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THE INTRODUCTION OF CABINET GOVERNMENT IN CANADA.

"There shall be a council to aid and advise in the government of Canada, to be styled the Queen's Privy Council for Canada, and the persons who are to be members of that council shall be from time to time chosen and summoned by the governor-general and sworn in as privy councillors, and members thereof may be from time to time removed by the governor-general."

(B.N.A. Act, 1867, Sec. 11).

It has often been remarked by constitutional authorities that the British North America Act made no express provision for the operation of the principle of responsible government in the new Dominion of Canada, but left the composition of the executive council and its relations with the Governor-General and Parliament to be determined by the usages already established in the several provinces. The explanation of this omission is not far to seek. From the beginning of the colonial system the character and conduct of the executive branch of government had been regulated by the Commissions and Instructions issued to the Governors of the provinces, as modified from time to time by despatches from the Secretary of State for the Colonies, and to a less extent by the indirect influence of custom and usage. In the Act of Union of 1840, the latest of the statutory constitutions conferred on Canada prior to federation, there is only one explicit provision relating to the Executive Council, and this clause merely enacts that powers, authorities, and functions, which under previous legislation had been conferred upon the Governor either with or without the advice and consent of the Executive Council as the case might be, were to continue to be so exercised under the Act of Union in so far as the same were not repugnant to or inconsistent with the terms of that Act.¹ The composition of the Executive Council, the tenure of

¹ The Union Act, 1840, 3 & 4 Victoria, ch. 35, sec. XLV.

office of its members, and the relations of the Council to the Governor and Legislature were regulated as before by the Commission and Instructions issued to the Governor, by official despatches, and by colonial custom. Moreover, in the succeeding period, when the principles of responsible government were introduced into Canada, this important constitutional change was made without any formal alteration of the written constitution, but by the conduct of Governors acting under the authority of their Commissions and Instructions, as modified by despatches from the Secretary of State. As Lord Durham had suggested in his Report in 1839, the principles of responsible government might be introduced "by a single despatch containing such instructions."² He declared:

It needs no change in the principles of government, no invention of a new constitutional theory, to supply the remedy which would, in my opinion, completely remove the existing political disorders. It needs but to follow out consistently the principles of the British Constitution, and introduce into the Government of these great Colonies those wise provisions, by which alone the working of the representative system can in any country be rendered harmonious and efficient . . . I would not impair a single prerogative of the Crown; on the contrary, I believe that the interests of the people of these Colonies require the protection of prerogatives which have not hitherto been exercised. But the Crown must, on the other hand, submit to the necessary consequences of representative institutions; and if it has to carry on the Government in unison with a representative body it must consent to carry it on by means of those in whom that representative body has confidence.³

It is evident from this and other passages in the Report that what Lord Durham had in mind under the description of responsible government was the application to colonial government of the principles of the cabinet system as then understood in Great Britain, with such reservations and qualifications as were implied in the colonial status of the provinces, and in the dual position of the Governor as an officer of the Imperial Government and the executive head of the provincial administration.⁴ It is equally clear that when the provinces of Upper and Lower Canada received their

² Lord Durham's Report. Lucas, Vol. II. Text, p. 280.

³ *Ibid.* p. 278.

⁴ *Ibid.* pp. 280-282 and 327.

"Nor can I conceive that it would be found impossible or difficult to conduct a Colonial Government with precisely that limitation of the respective powers which has been so long and so easily maintained in Great Britain."

"The responsibility of the United Legislature of all officers of the Government, except the Governor and his Secretary, should be secured by every means known to the British Constitution. The Governor, as the representative of the Crown, should be instructed that he must carry on his government by heads of departments, in whom the United Legislature shall repose confidence, and that he must look for no support from home in any contest with the Legislature, except on points involving strictly Imperial interests."

new constitution in 1840, the Colonial Office did not adopt Lord Durham's suggestions regarding the extension of parliamentary or cabinet government to Canada. This is confirmed by the attitude and conduct of the first Governors who served under the Act of Union. Lord Sydenham, as has often been remarked, was his own Prime Minister.⁵ He had no intention of surrendering the government into the hands of the Executive Council.⁶ Sir Charles Bagot who followed him was the first Governor who appeared to recognize a close resemblance between his Executive Council and a cabinet of responsible advisers such as then existed in Great Britain. His successor, Lord Metcalfe, in his first confidential despatch to the Colonial Secretary, made this significant comment on the relations between Sir Charles Bagot and the Executive Council:

I am not aware that any great change took place during that period of the administration of Sir Charles Bagot which preceded the meeting of the legislature, but this event was followed by a full development of the consequences of making the officers of the government virtually dependent for the possession of their places on the pleasure of the representative body . . . From that time the tone of the members of the council and the tone of the public voice regarding responsible government has been greatly exalted. The Council are now spoken of by themselves and others generally as the "ministers," the "administration," the "cabinet," the "government," and so forth.⁷

Such pretensions Metcalfe was determined to discourage. He said:

If you mean that the Governor is to have no exercise of his own judgment in the administration of the government and is to be a mere tool in the hands of the Council then I totally disagree with you. That is a condition to which I can never submit and which Her Majesty's Government, in my opinion, never can sanction.⁸

When responsible government was conceded to Canada during the administration of Lord Elgin, it is doubtful if either the Colonial Office or the Governor envisaged the full application of the cabinet system then prevailing in Britain, although Elgin went much further in this direction than any of his predecessors. Nevertheless, despite temporary reverses, the procedure regulating the relations between the Executive Council and the Legislature made significant progress towards the conventions of the cabinet system during the period 1840-1849. Sydenham, in forming his Executive Council, made it a general rule that the individuals composing it should be members

⁵ Statutes, Treaties and Documents of the Canadian Constitution. Kennedy, p. 453.

⁶ Charles, Lord Metcalfe, Vol. II. Kaye pp. 331-332. Also Independence Papers, Vol. II. Ewart, p. 434.

⁷ *Ibid.*

⁸ Charles, Lord Metcalfe, Vol. II. Kaye, pp. 478-480. Also Independence Papers, Vol. II. Ewart, p. 449.

of the popular branch of the Legislature⁹ Bagot recognized that members of the Executive Council must enjoy the confidence of the representative body and must tender their resignations when that confidence was withdrawn.¹⁰ Elgin's action in regard to the Rebellion Losses Bill established the further point that the Governor would not refuse his assent to a measure of purely colonial concern when such a bill was introduced by his ministers as a government measure, and received the necessary approval of both chambers of the Legislature.¹¹ All these precedents except the last, however, were concerned primarily with the relations between the Executive Council and the Legislature. This development touched only one side, as it were, of the cabinet system. The vitally important relations between the Executive Council and the Governor were still regulated by the explicit terms of Commissions and Instructions which continued to give to the Governor an active voice in the conduct of government, subject only to the interpretation he might put upon his instructions with the subsequent approval of the Secretary of State for the Colonies.

In tracing the further development of the cabinet system in Canada, one cannot do better than accept the guidance of Walter Bagehot in his penetrating analysis of the English Constitution. While dealing with the delicate organization of the executive branch of government, Bagehot emphasized for the first time the importance of the distinction between what he termed the "dignified" and the "efficient" parts of the English Constitution. He declared:

The Queen is only at the head of the dignified part of the constitution. The prime minister is at the head of the efficient part.¹²

And again:

To state the matter shortly the sovereign has, under a constitutional monarchy such as ours, three rights—the right to be consulted, the right to encourage, the right to warn. And a King of great sense and sagacity would want no others.¹³

It appears from these and other pertinent passages in Bagehot's study of the English Constitution that the distinction between the "dignified executive" (The Sovereign) and the "efficient executive" (The Cabinet) was a vital principle of the cabinet system. Cabinet government meant the withdrawal of the Sovereign from the active conduct of affairs, leaving executive decisions to the group of min-

⁹ Kaye, *op. cit.* pp. 331-332.

¹⁰ *Ibid.*

¹¹ Elgin's Letters and Journals. Walrond, p. 127.

¹² The English Constitution. Bagehot, p. 12.

¹³ *Ibid.* p. 75.

isters who enjoyed the confidence of the House of Commons, and who must assume entire responsibility for acts done in the name of the Crown. Thus the Queen became the formal executive and the head of the dignified part of the constitution, while the cabinet became the real executive and the prime minister the head of the efficient part of the constitution. Now the gradual extension of the cabinet system to Canada may be studied with the greatest enlightenment along the course of development here suggested. The concession of responsible government involved that the Governor must carry on the executive branch of government with the assistance of ministers who enjoyed the confidence of the representative branch of the Legislature. But the degree of responsible government was conditioned by the area within which it was permitted to operate, and its reality was conditioned by the extent to which the Governor continued to exercise an active voice in the conduct of the administration. It follows therefore that the development of the cabinet system in Canada during the period subsequent to the grant of responsible government is to be traced along the line of the gradual withdrawal of the Governor as representative of the Crown from the "efficient part" of the constitution, and by the gradual expansion of the area within which acts done in the name of the Crown in Canada were determined by a responsible Canadian ministry. It is the purpose of this article to deal particularly with the changing relations between the Governor and the Executive Council, and to reveal the gradual assimilation of the executive branch of government in Canada to the organization and conventions of the cabinet system in Great Britain. Such a task is rendered more difficult, though not less congenial to a student of constitutional history, by the fact that the growth of responsible government in the colonies must be sought in the common fields of convention and precedent rather than in the restrictive enclosures of legal enactment. In Britain the principles of cabinet government had never found a place in the written chapters of the constitution. To this circumstance, even before the illuminating studies of Bagehot, Anson, and Dicey, was attributed much of the flexibility and efficiency of the English Constitution. The liberty of the subject might be protected by a Magna Charta, a Bill of Rights, or a Habeas Corpus Act, but the machinery of government must be left as free as possible in its operation, subject only to the ever-watchful and all-powerful guidance of the elected representatives of the people. Thus, in Britain, and later in the Dominions, the real executive, or as Bagehot describes it "the efficient part of the constitution" has been free to adapt

itself by convention to variations of circumstance and changing conditions, while sudden and drastic changes have been as effectively arrested by an accretion of tradition which already attached to the cabinet system when it was adapted by successive stages to colonial administration.

In the period between 1849 and 1867, the former date being generally accepted as marking the concession of responsible government, there is evidence to suggest a gradual change in the relations between the Governor and the Executive Council in Canada. This change was not authorized by the Commissions and Instructions issued to the Governors during this period. It came about as a result of practical convenience, and found its warrant in the interpretation placed upon these Commissions and Instructions in consequence of the earlier grant of responsible government. The effect of the new practice was to detach the Governor from active participation in the deliberations of the Executive Council and to give to that body more of the character of a cabinet of ministers under the presidency of one of its own number. The Commissions and Instructions issued to the Governors at this time assumed the presence of the Governor at meetings of the Council, and assumed also that he was not bound by the advice of his ministers except in such cases where legislation explicitly called for action by the Governor-in-Council, or by the Governor with the advice and consent of the Council. Todd expresses the view that when responsible government was formally introduced into a colony, the Executive Council was not assembled, as under the old system, for the purpose of consultation and discussion with the Governor, but that ministers shall be at liberty to deliberate on all questions of a ministerial policy in private, after the example of the privy council in England; or that the executive council, privy council, or by whatsoever name the official council of ministers is known, shall only be convened for purposes required by law, or when it may be necessary to hold consultations unconnected with party politics.¹⁴

It is clear from the records, however, that Lord Elgin did attend meetings of the Council after responsible government was conceded, and that he was actively concerned in its decisions.¹⁵ Todd states in a footnote appended to the paragraph just quoted that:

In the early days of responsible government in Canada, the governor used to debate with his ministers in council; but this irregular proceeding was soon abandoned.¹⁶

¹⁴ Parliamentary Government in the British Colonies. Todd, p. 47.

¹⁵ Walrond, *op. cit.* p. 116.

¹⁶ Todd, *op. cit.* at p. 47.

The precise date of the abandonment of the earlier practice is perhaps a matter only of antiquarian interest. It is certain, however, that Elgin continued to meet with his Council after the introduction of responsible government, and it is equally certain that a few years later when Sir Edmund Head was Governor, the practice was quite well established that the Executive Council should meet in private and send its decisions to the Governor for his approval, thus approximating the procedure which governed the relations between the Queen and the cabinet in Great Britain.

The evidence on this point during the regime of Sir Edmund Head is contained in a despatch which deserves to be quoted in full because of the light it throws on the development which had taken place in the preceding few years. The explanation of the despatch lies in a circular letter which was sent to colonial Governors by Henry Labouchere, Secretary of State for the Colonies, directing their attention to an opinion given by Law Officers of the Crown on a point raised in the Bahamas regarding the necessity of the presence of the Governor at meetings of the Executive Council to give legality to orders issued under the authority of the Governor-in-Council, etc.¹⁷ The reply sent by Sir Edmund Head to this despatch is as follows:

In reply to your circular of January 30, marked confidential, I have to report that by the seventh clause of the Royal Instructions, addressed to me, I am empowered to appoint a member of the Executive Council to preside in my absence. This member is styled "President of the Committees of Council"—The Governor himself being considered as the President of the Council acting as such. There appears therefore no doubt that my instructions contemplate the occasional absence of the Governor from the Council.

Our ordinary practice in this Colony is as follows:—The minutes are regularly discussed in the absence of the Governor, and when drawn by the clerk of the Council are countersigned by the President of the Committees. They are then laid before the Governor, who, if he approves, writes the word "approved" with his initials and the date on the margin of the printed heading prefixed to each set or bundle of minutes. This is constantly done in Council; often however it is done by the Governor either in his own room at the Council office or at home. If he entertains any objection to a minute or recommendation of the Council, he either discusses it in Council before approving of it, or he takes it off the file and returns it for reconsideration by the Committee through the President or one of the members.

When responsible government is established, it is, in my opinion, most inexpedient as a general rule that the Governor should be present during the discussion in Council of particular measures. He is at liberty at all times to go into Council and discuss any measures which he or the Council thinks require it, but his presence, as a regular and indispensable rule, would check all freedom of debate and embarrass himself as well as his advisers.

¹⁷ Secret and Confidential Despatches. G. 180 B. No. 26 folio 60.

With reference to the legality of orders or minutes assented to by the Governor when not present in Council, I have consulted the Attorney-General for Canada West, who reports as follows:

"By our Interpretation Act, 12 Vic. c. 10, the words 'Governor in Council' are to be held to mean 'Governor acting by and with the advice of the Executive Council' so that under the within opinion His Excellency need not be present"

Sgd. John A. Macdonald.

I therefore see in the present practice nothing which is at variance either with the Law or the Royal Instructions.¹⁸

Although the language of this despatch is vague in some particulars, it appears that the practice under responsible government had led to certain quite definite results. 1st. The ordinary transaction of executive business was conducted by the Council as a Committee under its own President and in the absence of the Governor. 2nd. The Governor as a necessary consequence was withdrawing gradually from the "efficient part of the constitution" while retaining and doubtless enhancing his position as head of the "dignified part of the constitution." This, indeed, was the very development which had been foreseen by Elgin at the close of his long and fruitful period of office. Writing to Sir George Grey, the Colonial Secretary, in 1854, Lord Elgin made this shrewd comment on the trend of events in Canada under responsible government:

As the Imperial Government and Parliament gradually withdraw from legislative interference and from the exercise of patronage in Colonial affairs, the office of Governor tends to become, in the most emphatic sense of the term, the link which connects the Mother Country and the Colony, and his influence the means by which harmony of action between the local and Imperial authorities is to be preserved. It is not, however, in my humble judgment, by evincing an anxious desire to stretch to the utmost constitutional principles in his favour, but on the contrary, *by the frank acceptance of the conditions of the Parliamentary system*, that this influence can be most surely extended and confirmed.¹⁹

The account given by Sir Edmund Head of the relations between himself and his Council may be taken as an accurate description of the manner in which the executive branch of government was conducted in Canada up to the eve of Federation. Indeed, it would be true to say that the detachment of the Governor from active participation in the deliberations of the Council tended to become more complete during the interval which elapsed between Head's despatch and the union of the British North American provinces in 1867. This tendency, it should be noted, was neither authorized nor en-

¹⁸ *Ibid.*, folio 57.

¹⁹ Kennedy, *op. cit.* p. 515.

couraged by the Commissions and Instructions issued to Sir Edmund Head and his successor Lord Monck.²⁰ It originated in practical convenience and in a broad interpretation of the implications of responsible government. It affords an excellent illustration in the colonial sphere of the manner in which custom and usage, operating within the structure of representative institutions, have forged the conventions of the cabinet system.

The constitution given to the Dominion of Canada in 1867 was the first written constitution in British North America which followed the introduction of responsible government. Had it not been for the considerations already mentioned, one might have expected that the British North America Act in its provisions for the executive branch of government would have marked a departure from the constitution given to the United Provinces of Upper and Lower Canada in 1840. As a matter of fact, there is no significant change in the treatment of the executive in the two statutes, and the only formal alteration is in the title of the Queen's Privy Council for Canada which replaces the old title of Executive Council which was applied to the Governor's advisers in the Act of Union and in earlier constitutions.²¹ Certain results followed this change of title which were not introduced ipso facto by the language of the British North America Act, but are of more than passing interest in the study of the growth of the cabinet system in Canada. In the old Executive Council, resignation from office carried with it no continuing title of precedence. Todd writes:

Hitherto it has not been deemed expedient to retain ex-cabinet ministers on the list of colonial executive councils, merely as honorary members and in analogy to imperial practice. An organization resembling the imperial privy council, and liable to be convened on special occasions, or for ceremonial purposes, is not ordinarily required in colonial institutions, which, at the outset at least, should be as simple and practical as possible. But, in the Dominion of Canada the practice prevails that the Queen's privy council for Canada, the members of which are appointed by the governor-general "to aid and advise in the government" and are removed at his discretion, are nevertheless permitted to retain an honorary position in the council after their retirement from the cabinet. By command of the Queen "members of the privy council not of the cabinet" have a special precedence within the Dominion and are permitted to be styled "Honourable" for life.²²

This added dignity conferred upon the Canadian executive after 1867 was due to the combined efforts of Sir John Macdonald and

²⁰ Instructions to Sydenham, Metcalfe, Head, 1839-1854. G. 183, folio 372.

²¹ Under the Act of Union, 1840, the Executive Council was provided for in the Commissions and Instructions issued to the Governors. In the B.N.A. Act, 1867, the Queen's Privy Council for Canada is provided for by sec. 11 of the Constitution.

²² Todd op. cit. p. 54.

Lord Monck. Indeed, if these chief collaborators in the federation movement had attained their real objective the Privy Council of Canada would have borne an even closer resemblance to that of Great Britain. The question of the status of Canadian privy councillors was raised very soon after the Dominion came into being as a result of the resignation of Hon. Adams Archibald as Secretary of State for the Provinces in the first government formed by Macdonald. Mr. Archibald, acting in accordance with the previous practice in regard to executive councillors tendered his resignation both as Secretary of State and as a member of the Privy Council. Lord Monck at once perceived the importance of the issue thus raised, and in a letter to Macdonald on Oct. 11, 1867, made it clear that in his view the new designation given to the Canadian executive in the British North America Act ought to carry with it a large measure of the dignity and prestige which attached to the Privy Council of Great Britain. He said:

My own wish would be to treat the Privy Council of Canada both as to *title* and *tenure* exactly as the Privy Council of England and Ireland are dealt with. I have stated this view very strongly in conversations with as well as in a formal dispatch to the Duke of Buckingham, but up to this time I have had no intimation of his views on the subject. In the meantime I accept Mr. Archibald's resignation of his office of Secretary of State *only*. He remains a member of the Privy Council unless he shall be prevented by some future rule of the Colonial Office which I don't expect.²³

Macdonald was equally insistent on this point. In a letter written to Mr. Archibald on the day following receipt of Lord Monck's communication, he supported the position taken by the Governor-General. He wrote:

It is of some importance that you should retain your office as Privy Councillor because I believe that my suggestion that the title of Right Honourable should appertain to the office will be adopted, and it is a distinction that your family would naturally desire you should have.²⁴

As events proved, the imperial authorities were not prepared to go the full length of accepting the recommendations of Lord Monck and Sir John Macdonald as to the title to be conferred upon members of the Canadian executive, but by the special table of precedence for Canada, approved by Her Majesty in 1868, the tenure of Canadian privy councillors was made to accord with the life tenure of the Queen's privy councillors in Great Britain.²⁵ Thus it came to pass that in Canada, as in Britain, the cabinet or ministry of the

²³ Macdonald Papers, Governor-General's Correspondence, Vol. 2. Monck, 1867-1868, p. 120.

²⁴ Macdonald Letter Book, Vol. 11, p. 113.

²⁵ Todd, op. cit. p. 320, footnote.

day has become in fact a committee of the Privy Council, composed of those members of the Council who have been invited by the Prime Minister to act with him as the responsible advisers of the Crown, with the approval and concurrence of the House of Commons.

The new title and dignity conferred upon the Canadian executive through its designation as the Queen's Privy Council for Canada would appear to suggest that the establishment of the Dominion had led to the recognition of a new relationship between the Governor-General and the executive council in conformity with the conventions of the cabinet system in Great Britain. There is no evidence of such a change, however, in the Commissions and Instructions issued to the Governors-General in the years immediately following the passage of the British North America Act. In the Instructions given to Sir John Young, and to his successor Lord Dufferin, the Governor-General, as the representative of the Queen, was given an active voice in the determination of policy, was assumed to summon and preside over meetings of the Privy Council, and in certain contingencies was authorized to act in opposition to advice offered by the majority of its members. These powers and functions attributed to the Governor under his Commission and Instructions were wholly inconsistent with the conventions of the cabinet system in Great Britain, and made the Governor not only the formal executive as representative of Her Majesty, but also an integral part of the real executive of the Dominion.²⁶ In view of his persistent advocacy of Canadian autonomy, and his desire to secure for Canada the title and status of Kingdom at the London Conference, it seems curious that Macdonald permitted this outdated form of Commission and Instructions to pass without protest. Doubtless the explanation is to be found in the fact that Lord Monck and Sir John Young interpreted their Instructions, as Sir Edmund Head had done, in the spirit of responsible government, and did not attempt, therefore, to take an active part in the proceedings of the Privy Council. Nevertheless, it was not surprising that such a vigorous personality as Lord Dufferin should have concluded from the letter of his Instructions that he was entitled to attend meetings of the Privy Council in Canada, and might reasonably expect his ministers to place no obstacle in the way of this interpretation of his duty. In a letter addressed to Sir

²⁶ Macdonald Papers, Governor-General's Correspondence. Vol. 5. Dufferin, 1872-73.

See also *The Mechanism of the Modern State*, Marriott, Vol. II. p. 68.

"So long as the Sovereign presided over meetings of the Cabinet some share of responsibility for decisions taken thereat must necessarily have attached to his person. The last English Sovereign who regularly followed this practice was, as we have seen, Queen Anne."

John Macdonald soon after his arrival in Canada, Lord Dufferin writes:

As I am to have the pleasure of seeing you to-morrow, I would ask you to consider a little what habit it would be advisable for me to adopt as regards attending Council.²⁷

Some months later he returns to the same subject in a more formal and deliberate communication. He raises the issue directly by saying that he was not quite satisfied with his position in regard to the Privy Council. He continues:

You have seen enough of me to feel convinced that I have not the slightest desire to fidget with the administration of the country or to interfere in any way with the free action and official responsibility of my Ministers—in fact all my instincts are entirely constitutional, and my great desire is to enhance the prestige and authority of Canadian statesmen, and to teach the Canadian people to believe in and to be proud of their public men: consequently I am rather inclined to favour than otherwise, the tendency which is taking place of the Governor-General's council to transmute itself into the Prime Minister's cabinet, at whose deliberations it would be often inconvenient for the head of the Executive to be present;—but on the other hand, I do not think it would be desirable that the Governor-General should allow his right of presiding over his Council to lapse altogether into desuetude. At all events the subject is sufficiently important for me to desire to have the matter thoroughly faced and considered, and if at your leisure you could favour me with a Memorandum as to the practice you would recommend, I should esteem it a favour.²⁸

Confronted directly with this request, Macdonald fell back upon a compromise which was suggested by the existing practice in Great Britain, where a distinction was drawn between meetings of the cabinet as such for the consideration of matters of government policy and party strategy, and meetings of the Privy Council, which were held ordinarily at Buckingham Palace for the formal approval of Orders-in-Council.²⁹ In a letter dated Feb. 17, 1873, Macdonald writes:

I think the time is arrived when the form of our Orders-in-Council should be modified and a new practice introduced. I shall bring the matter up in Council and then take your Excellency's pleasure upon it before reducing it to writing. My idea is to have two descriptions of papers: 1. Orders-in-Council. 2. Minutes of Council. In adopting the first (or O-C's) the Governor-General should be present or supposed to be present. The 2nd or Minutes of Council will be merely conclusions of the Cabinet, and are submitted for your sanction as advice tendered by your responsible advisers.³⁰

²⁷ *Ibid.* p. 77.

²⁸ *Ibid.* p. 178.

²⁹ See Marriott, *op. cit.* Vol. 11, Appendix A, for distinction between the Form of Summons to a Privy Council and to a meeting of the Cabinet.

³⁰ Macdonald Letter Book, Vol. 19, pp. 786-787.

This proposal appeared to offer an excellent solution of the question raised by Lord Dufferin. It met his wishes so far as they could be met in a reasonable way. It did no violence to the acknowledged principles of responsible government. And by the adoption of the practice followed in Great Britain, it appeared to identify the Canadian executive even more closely with its prototype at Westminster.

Despite the arguments in favour of its adoption, the suggestion of Macdonald was never carried into effect. An examination of the correspondence between Dufferin and Macdonald fails to offer any explanation of its rejection. It is quite possible that some of Macdonald's colleagues may have advanced objections to the plan, or it may be that Dufferin himself decided it would be better to follow the example set by his immediate predecessors. Moreover, owing to the abundance of detail which was dealt with by Council in Canada rather than by ministerial regulations, the task of separating Orders from Minutes may well have presented practical difficulties sufficiently vexatious to cause Macdonald to recede from his original proposal. It is evident from the records that no visible change in Privy Council procedure was inaugurated at this time, and neither Macdonald nor Dufferin referred to the matter again in their official correspondence. The Canadian Pacific question soon took the centre of the political stage, and the resignation of the Macdonald government in the same year rendered further progress impossible so far as Macdonald himself was concerned. As events were soon to prove, the relations of the Governor-General to the Privy Council in Canada were to be dealt with in a more direct and satisfactory manner by the succeeding administration.

In the year 1875 it was decided by the Colonial Office to issue on behalf of each colony of the empire, letters patent constituting permanently the office of Governor, and providing that all future incumbents of this office should be appointed by special Commission, under the royal sign-manual and signet, to fulfil the duties thereof, under the general authority and directions of the letters-patent and of the permanent Instructions to be issued in the same connection.³¹ Before introducing this change, a circular letter was sent by the Secretary of State for the Colonies to all colonial Governors, enclosing a copy of the proposed new forms and asking for suggestions as to alterations that might be desired by any particular colony.³² When Lord Dufferin, who was then Governor-General of Canada received this circular letter, it was referred to a committee of the Privy Council for consideration, and led in due course to

³¹ Todd, *op. cit.* p. 100.

³² *Ibid.*

an exchange of correspondence during the ensuing two years which forms an important sequel to the earlier history of responsible government in Canada.

As already indicated, the Commissions and Instructions issued to Sir John Young and Lord Dufferin contained no recognition of any superior status conferred upon Canada after the establishment of the Dominion in 1867, and in fact assumed the direct participation of the Governor-General in the conduct of the executive government. Certain clauses in these instruments did not pertain to the position of the Governor as an officer of the Imperial Government, but related rather to his position as head of the Canadian executive.³³ They purported to give him an active voice in the conduct of the executive government in Canada which had long since been abandoned by the Sovereign in relation to the executive government in Great Britain. To this extent they implied a clear distinction between cabinet or parliamentary government in Britain and responsible government in the colonies. The same incongruous provisions, and others of the same character were incorporated in the new permanent form of Instructions submitted for the approval of colonial Governors in 1875, and justly aroused the emphatic protests of the Canadian government through the voice of Hon. Edward Blake, Minister of Justice in the Mackenzie administration. The correspondence on the permanent Letters-Patent and Instructions has been referred to frequently by constitutional writers as an important contribution to the development of imperial relations, and particularly in its bearing on the position and powers of the Governor-General. It may also be regarded from the special standpoint of Canadian government as a stage in the complete assimilation of the executive in Canada to the cabinet system as then existing at Westminster. In fact the contention of the Canadian government throughout the entire correspondence was predicated on the assumption that the creation of the Dominion in 1867 was a good and sufficient reason for the recognition of a different status and more ample powers than were conceded to other colonies of the empire. As Todd expresses it:

Approving of the idea of a revised and permanent form for these instruments, Mr. Blake nevertheless submitted that the peculiar position of Canada, in relation to the mother country, entitled her to special consideration and that the existing forms, while they might be eminently suited to other colonies, were inapplicable and objectionable in her case. For Canada is not merely a colony or province of the empire; she is also a Dominion, composed of a number of provinces federally united under an Imperial charter or Act

³³ See Clauses IV, V, VI of Instructions issued to the Earl of Dufferin.

of Parliament, which expressly recites that her constitution is to be similar in principle to that of the United Kingdom.³⁴

In other words, to quote Mr. Blake:

There is no dependency of the British Crown which is entitled to so full an application of the principles of constitutional freedom as the Dominion of Canada.³⁵

This contention on the part of Mr. Blake may be regarded as the first formal assertion of what later came to be described as "Dominion Status."

Referring particularly to the relation of the Governor-General in Canada to the Privy Council, Blake pointed out to Lord Carnarvon, Colonial Secretary in 1876, that the practice for a great number of years had been that the business of Council was done in the absence of the Governor. On very exceptional occasions the Governor might preside but these would occur only at intervals of years, and would probably be for the purpose of taking a formal decision on some extraordinary occasion, and not for deliberation. The mode in which the business was done was by report to the Governor of the recommendations of the Council sitting as a committee, sent to the Governor for his consideration, discussed where necessary between the Governor and the first Minister, and becoming operative upon being marked "approved" by the Governor. Blake declared:

This system is in accordance with constitutional principle, and is found very convenient in practice. It is probable that the language of this clause (in the proposed permanent Instructions) is not intended to require a different practice, but it has been thought right to point out the actual working of the system under it with a view to any amendment which may be thought necessary.³⁶

Mr. Blake was equally specific in his objection to the clauses in the proposed Instructions which authorized the Governor-General under certain contingencies to act in opposition to the advice of the majority of his Ministers. His recommendation on this point deserves to be quoted at length, for it makes it abundantly clear that what the Canadian government was seeking at the time was the extension to Canada of the cabinet system of Great Britain, divested of those precautionary reservations which had been incorporated in the Commissions and Instructions issued to the Governors even after the principle of responsible government had been conceded. The relevant paragraphs follow:

³⁴ Todd, op cit. p. 110.

³⁵ Sessional Papers, 1877, Vol. 7, No. 13.

³⁶ *Ibid.*

In so far as it may be intended by this clause to vest in the Governor the full constitutional power which Her Majesty, if she were ruling personally instead of through his agency, could exercise, it is, of course, unobjectionable. The Governor-General has an undoubted right to refuse compliance with the advice of his Ministers, whereupon the latter must either adopt and become responsible for his views, or leave their places to be filled by others prepared to take that course. But the language of the clause (which for the suggested purpose would be unnecessary) is wider, and seems to authorize action in opposition to the advice not merely of a particular set of Ministers, but of any Ministers. Notwithstanding the generality of the language, there are but few cases in which it would be possible to exercise such a power, for as a rule, the Governor does and must act through the agency of Ministers, and Ministers must be responsible for such actions. The cases not falling within this limitation may be said for practical purposes to be those in which the line taken by the Governor is purely negative, in which, while dissenting from action proposed to him by Ministers, he does nothing but dissent. Even in such cases, I presume no one could contend that any such power should be exercised under this clause, save upon the argument that there are certain conceivable instances in which, owing to the existence of substantial Imperial as distinguished from Canadian interests, it may be considered that full freedom of action is not vested in the Canadian people. It appears to me that any such cases must, pending the solution of the great problem of Imperial Government, be dealt with as they arise. Were the clause retained, though in a limited form, it would be found increasingly difficult to divest the Canadian Ministers even in such cases of full responsibility for the action of the Governor, and the question in each case of the relative rights and duties of the Governor and the Ministers would probably be more and more earnestly discussed.

It is, so far as I can see, impossible to formulate any limitation. The effort to reconcile by any form of words the responsibility of Ministers under the Canadian constitution with a power to the Governor to take even a negative line independently of advice, cannot, I think, succeed. The truth is, that Imperial interests are, under our present system of government to be secured in matters of Canadian executive policy, not by any such clause in a Governor's Instructions (which would be practically inoperative) but by mutual good feeling, and by a proper consideration for Imperial interests on the part of Her Majesty's Canadian advisers, the Crown necessarily retaining all its constitutional rights and powers, which would be exercisable in any emergency in which the indicated securities might be found to fail. I have therefore, for the reasons suggested here and in the former part of this letter, to propose that this clause should be omitted; the Governor-General's status being determined by our own constitutional Act, that Officer remaining, of course, subject to any further instructions, special or general, which the Crown may lawfully give, should circumstances render that course desirable.³⁷

Mr. Blake's contention was, in effect, that in all matters of Dominion concern the Governor-General should cease to act in any respect as an officer of the Imperial Government, but should hold

³⁷ *Ibid.*

as the representative of Her Majesty a position in relation to the Canadian executive Council analagous to that held by Her Majesty in relation to her cabinet in Great Britain. In other words, there must be extended to Canada, within the limits of jurisdiction laid down in the British North America Act, the recognized conventions of cabinet government. This view, as presented officially on behalf of Canada, was recognized and tacitly conceded by the Imperial Government. As a result of the considerations urged so vigorously by Mr. Blake, every clause was removed from the proposed permanent Instructions which was inconsistent with the unhampered operation of the cabinet system in this Dominion.³⁸ Henceforth, no Governor-General of Canada could find a general warrant in his Commission and Instructions to take an active part in the conduct of the executive branch of government. He became, like his principal the Sovereign of Great Britain, only the titular head of the executive, while the real power of executive action was vested under the conventions of cabinet government in the Queen's Privy Council for Canada. For this reason, the new Commission and Instructions issued to the Marquis of Lorne in 1878 may be regarded as an important milestone in the long development whereby colonial self-government as conceded in 1849 was converted by successive stages into Dominion self-government through the extension to Canada of a constitution of the executive "similar in principle to that of the United Kingdom." In the constitutional issue of 1876 and the manner of its settlement there is the prophecy of the more formal and definitive declaration of the Imperial Conference of 1926 that:

The Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain.³⁹

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³⁸ Sessional Papers, 1879, No. 14.

³⁹ Imperial Conference of 1926. Summary of Proceedings, p. 14.