

Canada's Legal-Constitutional Continuity, 1791-1867

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Sir John A. Macdonald's Ministry: 1864-1873

- Alpheus Todd believed that one of Macdonald's ministries went from 1864-1873
- 1864, not 1867
- This little discovery gave way to a larger idea!



The Succession of Polities

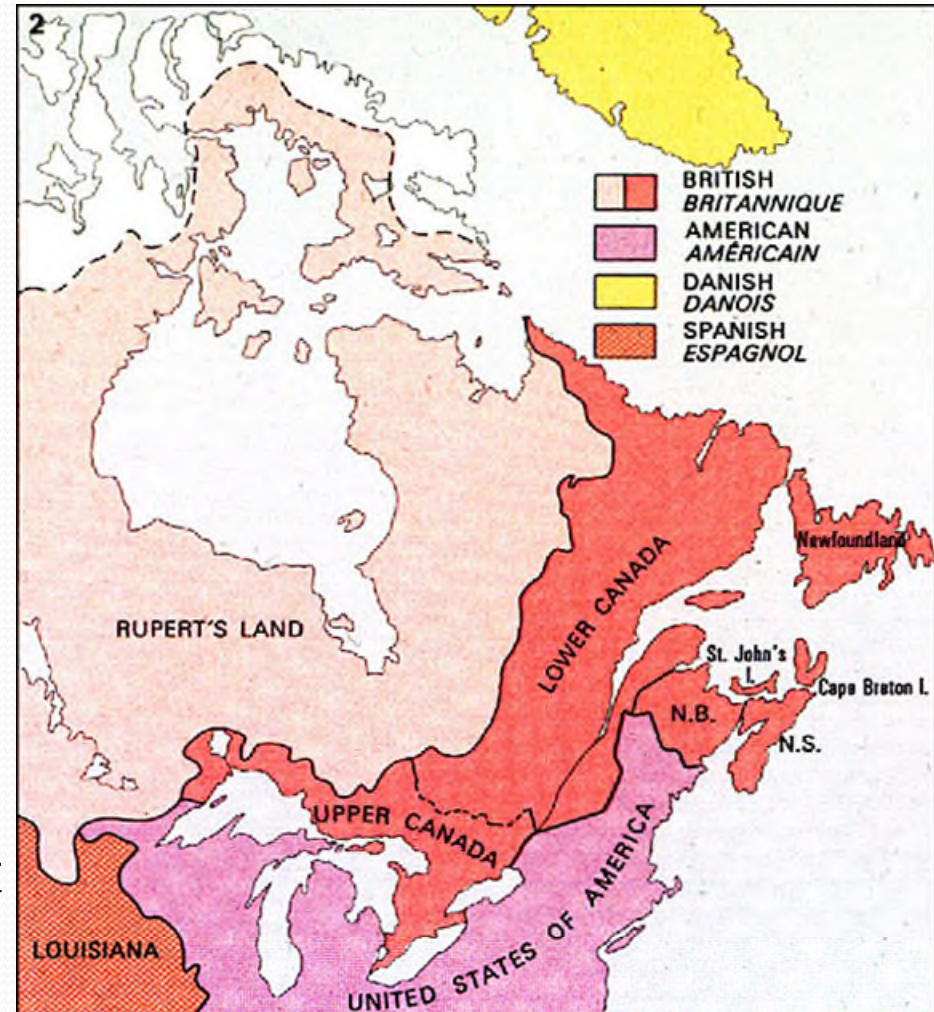
Upper Canada and Lower Canada (1791-1841)

The Province of Canada (1841-1867)

The Dominion of Canada (1867-present)

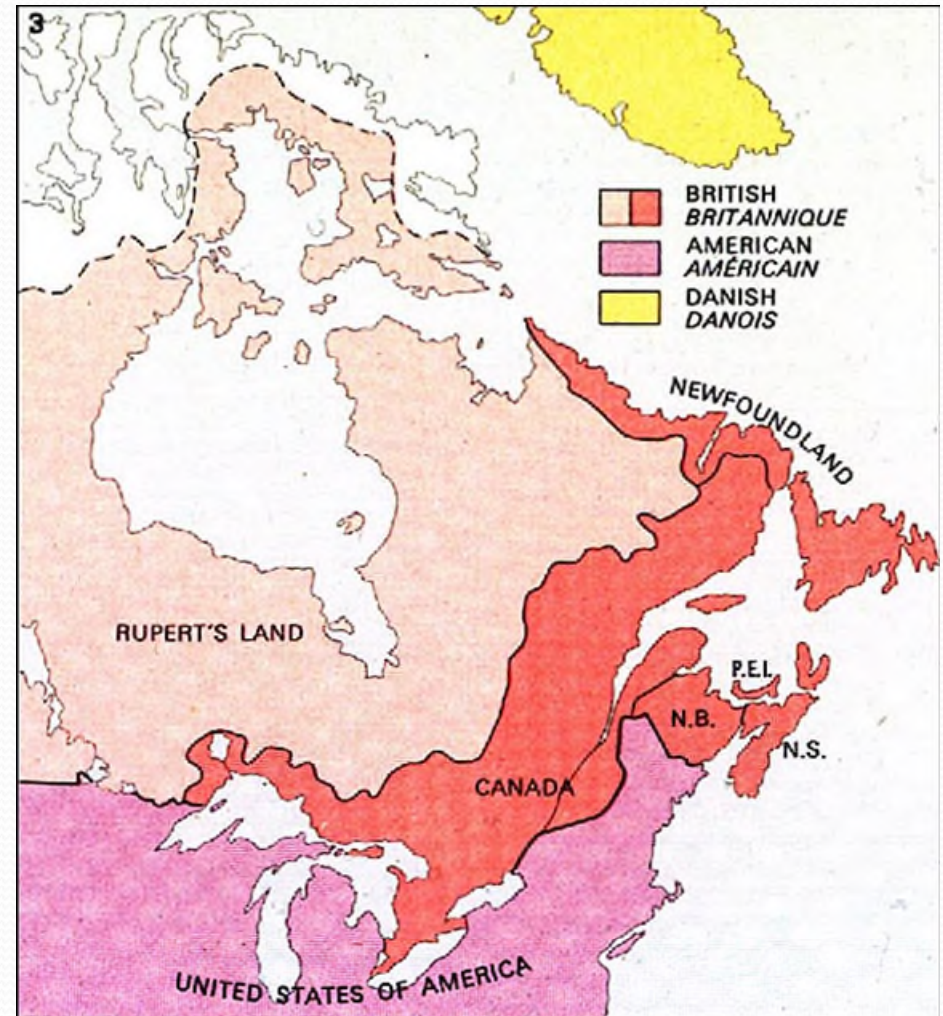
The Canadas, 1791-1841

- *Constitutional Act, 1791* establishes a polity
- Key institutions:
 - Governor General,
 - Lieutenant Governors,
 - Legislative Councils,
 - Legislative Assemblies
- Representative Government



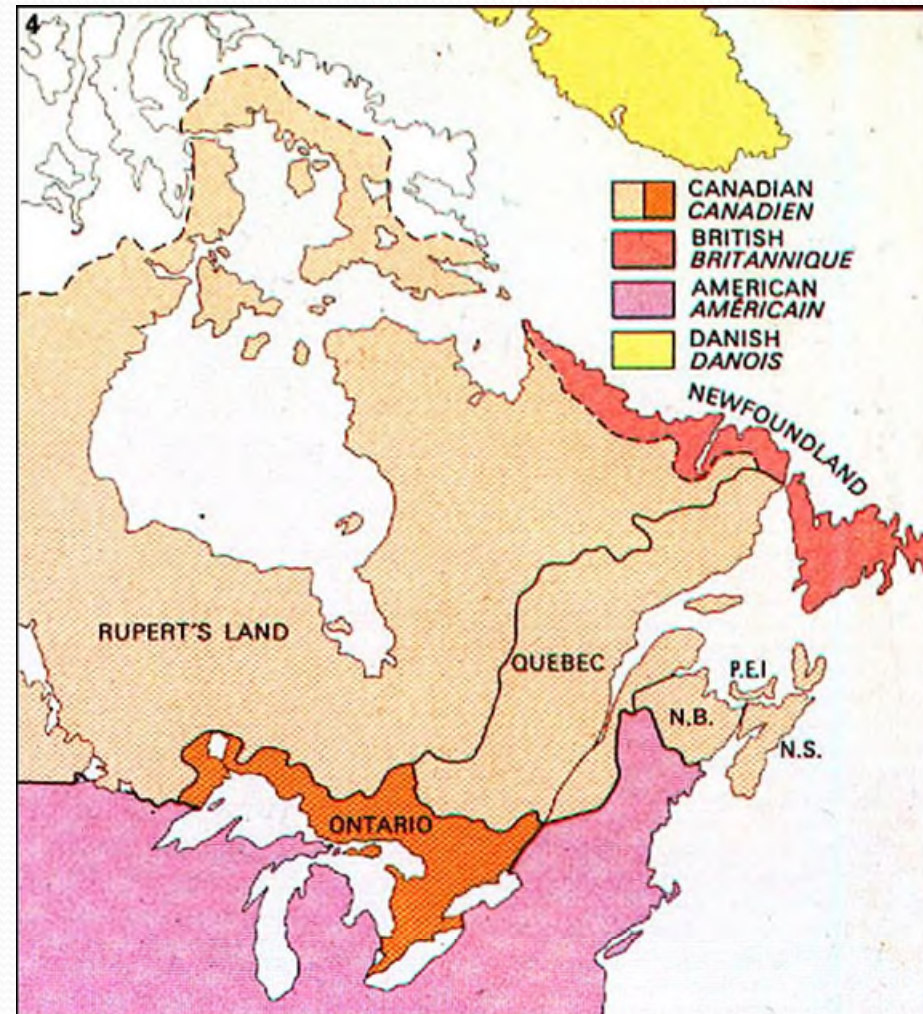
The Province of Canada, 1841-1867

- Province of Canada is the same polity as the Canadas
- Continuity of executive, legislative, and judicial authority
- Responsible Government* emerges, 1841-1848
 - *Double Majority Convention
 - *Consociationalism



Dominion of Canada, 1867-?

- The *British North America Act, 1867*:
 - Transforms the Province of Canada into the Dominion of Canada
 - Restores Upper Canada and Lower Canada as Ontario and Quebec
 - Continues the colonies of New Brunswick and Nova Scotia as provinces
- Responsible Government *without* Double Majority Convention



The Continuity Principle in Statute

- The *Constitutional Act, 1791* establishes institutions
- The *Act of Union, 1841* continues them
- The *British North America Act, 1867* continues them but re-organizes them along a federal division of powers

Constitutional Act, 1791

- Establishes the institutions of Representative Government
- Lays the groundwork for Responsible Government
- 2. "[...] there shall be within each of the said Provinces respectively a Legislative Council, and an Assembly [...]."
- 27: The Legislatures of Upper and Lower Canada must meet at least once every 12 months. Legislative Assemblies are elected every 4 years.
- Governor General and Lieutenant-Governors are appointed by the Colonial Secretary.

The *Act of Union, 1841*

- Continuity of Executive, Legislative, and Judicial Authority:
- 45. [...] all Powers, Authorities, and Functions which [...] are vested in or are authorized or required to be exercised by the respective Governors or Lieutenant Governors of the said Provinces [...] shall [...] be vested in and may be exercised by the Governor of the Province of Canada [...].
- 46. [...] all Laws, Statutes, and Ordinances, which at the Time of the Union of the Provinces of Upper Canada and Lower Canada shall be in force within the said Provinces or either of them, or any Part of the said Provinces respectively, **shall remain and continue** to be of the same Force, Authority, and Effect [...]
- 47. [...] all the Courts of Civil and Criminal Jurisdiction within the Provinces of *Upper* and *Lower Canada* at the Time of the Union of the said Provinces, and all legal Commissions, Powers, and Authorities [...] **shall continue** to subsist [...] in the same Form and with the same Effect [...]."

The Continuity Principle in the *BNA Act*

- The Province of Canada becomes the Dominion of Canada (apart from provincial functions under s.92)
 - Executive: ss. 9, 15
- Upper Canada and Lower Canada were in abeyance and restored as Ontario and Quebec
 - Ss. 6, 136, 138
- Colonies of New Brunswick and Nova Scotia continue as provinces of New Brunswick and Nova Scotia (s.7)
 - Executive: s. 64
 - Legislative: s. 88

The Continuity Principle in the *BNA Act*

- Bifurcates the Province of Canada's functions into the Dominion of Canada and Ontario & Quebec (ss. 91 and 92):
 - Sections 41 and 84: electoral law to Canada and to Ontario & Quebec
 - Section 122: customs and excise of Province of Canada go to the Dominion of Canada
 - Section 141: prisons of Province of Canada go to Ontario and Quebec
 - Section 130: transfer of some of New Brunswick's and Nova Scotia's functions to the Dominion

The Continuity Principle in the *BNA Act*

- Bifurcates the Province of Canada's functions into the Dominion of Canada and Ontario & Quebec (ss. 91 and 92):
 - Sections 139 and 140 preserve the Province of Canada's proclamations and transfer them to either the Dominion or to Ontario or Quebec
 - Section 136 restores to the Great Seals of Upper Canada and Lower Canada to those of Ontario and Quebec
 - Section 138 confirms that "Upper Canada" means "Ontario" and that "Lower Canada" means "Quebec" in legal documents
 - Continuity from 1791 to 1867

The Continuity Principle in the *BNA Act*: Executive Authority

III.—EXECUTIVE POWER.

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

Command
of armed
Forces to
continue to
be vested in

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

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

The Continuity Principle in the *BNA Act*

41. Until the Parliament of *Canada* otherwise provides, all Laws in force in the several Provinces at the Union relative to the following Matters or any of them, namely,—the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the House of Assembly or Legislative Assembly in the several Provinces, the Voters at Elections of such Members, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which Elections may be **continued**, the Trial of controverted Elections, and Proceedings incident thereto, the vacating of Seats of Members, and the Execution of new Writs in case of Seats vacated otherwise than by Dissolution,—shall respectively apply to Elections of Members to serve in the House of Commons for the same several Provinces.

Continuance
of existing
Election
Laws until
Parliament
of Canada
otherwise
provides.

The Continuity Principle in the *BNA Act*

Continuance
of existing
Election
Laws,

84. Until the Legislatures of *Ontario* and *Quebec* respectively otherwise provide, all Laws which at the Union are in force in those Provinces respectively, relative to the following Matters, or any of them, namely,—the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the Assembly of *Canada*, the Qualifications or Disqualifications of Voters, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which such Elections may be **continued**, and the Trial of controverted Elections and the Proceedings incident thereto, the vacating of the Seats of Members and the issuing and execution of new Writs in case of Seats vacated otherwise than by Dissolution,—shall respectively apply to Elections of Members to serve in the respective Legislative Assemblies of *Ontario* and *Quebec*.

The Continuity Principle in the *BNA Act*

4.—*NOVA SCOTIA AND NEW BRUNSWICK.*

88. The Constitution of the Legislature of each of the Provinces of *Nova Scotia* and *New Brunswick* shall, subject to the Provisions of this Act, **continue** as it exists at the Union until altered under the Authority of this Act; and the House of Assembly of *New Brunswick* existing at the passing of this Act shall, unless sooner dissolved, continue for the Period for which it was elected.

Constitu-
tions of
Legislatures
of Nova
Scotia and
New Bruns-
wick.

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

Continuance
of Customs
and Excise
Laws.

The Continuity Principle in the *BNA Act*

129. Except as otherwise provided by this Act, all Laws in force in *Canada, Nova Scotia, or New Brunswick* at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall **continue** in *Ontario, Quebec, Nova Scotia, and New Brunswick* respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of *Great Britain* or of the Parliament of the United Kingdom of *Great Britain and Ireland*,) to be repealed, abolished, or altered by the Parliament of *Canada*, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

Continuance
of existing
Laws,
Courts, Offi-
cers, &c.

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

Transfer of
Officers to
Canada.

The Continuity Principle in the *BNA Act*

139. Any Proclamation under the Great Seal of the Province of *Canada* issued before the Union to take effect at a Time which is subsequent to the Union, whether relating to that Province, or to *Upper Canada*, or to *Lower Canada*, and the several Matters and Things therein proclaimed, shall be and **continue** of like Force and Effect as if the Union had not been made.

As to Issue
of Proclama-
tions before
Union, to
commence
after Union.

140. Any Proclamation which is authorized by any Act of the Legislature of the Province of *Canada* to be issued under the Great Seal of the Province of *Canada*, whether relating to that Province, or to *Upper Canada*, or to *Lower Canada*, and which is not issued before the Union, may be issued by the Lieutenant Governor of *Ontario* or of *Quebec*, as its Subject Matter requires, under the Great Seal thereof; and from and after the Issue of such Proclamation the same and the several Matters and Things therein proclaimed shall be and **continue** of the like Force and Effect in *Ontario* or *Quebec* as if the Union had not been made.

As to Issue
of Proclama-
tions after
Union:

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

Penitentiary.

Continuity from the Province to the Dominion of Canada in Practice

- Executive Authority and the Macdonald Ministry
- Legislative Authority
- Legislative Council of Canada to the Senate of Canada

Continuity of the Executive in Practice

- The civil service, the Governor General, and the Macdonald Ministry itself continued to the Dominion of Canada
 - Governor General Monck
 - Prime Minister Macdonald and 9 of the 13 cabinet portfolios
 - Most Deputy Ministers
 - The Militia
 - All civil service departments that were not transferred to Ontario and Quebec as per s.92
- Alpheus Todd is right: Macdonald's Ministry began in 1864

Timeline

- | | | | |
|------|---------------------------------|------|--|
| I. | 22 May 1867 | I. | The Queen-in-Council sets 1 July as the coming into force of the <i>British North America Act</i> |
| II. | 24 May 1867 | II. | Colonial Secretary re-commissions Lord Monck as Governor General of Canada |
| III. | 24 May 1867 | III. | Governor General Monck formally commissions Sir John A. Macdonald as the Prime Minister of the Dominion of Canada (takes effect on 1 July) |
| IV. | 1 July 1867 | IV. | Sir John A. Macdonald advises GG Monck to appoint his cabinet and create their departments |
| V. | 17 August-
20 September 1867 | V. | 1 st General Federal Election |
| VI. | 6 November 1867 | VI. | Meeting of 1 st Parliament of Canada |

Continuity of Ministers

Minister	Cabinet in the Province of Canada	Cabinet in the Dominion of Canada
John A. Macdonald	Premier and Attorney General for Upper Canada: 30 March 1864-30 June 1867	Prime Minister and Attorney General: 1 July 1867-5 November 1873
Hector Louis Langevin	Solicitor General for Lower Canada: 30 March 1864-30 June 1867	Secretary of State of Canada: 1 July 1867-7 December 1869
Alexander Tilloch Galt	Minister of Finance: 30 March 1864-30 June 1867	Minister of Finance: 1 July 1867-7 November 1867
William Pierce Howland	Postmaster General: 24 November 1864-30 June 1867	Minister of Inland Revenue: 1 July 1867-14 July 1868
Alexander Campbell	Commissioner of Crown Lands: 30 March 1864-30 June 1864	Postmaster General: 1 July 1867-30 June 1873
Jean-Charles Chapais	Commissioner of Public Works: 30 March 1864-30 June 1867	Minister of Agriculture: 1 July 1867-15 November 1869
Adam J.F. Blair	President of the Executive Council and Minister of Agriculture: 3 January 1866	President of the Privy Council: 1 July 1867-29 December 1867
William McDougall	Provincial Secretary: 30 June 1864-30 June 1867	Minister of Public Works: 1 July 1867-27 September 1869
George-Etienne Cartier	Premier and Attorney General for Lower Canada: 30 March 1864-30 June 1867	Minister of Militia and Defence: 1 July 1867-20 May 1873
Sir N.F. Belleau	Receiver General: 7 August 1865-30 June 1867	
J. Cockburn	Solicitor General for Upper Canada: 30 March 1864-30 June 1867	
Samuel Leonard Tilley		Minister of Customs: 1 July 1867 - 21 February 1873
Peter Mitchell		Minister of Marine and Fisheries: 1 July 1867-5 November 1873
Edward Kenny		Receiver General: 4 July 1867 - 15 Nov. 1869
Adams George Archibald		Secretary of State for the Provinces: 1 July 1867 - 30 April 1868

Continuity of Deputy Ministers

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

Continuity of the Legislature

- Victoria Building itself
 - Legislative Assembly became the House of Commons
 - Legislative Council Chamber became the Senate
- Legislative Councillors of Canada became Senators for Ontario and Quebec
- Alpheus Todd remained as Librarian of Parliament



Conclusion: “Canada” Began in 1791

- The Canadas and the Province of Canada were both necessary failures

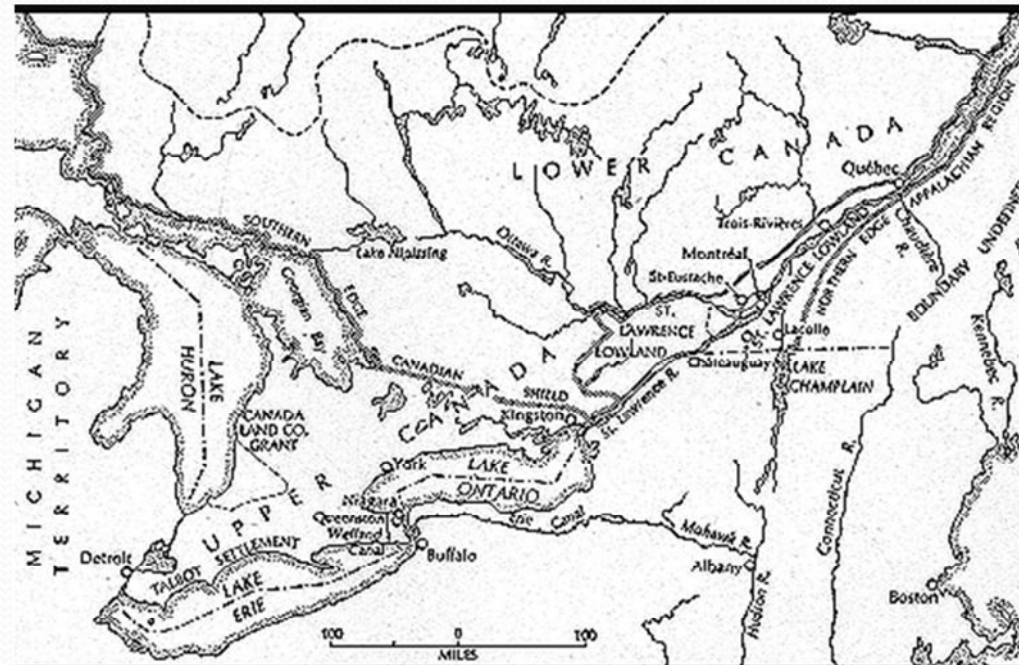
Failed and Forgotten History, 1791-1867

- The Canadas and the Province of Canada are both seen as failures, which allowed them to be forgotten
 - Rebellions of 1837
 - Migrating capital city of the Province of Canada (1841-1866)
 - Two legislatures burn down (one by arson, the other by accident)
 - Sectional Equality leads to consociationalism but also gridlock



The Province of Canada's Migrating Capital City

1. Kingston: 1841-1844
2. Montreal: 1844-1849
3. Toronto: 1850-1851
4. Quebec City: 1852-1854
5. Toronto: 1855-1859
6. Quebec City: 1860-1865
7. Ottawa: 1866-1867



Failed & Forgotten History, 1791-1867

- Only Quebec has given Lower Canada and the Province of Canada their due credit
- But Ontario and Ottawa completely ignores Upper Canada and the Province of Canada
- None of the official records are easy to find online; neither Queen's Park nor ParlInfo includes them
 - But the *Publication of Statutes Act* would suggest that the Parliament of Canada should make more of an effort
 - A classic Canadian joint initiative between Ottawa, Ontario, and Quebec?

Canada Is Older Than 150

- Representative Government and institutions began in 1791
- Responsible Government emerged between 1841 and 1848
- The Dominion of Canada's first Ministry began in 1864
- We celebrate the 150th anniversary of Confederation and the *BNA Act*
- Canada as a polity and constitutional government are far older, at 226!