Council and Assembly, or the major part of them respectively".

The origin of the New Brunswick constitution is found in the Commission, August 16th, 1784,[13] and the Instructions[14] to Governor Thomas Carleton. These documents were modelled upon the Nova Scotian, which had already been simplified by the elimination of transitory provisions and the incorporation of the Additional Instructions concerning appeals. There was substantial identity of provisions relating to the following essential matters: establishment of the Council; authority to summon assemblies; legislative power; disallowance; veto; courts of justice; pardons; appeals; reservation of bills.

The constitution of Quebec, at the outset, followed the Nova Scotian model; and, indeed, there are specific references to the Nova Scotian documents in the Instructions to Governor Murray. The recital in the Proclamation of October 7th, 1763, the Commission to Governor Murray of November 28th, 1763, and the Instructions of December 7th, 1763,[15] provide a constitutional position substantially identical to that of Nova Scotia under the Wilmot documents.

By an ordinance of the Governor and Council, September 17th, 1764,[16] civil courts were established; and provision was made for appeals to the Governor and Council, and ultimately to the King in Council, along the lines of the Nova Scotian provisions. The Ordinance also prescribed the law that was to be applied by the courts:

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[11] Can Sess. Papers, 1883, No. 70, p. 2.
[12] P.R.O., C.O. 227/1.
[13] Can. Sess. Papers, 1883, No. 70, p. 47.
[14] P.R.O., C.O. 189/1.
[15] Shortt & Doughty, Part 1, pp. 163, 173, 181.
[16] Shortt & Doughty, Part 1, p. 205.

> The Judges in this Court are to determine agreeable to Equity, having Regard nevertheless to the Laws of *England*, as far as the Circumstances and present Situation of Things will admit, until such Time as proper Ordinances for the Information of the People can be established by the Governor and Council, agreeable to the Laws of *England*.
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> The *French* Laws and Customs to be allowed and admitted in all Causes in this Court, between the Natives of the Province, where the Cause of Action arose before the first day of *October*, One Thousand Seven Hundred and Sixty-four.

It will be borne in mind that this was ten years before the case of *Campbell* v. *Hall*. Otherwise, there might have been some doubt as to the validity of law-making Ordinances. Under Article 11 of the Instructions, the Governor was given interim authority "to make such Rules and Regulations, by the Advice of Our said Council, as shall appear to be necessary for the Peace, Order and good Government of Our said Province, taking Care that nothing be passed or done, that shall any ways tend to affect the Life, Limb or Liberty of the Subject, or to the imposing any, Duties or Taxes". The measure might have been regarded as being, in substance though not in name, a regulation made under the interim authority given by Article 11.

The difficulties arising out of the attempted application of the Laws of England to more than sixty-five thousand Canadians, unfamiliar with the common law and English ways, were among the factors that led to the Quebec Act of 1774.[17] The Quebec Act did not directly establish a constitution for Quebec. It nullified the former provisions made for the province; assured a wide measure of religious liberty to the Roman Catholic inhabitants; and confirmed the Roman Catholic clergy in the enjoyment of their accustomed dues. Roman Catholics were relieved of the obligation to take the oaths prescribed by the Statute of I Elizabeth and an oath of allegiance was substituted. The property rights of Canadian subjects were secured and matters of controversy, relative to property and civil rights, were made subject to the laws of Canada. The courts were required to decide cases with respect to such property and rights agreeably to the laws and customs of Canada, until altered by ordinances made by the Governor and Legislative Council. The right of testamentary disposition, by will in either the Canadian or English form, was preserved. On the other hand, the Criminal Law of England was continued, subject to change by ordinance.

Authority was given to the Crown to constitute and appoint a Council; and the Council, with the consent of the Governor,

[17] 14 Geo. III, c. 83.

was empowered to make ordinances "for the Peace, Welfare, and good Government, of the said Province". There were modified provisions for disallowance, and some limitations upon the legislative power, and there was an express reservation of the authority of the Crown to constitute and appoint courts of civil, criminal and ecclesiastical jurisdiction.

The Quebec Act was the first instance of a constitution, based upon statutory authority, in our Canadian constitutional history; and it broke new ground by embodying constitutional guarantees in a British statute, beyond the powers of any Canadian legislative authority.

The relatively modest restrictions upon legislative power, which were contained in the Act, were supplemented by the Instructions to Governor Carleton in 1775,[18] which also contained directions as to the scope and content of the ordinances that should be made to provide for the administration of justice. The establishment of the courts followed.[19] The Ordinance for Establishing Courts of Civil Judicature contained, in addition to provisions for trials and appeals within the province, measures governing appeals to His Majesty in His Privy Council. It is noteworthy that it did not seem to occur to the Law Officers of the Crown in England or in Quebec that there was any doubt as to the legal competence of a colonial legislature to make laws regulating and controlling the appeal to the Privy Council.

The Constitutional Act of 1791[20] is a statutory constitution in modern form and deserves to be studied in detail. For the purposes of this survey, it is only possible to note some of its salient features. The provisions of the Quebec Act relating to the appointment of the Council and its powers were repealed; but the constitutional guarantees contained in it remained in force. There were provisions for veto and for disallowance within two years. The provisions for reservation of bills were strengthened by statutory safeguards in specified cases and supplemented by extensive instructions to Lord Dorchester.[21] The interval up to the first meeting of the legislatures was covered by giving the Governor and Executive Council temporary powers.

The grant of legislative power deserves special consideration. The wording is as follows:

[18] Shortt & Doughty, Part II, p. 594.
[19] See Commissions and Ordinances, Short & Doughty, Part II, pp. 672, 674, 679, 690.
[20] 32 Geo. III, c. 31.
[21] Doughty & McArthur, p. 13.

> that in each of the said Provinces respectively His Majesty, His Heirs or Successors, shall have Power, during the Continuance of this Act, by and with the Advice and Consent of the Legislative Council and Assembly of such Provinces respectively, to make Laws for the Peace, Welfare, and good Government thereof, such Laws not being repugnant to this Act:

The repugnancy provision is confined to repugnancy to the Act, itself. The most important innovation is the reference to the Crown. In the prerogative constitutions, it might have seemed inappropriate for the King to make a grant of power to the King with the advice and consent of the Council and Assembly. For example, in the Commission to Governor Wilmot, October 5th, 1763,[22] the grant reads:

> And that you the said Montague Wilmot with the advice and Consent of Our said Council and Assembly or the Major part of them respectively shall have full Power and Authority to make Constitute and Ordain Laws, Statutes and Ordinance, for the public Peace Welfare and Good Government of our said Province. . . .

The 11th Instruction provides:[23]

> That the style of enacting the said laws, statutes and ordinances be, by the Governor, Council and Assembly, and no other.

In contrast, the Dorchester Instructions provide that the style of enactment is to be by "Us, Our Heirs, or Successors, by and with the Advice and Consent of . . ."[24] The difference was not as significant, in one sense, as it might seem. The Governor was the King's servant, acting for and in the name of the Crown. It was, however, important in another sense. A statute enacted by the King, with the advice and consent of the Council and Assembly, was bound to command more respect in England. The form made it more difficult to think of such an Act as a sort of municipal ordinance. It was easier to think in terms of sovereignty when the power was being exercised by the King with appropriate advice and consent.

The Union Act of 1840,[25] whereby Upper and Lower Canada were united, like the Constitutional Act of 1791, deserves extensive study; but, from the point of view of the present survey, it does not present many new features. The grant of legislative power used the same wording as in the Constitutional Act; but the repugnancy clause was new: "not being repugnant to . . . any Act of Parliament made or to be made, and not hereby repealed,

[22] P.R.O., C.O. 218/6.
[23] Can. Sess. Papers, 1883, No. 70, p. 30.
[24] Doughty & McArthur, Instructions, 16th Sept., 1791, para. 12.
[25] 3–4 Vict., c. 35.

which does or shall, by express Enactment or by necessary Intendment, extend to the Provinces of *Upper* and *Lower* Canada, or to either of them, or to the Province of *Canada;*". The Colonial Laws Validity Act provision was thus anticipated by fifteen years. Disallowance and reservation of bills were both subject to a limitation of two years. The Instructions to Lord Sydenham (August 13th, 1840) and to Lord Monck (November 12th, 1861)[26] both contained directions that bills whereby the Royal Prerogative might be prejudiced should be reserved for the signification of the Queen's pleasure.

British Columbia was in a special position. By two Acts of Parliament[27] the jurisdiction of the courts of Upper Canada had been extended to the Indian territories, including what is now British Columbia. It was not possible to establish colonial government by prerogative action alone, in areas covered by these Acts.

Vancouver's Island was established in 1849. The statute[28] withdrew the colony from the application of the two Acts referred to and enabled the Crown to provide for the administration of justice. It did not provide for the establishment of legislative institutions, but it did make the provisions for the administration of justice subject to legislation upon the establishment of a local legislature. The Act also provided for appeals to the Privy Council, but this provision was not made subject to local legislation. The actual constitution was supplied by the Commission and Instructions to Governor Blanshard (July 9th and 13th, 1849),[29] which followed the general lines of the other prerogative constitutions. It will be noted, however, that the Governor and Council were given an independent law-making power; that the wording "peace, order and good government" was used for the Governor and Council, while the general grant used the older form "public peace, welfare and good government"; and that the old form of repugnancy provision was used and not the form that had been used in the Union Act of 1840. It will also be observed that the general direction for reservation of bills of an extraordinary nature and importance whereby the prerogative might be prejudiced is included in the Instructions.

The colony of British Columbia was established in 1858. The statute[30] empowered the Crown, by order in council, to legislate for the colony, or to empower the Governor to make

[26] Can. Sess. Papers, 1906, No. 18, pp. 115, 130.
[27] 43 Geo. III, c. 138; 1–2 Geo. IV, c. 66.
[28] 12–13 Vict., c. 48.
[29] P.R.O., C.O. 380/18.
[30] 21–22 Vict., c. 99.

provision for the administration of justice and to make laws and ordinances, with a provision for tabling orders in council, laws and ordinances. The statute also authorized the Crown to establish a legislature, prescribed the appeal to the Privy Council and withdrew British Columbia from the operation of the two Acts referred to previously. The Commission and Instructions to Governor Douglas (September 2nd, 1858)[31] authorized the Governor to provide for the administration of justice and to make laws for the peace, order and good government of the inhabitants. There was a repugnancy clause in the old form, but the documents differed from those in the other provinces. The differences were formal and took into account the special situation in which the laws were being made by the Governor by proclamation and not by a local legislature. Even in this case, it was considered necessary to put an express provision in the Instructions, to prevent the Governor from making laws that might prejudice the prerogative.

By an Order in Council of June 11th, 1863,[32] the Governor was empowered to provide for the administration of justice and to constitute a partly representative Legislative Council, with authority to make laws "for the Peace, Order, and Good Government of the said Colony". This Order was revoked by an Order in Council [33] made under the authority of the British Columbia Government Act, 1870. The new order made provision for a partly representative Legislative Council, nine elective and six non-elective members, with legislative power along the same general lines. In the meantime, the Colonies of Vancouver's Island and British Columbia had been united under the provisions of 29–30 Vict., c. 67. It will be noted that legislation by Parliament was necessary to unite the colonies. It could not be done by prerogative action, as in the case of Cape Breton.

This survey of the origins of the provincial constitutions is limited to those that came into being as a result of prerogative action or British legislation. It discovers the nature of the constitutions, as they were before Confederation, and the study may be of some help in examining the federal and provincial constitutions under the British North America Acts.

It may be useful to summarize the results. It seems to be clearly established that the constitutional systems of the provinces, before Confederation, possessed the following characteristics:

[31] P.R.O., C.O. 380/19.
[32] Can. Archives: Col. Secy. to Douglas; G. 344, 441, 478.
[33] Can. Archives: Col. Secy. to Musgrave; G. 327, 351.

(1) The Crown was an integral part of the system and, fundamentally, the provinces were limited monarchies. The governors acted in the name of, on behalf of and subject to the instructions of the Crown. The Crown was a part of the legislature, notwithstanding the formal difference in the style of enactment between the prerogative and the statutory constitutions. The Crown was the fountain of justice; the courts were royal courts; process issued in the King's name; and, in the field of public law, proceedings were in the name of the Crown. Revenues were the Crown's revenues; royalties enured to the Crown; the Crown was the owner of the public domain and lord paramount of all lands; and private titles to land were derived from Crown grants. (It should be noted that there are qualifications to be made in this and in the next paragraph to take into account the special position that existed in Lower Canada.)

(2) The Royal Prerogative, to the extent that it was applicable to colonial conditions, was a part of the legal system. The persistence of provisions in the documents directing the reservation of bills that might prejudice the prerogative, and the frequent colonial legislation in prerogative matters such as privy council appeals, indicate clearly that aspects of the prerogative which related to the peace, order and good government of the provinces were regarded as being subject to provincial legislative power.

(3) The grants of legislative power were in broad terms, ranging from "Publick peace, welfare & good government" to "Peace, Order and good Government". A provincial statute could not be questioned upon the ground that it was unreasonable, oppressive, confiscatory or contrary to imperial interest; although it might be disallowed on such grounds. There were the following legal limitations upon the legislative power:

(a) It was questionable whether the legislature could make laws having extra-territorial operation.

(b) There was a substantial body of imperial statute law, made applicable to the colonies, or to particular provinces, by express words or necessary intendment, which prevented the operation of repugnant provisions of provincial laws. This included: trade and navigation, shipping, admiralty jurisdiction, privy council appeals, copyright, bankruptcy, naturalization, and military and naval discipline.

(c) There were specific provisions in some of the constitutions limiting legislative power.

On the other hand, the powers were augmented by constituent power under the Colonial Laws Validity Act.

(4) There were even more important political restraints upon the exercise of power:

(a) The governor's influence and authority over legislation and administration, together with his relation with the British government, resulted in an effective, but diminishing, political restraint.

(b) The actual exercise of prerogative power, at Westminster, in matters affecting the colonies, together with the position of the colonies in the world, effectively prevented local action in many fields: foreign affairs, honours, defence and so on.

(c) The exercise of the legal powers of veto, reservation of bills and disallowance of statutes, and even the existence of the powers without their exercise, imposed an effective, but diminishing, political control over legislation. While these were legal powers, their exercise depended upon political instruction and did not impair, in any way, the competence of the legislatures.

In addition to these special points, it will be noted that the tendency, not unknown in recent years, to whittle down the scope of grants of power to make laws for the peace, order and good government, whether of Canada or of a province, finds little or no support in the history of the early provincial constitutions.

THAT AGONY IS OUR TRIUMPH

If it had not been for these things, I might have live out my life, talking at street corners to scorning men. I might have die, unmarked, unknown, a failure. Now we are not a failure. This is our career and our triumph. Never in our full life can we hope to do such work for tolerance, for joostice, for man's onderstanding of man, as now we do by an accident. Our words — our lives — our pains — nothing! The taking of our lives — lives of a good shoemaker and a poor fish peddler — all! That last moment belong to us — that agony is our triumph. (Bartolomeo Vanzetti to Judge Webster Thayer at the Sacco-Vanzetti trial)