
**Compilation of primary documents to assist
in interpreting Executive Power in Section 12 of the
*Constitution Act, 1867***



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12. All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exercisable by the respective Governors or Lieutenant Governors of those Provinces, with the Advice, or with the Advice and Consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any Number of Members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in

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and exercisable by the Governor General, with the Advice or with the Advice and Consent of or in conjunction with the Queen's Privy Council for Canada, or any Members thereof, or by the Governor General individually, as the Case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of Canada.¹

Summary of Section 12

The section contains essentially one provision: that all statutory executive powers for Canada, New Brunswick, Nova Scotia existing before confederation will be *vested* and *continue to be exercised* by the Lieut. Governors, insofar that these powers fall within their provincial jurisdiction, and be exercised by the Governor General of Canada insofar these powers fall within federal jurisdiction. It essentially contains two sub-parts: (i.) these Lieut. Governors or Governors will exercise these powers with the *advice or consent of their respective executive councils*, and (ii.) until abolished or altered by the Parliament of Canada, subject to the sovereign authority of the Imperial Parliament. This provision is located in Part III "Executive Power" of the *Constitution Act, 1867*, and along with Sections 9 to 16, settles the constitutional basis for the executive power of the Federal government – it is what makes Canada a constitutional monarchy. Its provincial counterparts are further found in Part V "Provincial Constitutions", in section 65, mirroring the language and purpose for creating the executive power of the *new* provinces of Ontario and Quebec. See also footnote 1. Keywords: "**executive power**"; "**sovereign power**"; "**responsible government**"; "**power**"; "**sovereignty**".

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¹ On the Justice website (<https://laws-lois.justice.gc.ca/eng/const/FullText.html#end7>), an endnote is attached to the end of this section. It reads, "The restriction against altering or repealing laws enacted by or existing under statutes of the United Kingdom was removed by the *Statute of Westminster, 1931*, 22 Geo. V, c. 4 (U.K.), except in respect of certain constitutional documents. Comprehensive procedures for amending enactments forming part of the Constitution of Canada were provided by Part V of the *Constitution Act, 1982*."

PART 1:

Executive Power Prior to 1867

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1774: The Quebec Act

IV. And whereas the Provisions, made by the said Proclamation, in respect to the Civil Government of the said Province of Quebec, and the Powers and Authorities given to the Governor and other Civil Officers of the said Province, by the Grants and Commissions issued in consequence thereof, have been found, upon Experience, to be inapplicable to the State and Circumstances of the said Province, the Inhabitants whereof amounted, at the Conquest, to above sixty-five thousand Persons professing the Religion of the Church of Rome, and enjoying an established Form of Constitution and System of Laws, by which their Persons and Property had been protected, governed, and ordered, for a long Series of Years, from the first Establishment of the said Province of Canada;” be it therefore further enacted by the Authority aforesaid, That the said Proclamation, so far as the same relates to the said Province of Quebec, and the Commission under the Authority whereof the Government of the said Province is at present administered, and all and every the Ordinance and Ordinances made by the Governor and Council of Quebec for the Time being, relative to the Civil Government and Administration of Justice in the said Province, and all Commissions to Judges and other Officers thereof, be, and the same are hereby revoked, annulled, and made void, from and after the first Day of May, one thousand seven hundred and seventy-five.

(Source: *Quebec Act* (UK), 14 Geo III, c 83, reprinted in RSC 1985, App II, No. 2. Click [HERE](#).)

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1791: The Constitutional Act

II. And whereas his Majesty has been pleased to signify, by his Message to both Houses of Parliament, his royal Intention to divide his Province of Quebec into two separate Provinces, to be called The Province of Upper Canada, and The Province of Lower Canada,” be it enacted by the Authority aforesaid, That there shall be within each of the said Provinces respectively a Legislative Council, and an Assembly to be severally composed and constituted in the Manner herein-after described; and 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; and that all such Laws, being passed by the Legislative Council and Assembly of either of the said Provinces respectively, and assented to by his Majesty, his Heirs or Successors, or assented to in his Majesty’s Name, by such Person as his Majesty, his Heirs or Successors, shall from Time to Time appoint to be the Governor, or Lieutenant Governor, of such Province, or by such Person as his Majesty, his Heirs and Successors, shall from Time to Time appoint to administer the Government within the same, shall be, and the same are hereby declared to be, by virtue of and under the Authority of this

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Act, valid and binding to all Intents and Purposes whatever, within the Province in which the same shall have been so passed.

(Source: *Constitutional Act* (UK), 31 Geo III, c 31, reprinted in RSC 1985, App II, No. 3. Click [HERE](#).)

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1840: Act of Union

XL. Provided always, and be it enacted, That nothing herein contained shall be construed to limit or restrain the Exercise of Her Majesty's Prerogative in authorizing, and that notwithstanding this Act, and any other Act or Acts passed in the Parliament of Great Britain, or in the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of the Province of Quebec, or of the Provinces of Upper or Lower Canada respectively, it shall be lawful for Her Majesty to authorize the Lieutenant Governor of the Province of Canada to exercise and execute, within such Parts of the said Province as Her Majesty shall think fit. notwithstanding the Presence of the Governor within the Province, such of the Powers, Functions, and Authority, as well judicial as other, which before and at the Time of passing of this Act were and are vested in the Governor, Lieutenant Governor, or Person administering the Government of the Provinces of Upper Canada and Lower Canada respectively, or of either of them, and which from and after the said Reunion of the said Two Provinces shall become vested in the Governor of the Province of Canada; and to authorize the Governor of the Province of Canada to assign, depute, substitute, and appoint any Person or Persons, jointly or severally, to be his Deputy or Deputies within any Part or Parts of the Province of Canada, and in that Capacity to exercise, perform, and execute during the Pleasure of the said Governor such of the Powers, Functions, and Authorities, as well judicial as other, as before and at the Time of the passing of this Act were and are vested in the Governor, Lieutenant Governor, or Person administering the Government of the Provinces of Upper and Lower Canada respectively, and which from and after the Union of the said Provinces shall become vested in the Governor of the Province of Canada, as the Governor of the Province of Canada shall deem to be necessary or expedient: Provided always, that by the Appointment of a Deputy or Deputies as aforesaid the Power and Authority of the Governor of the Province of Canada shall not be abridged, altered, or in any way affected otherwise than as Her Majesty shall think proper to direct.

(Source: *Union Act* (UK), 3-4 Vict, c 35, reprinted in RSC 1985, App II, No. 4. Click [HERE](#).)

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1858: Alexander Galt's Federation Resolutions Draft

3. The Federal government to be composed of a Governor-General or Viceroy, appointed by the Queen, an Upper House or Senate elected on a territorial basis, and a House of Assembly elected on the basis of population; the Executive to be composed of ministers responsible to the legislature.

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(Source: Oscar Douglas Skelton's *The Life and Times of Sir Alexander Tilloch Galt* (Oxford University Press, 1920), pp. 371-372. Click [HERE](#).)

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October 25, 1858: G.E. Cartier, J.N.O. ROSS and A.T GALT's DESPTACH To Right Hon. Sir E.B. Lytton, Bart, Secretary of State for the Colonies on the Subject of Federal Resolutions

It will be observed that the basis of Confederation now proposed differs from that of the United States in several important particulars. It does not profess to be derived from the people but would be the constitution provided by the imperial parliament, thus affording the means of remedying any defect, which is now practically impossible under the American constitution. The local legislature would not be in a position to claim the exercise of the same sovereign powers which have frequently been the cause of difference between the American states and their general government. To this may be added that by the proposed distribution of the revenue each province would have a direct pecuniary interest in the preservation of the authority of the Federal Government. In these respects it is conceived that the proposed Confederation would possess greater inherent strength than that of the United States, and would combine the advantage of the unity for general purposes of a legislative union with so much of the Federation principle as would join all the benefits of local government and legislation upon questions of provincial interest.

(Source: Oscar Douglas Skelton's *The Life and Times of Sir Alexander Tilloch Galt* (Oxford University Press, 1920), pp. 242-244. Click [HERE](#).)

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PART 2:

**Section 12 in Successive Drafts,
from the Quebec Resolutions, 1864 to the
*Constitution Act, 1867***

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[The Quebec Resolutions \(1864\)](#)²

October 10-11, 1864: Working Notes

| Composition of Executive (Macdonald, Cartier, Brown, Galt)
| Maintain Responsible Gov.?

(Source: George Brown Papers, Drafts of the Quebec Resolutions, Working Notes, October 10-11th, 1864
(MG 24, B 40, Vol. 21, p. 3763). Click [HERE](#).)

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October 12, 1864: Notes on the Division of Powers

| Executive as now

(Source: George Brown Papers, Drafts of the Quebec Resolutions, Notes on the Division of Powers,
October 12th, 1864 (MG 24, B 40, Vol. 21, p. 3764-3766). Click [HERE](#).)

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October 26, 1864: Working Draft No. 1

| That the Executive Authority of Government shall be vested in the Sovereign of the United
| Kingdom of Great Britain and Ireland, and be administered according to the well understood
| principles of the British Constitution by the Sovereign personally or by Representative duly
| authorized.

² All transcriptions from the Quebec Resolutions are from [Charles Dumais, *The Quebec Resolutions: Including Several Never-Published Preliminary Drafts by George Brown and John A. Macdonald, and a Collection of all Previously-Published Primary Documents Relating to the Conference, October 10, 1864-October 29th, 1864* \(CCF, 2021\).](#)

SECTION 12, EXECUTIVE POWER

(Source: John A. Macdonald, Drafts of the Quebec Resolutions, Working Draft No. 1, October 26th, 1864, MG 26 A, Vol. 46, pp. 18164-18168. Click [HERE](#).)

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October 26-27, 1864: Working Draft No. 2

[4] That the Executive Authority or Government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well understood principles of the British Constitution by the Sovereign personally or by Representative duly authorized.

(Source: John A. Macdonald, Drafts of the Quebec Resolutions, Working Draft No. 2, October 26th-27th, 1864, MG 26 A, Vol. 46, pp. 18142-18155. This text is found on pp. 18148 & 18151. Click [HERE](#).)

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October 27, 1864: Working Draft No. 3

That the Executive Authority or Government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well understood principles of the British Constitution by the Sovereign personally or by Representative duly authorized.

(Source: John A. Macdonald, Drafts of the Quebec Resolutions, Working Draft No. 3, October 27th, 1864, MG 26 A, Vol. 46, pp. 18156-18158. This text is found on p. 18157. Click [HERE](#).)

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October 27, 1864: Working Draft No. 4

[4.] That the Executive Authority or Government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well understood principles of the British Constitution by the Sovereign personally or by the Representative of the Sovereign duly authorized.

(Source: John A. Macdonald, Drafts of the Quebec Resolutions, Working Draft No. 4, October 27th, 1864, MG 26 A, Vol. 46, pp. 18136-18138. This text is found on p. 18137. Click [HERE](#).)

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October 29, 1864: Edward Whelan's (PEI) Draft of Quebec Resolutions, as corrected in Montreal³

³ *Supra* footnote 1. The following footnote from Charles Dumais is attached to this version, "According to Edward Whelan, this is the draft of the Quebec Resolutions as amended at Montreal on October 29th, 1864. It is found published in the *Examiner*

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The Executive Authority or Government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well understood principles of the British Constitution by the Sovereign personally or by the Representative of the Sovereign duly authorized.

(Source: [Charlottetown] *Examiner*, November 14, 1864, Click [HERE](#).)⁴

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March 14, 1865: Quebec Resolutions as adopted in the Legislature of the Province of Canada

4. The Executive Authority or Government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well-understood principles of the British Constitution, by the Sovereign personally, or by the Representative of the Sovereign duly authorized.

(Source: John A. Macdonald, *The Quebec Resolutions, 1864 as Adopted in the Legislature of the Province of Canada*, Vol. 46, pp. 18210-18216. This text is found on pp. 18213-18214. Click [HERE](#).)

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[The London Resolutions \(1866\)](#)

December 4, 1866: Version No. 1, Copy 1

4. The Executive Authority or Government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well understood principles of the British Constitution by the Sovereign personally or by the Representative of the Sovereign duly authorized.

(Source: John A. Macdonald Fonds, *Drafts of the London Resolutions – Version No. 1, Copy 1, December 4th, 1866* (MG 26 A, Vol. 46, pp. 18184-18190). This text is found on p. 18184. Click [HERE](#).)

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(Charlottetown, PEI) newspaper, November 14th, 1864. This version (above) does not include the amendments and three resolutions added in what we titled Macdonald's "Working Draft No. 4" in this compilation. This version however does seem to work off the base text of "Macdonald's "Working Draft No. 4" (without the amendments). Like the base text, this draft above does not feature numbered provisions. The three provisions missing in this draft (above), and found in the final text of the Quebec Resolutions are the following:

"35. The Judges of the Courts of Lower Canada shall be selected from the Bar of Lower Canada."

"58. All assets connected with such portions of the Public Debt of any Province as are assumed by the Local Governments shall also belong to those Provinces respectively."

"71. That Her Majesty the Queen be solicited to determine the Rank and Name of the Federated Provinces."

⁴ The relevant newspaper is found on the second to last page of the PDF.

SECTION 12, EXECUTIVE POWER

December 4-6, 1866: Version No. 1, Copy 2

[Checkmark in the left hand margin] 4. The Executive Authority or Government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well understood principles of the British Constitution by the Sovereign personally or by the Representative of the Sovereign duly authorized.

(Source: John A. Macdonald Fonds, Drafts of the London Resolutions – Version No. 1, Copy 2, December 4-6th, 1866 (MG 26 A, Vol. 46, pp. 18169-18174). This text is found on p. 18169. Click [HERE](#).)

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December 13-14, 1866: Version No. 2, Copy 1

4. The Executive Authority or Government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well understood principles of the British Constitution by the Sovereign personally or by the Representative of the Sovereign duly authorized.

(Source: John A. Macdonald Fonds, Drafts of the London Resolutions – Version No. 2, Copy 1, December 13-14th (MG 26 A, Vol. 46, pp.18176-18183). This text is found on p. 18176. Click [HERE](#).)

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December 13-14, 1866: Version No. 2, Copy 2

[Checkmark in the right hand margin] 4. The Executive Authority or Government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well understood principles of the British Constitution by the Sovereign personally or by the Representative of the Sovereign duly authorized.

(Source: John A. Macdonald Fonds, Drafts of the London Resolutions – Version No. 2, Copy 2, December 13-14th, 1866 (MG 26 A, Vol. 46, pp. 18191-18196). This text is found on p. 18191. Click [HERE](#).)

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December 14, 1866: Version No. 3, Copy 1

[Illegible comment in right hand margin] 4. The Executive Authority or Government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well understood principles of the British Constitution by the Sovereign personally or by the Representative of the Sovereign duly authorized.

(Source: John A. Macdonald Fonds, Drafts of the London Resolutions – Version No. 3, Copy 1, December 14th, 1866 (MG 26 A, Vol. 46, pp. 18197-18209). This text is found on p. 18198. Click [HERE](#).)

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December 28, 1866: Final Version

4. The Executive Authority or Government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well-understood principles of the British Constitution, by the Sovereign personally, or by the representative of the Sovereign duly authorized.

(Source: London Resolutions as found in Joseph Pope (ed), *Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act* (Toronto: Carswell Co. Ltd., 1895) at 98-110. This text is found on p. 99. Click [HERE](#).)

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[Constitution Act, 1867](#)

n.d. (probably early January, 1867): Rough Draft

GENERAL GOVERNMENT

2. The Executive Authority or Government, so far as may be necessary for the purposes of this Act, shall be and continue to be vested in the Queen of the United Kingdom of Great Britain and Ireland, to be administered either personally or by representatives upon the principles of the British Constitution.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – Rough Draft, n.d. (MG 26, A, Vol. 48, pp. 18768-18793). This text is found on p. 18768. Click [HERE](#).)

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n.d. (probably early January, 1867): Rough Draft, John A. Macdonald's Copy

GENERAL GOVERNMENT

2. The Executive Authority or Government, so far as may be necessary for the purposes of this Act, shall be and continue to be vested in the *[Sovereign]* Queen of the United Kingdom of Great Britain and Ireland, to be administered either personally or by *[a]* representatives upon the princip*[l]*es of the British Constitution.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – Rough Draft, n.d. (MG 26, A, Vol. 48, pp. 18845-18870). This text is found on p. 18845. Click [HERE](#).)

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January 23, 1867: 23rd January Draft

SECTION 12, EXECUTIVE POWER

No provision.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – 23rd January Draft, J.W. Ritchie’s Copy, January 23rd, 1867 (MG 26, A, Vol. 48, pp. 18971-18988). Click [HERE](#).)

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January 30, 1867: 1st Draft

THE EXECUTIVE POWER.

7.—The Executive Government and authority is and shall be vested in Her Majesty the Queen.

(Source: John A. Macdonald Fonds, Drafts of the *British North America Act, 1867* – 1st Draft, January 30th, 1867 (MG 26 A, Vol. 48, pp. 19017-19021. The text is found on p. 19018. Click [HERE](#).)

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January 30, 1867: 1st Draft with Handwritten Provisions

THE EXECUTIVE POWER.

7.—The Executive Government and authority is and shall be vested in Her Majesty the Queen.

[There is a handwritten provision in the left margin regarding the power of the Governor General to constitute by instrument of the Great Seal of Canada an executive council.]

(Source: National Archives of Canada. John A. Macdonald Fonds, Drafts of the *British North America Act, 1867* – 1st Draft, January 30th, 1867 (MG 26 A, Vol. 48, pp. 19001-19006. The text is found on p. 19002. Click [HERE](#).)

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January 31, 1867: 2nd Draft

THE EXECUTIVE POWER

7.—The Executive Government and authority is and shall be vested in Her Majesty the Queen.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – 2nd Draft, January 31st, 1867 (MG 26, A, Vol. 48, pp. 19022-19039). This text is found on p. 19023. Click [HERE](#).)

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SECTION 12, EXECUTIVE POWER

January 31, 1867: 2nd Draft with Handwritten Provisions and Notes

THE EXECUTIVE POWER

7.—The Executive Government and authority is and shall be vested in ~~Her Majesty~~ the Queen.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – 2nd Draft with Handwritten Provisions and Notes, January 31st, 1867 (MG 26, A, Vol. 48, p. 19041). This text is found on p. 19023. Click [HERE](#).)

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n.d. (between Jan. 31 & Feb. 2, 1867): 3rd Draft, Early Copy

THE EXECUTIVE POWER

7.—The Executive Government and authority is and shall be vested in the Queen.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – 3rd Draft, Early Copy, n.d. (MG 26, A, Vol. 48, pp. 19101-19124). This text is found on p. 19103. Click [HERE](#).)

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February 2, 1867: 3rd Draft, Revised Copy

THE EXECUTIVE POWER.

[Checkmark in the left margin] 7.—The Executive Government and authority is and shall be vested in the Queen.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – 3rd Draft, Revised, February 2nd, 1867 (MG 26, A, Vol. 48, pp. 19125-19148). This text is found on p. 19127. Click [HERE](#).)

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n.d. (1867): 4th Draft, Early Version

THE EXECUTIVE POWER.

9.—The Executive Government and authority is and shall be vested in the Queen.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – 4th Draft, Early Version, n.d. (MG 26, A, Vol. 49/1, pp. 19150-19181). The text is found on p. 19155. Click [HERE](#).)

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SECTION 12, EXECUTIVE POWER

n.d. (1867): 4th Draft, Later Version

THE EXECUTIVE POWER.

9. The Executive Government and authority is and shall be vested in the Queen.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – 4th Draft, Later Version, n.d. (MG 26, A, Vol. 49/1, pp. 19337-19367). The text is found on p. 19342. Click [HERE](#).)

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n.d. (1867): 4th Draft, Later Version, Revised Copy

THE EXECUTIVE POWER.

9. The Executive Government and authority is and shall be vested in the Queen.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – 4th Draft, Later Version, Revised Copy, n.d. (MG 26, A, Vol. 49/1, pp. 19399-19450). This text is found on p. 19404. Click [HERE](#).)

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n.d. (1867): 4th Draft, Final Version

THE EXECUTIVE POWER.

9. The Executive Government and authority is and shall be vested in the Queen.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – 4th Draft, Final Version, n.d. (MG 26, A, Vol. 49/2, pp. 19614-19664). This text is found on p. 19619. Click [HERE](#).)

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n.d. (1867): House of Lords Bill

Powers to be exercised by Governor General with Advice or alone.

12. All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exercisable by the respective Governors or Lieutenant Governors of those Provinces, with the Advice, or with the Advice and Consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any Number of Members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in and

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exercisable by the Governor General, with the Advice or with the Advice and Consent of or in conjunction with the Queen's Privy Council for Canada, or any Members thereof, or by the Governor General individually, as the Case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of Canada.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – H.L. Bill (Floor), n.d. (MG 26, A, Vol. 49/2, pp. 19665-19711). This text is found on p. 19673. Click [HERE](#).)

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PART 3:

**Debates on Section 12 from the
Quebec Conference (1864) &
*Confederation Debates in the
Province of Canada (1865-1866)***

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[Quebec Conference \(1864\)](#)⁵

October 20, 1864: Secretary Hewitt Bernard's Minutes of the Proceedings at Quebec (click [HERE](#), then scroll to p. 96)

It was moved by the Honourable Mr. John A. Macdonald:—

That the Executive authority or Government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well understood principles of the British Constitution by the Sovereign personally or by representative duly authorized.

And the question of concurrence being put thereon, the same was unanimously resolved in the affirmative.

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October 20, 1864: Secretary Hewitt Bernard's Report of Discussions at Quebec (click [HERE](#), then scroll to p. 123)⁶

Mr. John A. Macdonald moved:—

That the Executive authority or Government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well understood principles of the British Constitution by the Sovereign personally or by representative duly authorized.

⁵ *Supra* footnote 1. The Quebec Conference transcriptions are from the aforementioned Dumais text (*The Quebec Conference*, p. 96). They were originally from Joseph Pope, *Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act* (Toronto: The Carswell Co. Ltd. Law Publishers, 1895).

⁶ *ibid.*

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Mr. Tupper—Is it meant to leave it to the Queen or to make any suggestion as to the appointment of a, Viceroy?

Mr. John A. Macdonald—I think it advisable not to make any suggestion. At least it should not be a constitutional suggestion. Hereafter the Parliament of the Federation may represent a desire for one of the Royal Family as Viceroy.

Mr. McCully—I assume that we should continue to be governed by a Governor-General.

Mr. Macdonald's motion carried.

Evening Session, p. 124

Mr. Archibald proposed a resolution to the effect that Lieutenant-Governors should be appointed by the Federal Government for five years; each Legislature to continue until altered. He said: If the Imperial Act authorizes this, you have then the several governments shorn, however, of such powers as are taken from them by the central authority.

Mr. Chandler—I think we should form only a federal constitution, and we should pass no resolutions or act relative to the Local Governments. Let them retain what they have, and have power to manage their own local concerns. The Imperial Government will never consent to put in an Imperial Act of Parliament that the Crown shall appoint Lieutenant-Governors on the recommendation of the Federal Government. It is perfectly understood that as in case of Legislative Councillors the Crown take the recommendation of the Government and appoint a suitable person.

Mr. McCully—I would make it absolute in the Federal Government to appoint Lieutenant Governors.

Mr. Chandler— I think the Imperial Government would never acquiesce in that.

Mr. McDougall—From the peculiar position of Canada we must get permission to change.

Mr. Dickey—I agree with Mr. Chandler that the Crown should appoint Lieutenant-Governors directly.

Mr. Brown—One material point is that the choice of the Federal Legislative Councillors will extinguish or largely diminish the Local Legislative Councils. If you have a Local Legislative Council you then embarrass yourselves by reconstructing that body. Mr. McDougall says he is willing to take a Governor and two Chambers as a Local Government and reduce them afterwards. Consider how insignificant are the matters agreed at Charlottetown, to be left to the Local Governments. As to private and local bills, that might be done under the General Incorporation Act.

Mr. John A. Macdonald—The Imperial Act must repeal the several Acts affecting the constitution of the various Colonies. The most artistic way to do this would be to wipe them out and re-enact. The mode adopted in Ireland was by resolutions setting forth "it is fit that such should be done,"

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which were afterwards turned into enactments. I have little doubt that when the system is complete a delegate will have to be sent to the Imperial Government from each Province, charged with the interests of the Province and to express them to the Imperial Government and their views. We should have uniformity as much as possible, but that is only a secondary matter as compared with the passage of the measure.

Mr. McCully—Let Upper Canada try a single Chamber, and if it succeeds the other Provinces can afterwards adopt it.

Mr. McCully's motion carried.

Mr. Dickey—Ought not something to be laid down as to the constitution of the Federal Executive Government?

On the principle now adopted by Upper and Lower Canada, ought not there to be some mode of choosing advisers from the agricultural interests of Upper Canada, the mixed agricultural and maritime interests of Lower Canada, and the great maritime interests of the Lower Provinces?

Mr. John A. Macdonald—We cannot limit or define the powers of the Crown in such respect. See our Union Act. There is nothing in it about Responsible Government. It is a system which we have adopted. There is not even any resolution on our own journals as to the number of the Executive. The Sovereign may have such number as she pleases. In Canada it was found convenient that both sections of the Province should be represented in the Cabinet, and in time it grew practically into an equal division. The same principle must obtain as to the body of advisers of the Governor-General of the Federation. That must be a provisional cabinet, and it probably will be very few and merely for necessary purposes. The Federal Parliament being elected, the person charged with the formation of the Ministry will probably increase the number. We must leave such arrangements as to equality in the Cabinet to change or necessity.

Mr. Chandler concurred.

Mr. McCully—But the royal instructions limit the number to nine. It should be an unlimited number, and that point seems generally conceded here.

Mr. Henry—We feel that the first Government at least, should contain a due number from the Lower Provinces. We of the Lower Provinces feel that we may be out-voted by Upper and Lower Canada; but we knew that before we came here, and are willing to run the risk of it.

Mr. John A. Macdonald—I think there may be an expression of opinion as suggested by Mr. Dickey. In the formation of the first Executive Council I think the Governor-General should send for one man through whom the writs for election should be issued, and choose his Council afterwards.

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[Province of Canada \(1865\)](#)⁷

February 6, 1865: John A. Macdonald, speaking in the Legislative Assembly of Canada (click [HERE](#) to view a PDF of the 1865 edition of the Confederation Debates, then scroll to p. 32)

John A. Macdonald [Kingston, Attorney General West]—[...] I think and believe that it is one of the most skilful works which human intelligence ever created; is one of the most perfect organizations that ever governed a free people. To say that it has some defects is but to say that it is not the work of Omniscience, but of human intellects. We are happily situated in having had the opportunity of watching its operation, seeing its working from its infancy till now. It was in the main formed on the model of the Constitution of Great Britain, adapted to the circumstances of a new country, and was perhaps the only practicable system that could have been adopted under the circumstances existing at the time of its formation. We can now take advantage of the experience of the last seventy-eight years, during which that Constitution has existed, and I am strongly of the belief that we have, in a great measure, avoided in this system which we propose for the adoption of the people of Canada, the defects which time and events have shown to exist in the American Constitution. In the first place, by a resolution which meets with the universal approval of the people of this country, we have provided that for all time to come, so far as we can legislate for the future, we

• (p. 33)

shall have as the head of the executive power, the Sovereign of Great Britain.

Some Hon. Members—Hear, hear.

John A. Macdonald [Kingston, Attorney General West]—No one can look into futurity and say what will be the destiny of this country. Changes come over nations and peoples in the course of ages. But, so far as we can legislate, we provide that, for all time to come, the Sovereign of Great Britain shall be the Sovereign of British North America.

John A. Macdonald, p. 36

John A. Macdonald [Kingston, Attorney General West]—[...] When responsible government was introduced, it became necessary for the Governor of the day to have a body of advisers who had the confidence of the House of Assembly which could make or unmake ministers as it chose. [...]

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February 13, 1865: Walter McCrea, speaking in the Legislative Council of Canada (click [HERE](#) to view a PDF of the 1865 edition of the Confederation Debates, then scroll to p. 171)

⁷ Please note that there is a difference between the formatting of the original and that of the text in these reports. That is because the text portion comes from our publication, *The Confederation Debates in the Province of Canada (CCF, 2022)*, which modernized the formatting of the text to current *Hansard* style. The content remains the same. However, if the user wishes to see the original, the hyperlink will bring them to the 1865 edition.

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Walter McCrea [Western, elected 1862]— [...] Short-sighted politicians of those days, who did not very well understand the working of the British Constitution, fancied the only remedy was by making this House elective. But the memorable resolutions of the 3rd September, 1841, at Kingston, established the true British principle of responsible government, and I maintain that since that time the people never demanded that this House should be made elective.

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February 14, 1865: Narcisse Belleau, speaking in the Legislative Council of Canada (click [HERE](#) to view a PDF of the 1865 edition of the Confederation Debates, then scroll to p. 185)

Narcisse F. Belleau [Canada East, appointed 1852]— [...] since we shall have a responsible Government and a Federal Government, composed of members elected by the people [...]

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February 15, 1865: Joseph Armand, speaking in the Legislative Council of Canada (click [HERE](#) to view a PDF of the 1865 edition of the Confederation Debates, then scroll to p. 209)

Joseph Armand [Alma, elected 1858]— [...] I can well understand that before England permitted us to adopt its Constitution—gave us responsible government, allowed us the control of our own affairs; and when its governor were not advised by ministers responsible to the people, but were surrounded by advisers who were more like clerks, who to preserve their salaries were often obliged to submit to the arbitrary will of their master—I can easily conceive, I repeat, that it was expedient to seek a remedy for the wrongs under which we then labored.

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February 16, 1865: Étienne Pascal Taché, speaking in the Legislative Council of Canada (click [HERE](#) to view a PDF of the 1865 edition of the Confederation Debates, then scroll to p. 240)

Étienne Pascal Taché [Canada East, appointed 1848, Premier, Minister of Militia, and Receiver General]—And it is not surprising that we experienced the difficulties we did until that period. After the establishment of responsible government the position was very different—the resolutions of the 3rd September, 1841, having declared that no Government could be carried on except by heads of departments having the confidence of the representatives of the people in the lower branch of the Legislature.

If, from that moment, bad appointments happened to be made to the Legislative Council, then the Government for the time being was responsible to the people for those appointments. And, when the people wanted an elective Council at that time, they did not base the demand upon constitutional principles, but were led by their passions, which had been excited by their

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recollections of the past. They did not reason the thing out; and, in fact, the great majority of the people here, as everywhere else, are not able to reason, out constitutional points—they are led by those who are at the head of the different parties.

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February 17, 1865: Walter Dickson, speaking in the Legislative Council of Canada (click [HERE](#) to view a PDF of the 1865 edition of the Confederation Debates, then scroll to p. 285)

Walter Dickson [Canada West, appointed 1855]—He came back from the country and has since taken part in the Government; and here I wish to make a few observations with reference to the Government as it stands today. You must recollect, honorable gentlemen, that we are enjoying, or at least have enjoyed, a system of government in this country which has a great many admirers, and which some honorable gentlemen admire a great deal more than the quality of the people. The system is known by the name of Responsible Government. If I understand the subject properly, that system of government is defined in this way—that the Government of the country must be carried on according to the well-understood wishes of the people, as expressed through their representatives on the floor of the House of Assembly.

Some Hon. Members—Hear, hear.

Walter Dickson [Canada West, appointed 1855]—Well now, I take exception to the formation of the present Government, on the ground that it was not established on that principle, because they are not a government emanating from the people. I cannot hold them in the same respect that I

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did before the three Conservative members from Upper Canada, who retired in favor of the three Grit members, left it. The Government then all belonged to one political party, were all consistent members of that party, and taken together, were equal in talent to any Administration that has ever had charge of the affairs of this or any other province. All holding the same views on leading political questions, even those who opposed them could not but feel a very large degree of respect for them as sincere, honest, consistent Conservatives, and as I believe, entertaining sound political principles. But the introduction of the three other members altered the whole face of the Government. And the first thing this unholy alliance does is to go to work at the suggestion of the chief with the still, small voice to upset our Constitution.

Some Hon. Members—Hear, hear.

Walter Dickson [Canada West, appointed 1855]—When a great constitutional question comes before this House, designed as it is to sweep an entire constitution from our Statute Book, and replace it with another, I think you will agree with me, honorable gentlemen, that this is one of the most important measures that could come from any government on the face of the earth.

Some Hon. Members—Hear, hear.

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Walter Dickson [Canada West, appointed 1855]—Well, I would ask those people who are so anxious to see responsible government carried out in this country in its integrity, is this a government that you can recognize as representing the well-understood wishes of the people? A government claiming to be a responsible government ought to have for its basis returns made from the polls, and ought not to have its origin through the instrumentality of ministerial convenience. [...]

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February 20, 1865: David Reesor, speaking in the Legislative Council of Canada (click [HERE](#) to view a PDF of the 1865 edition of the Confederation Debates, then scroll to p. 331)

David Reesor [King's, elected 1860]—With regard to the constitution of the Upper House of the proposed General Legislature, a good deal has been said, but I think the main point has too often been lost sight of. The course of the debate upon these resolutions has seemed to run in some instances as though we regarded a membership of this branch of the Legislature a position which we ought to occupy by right, as though we had some sort of a constitutional right to remain here, and as though governments and parliamentary bodies were instituted by the people, not for the benefit of the community, but for the advancement of those who compose them. We would seem to have overlooked a fundamental principle of all free governments, that governments should be carried on for the good of the governed; and the principle of responsible government, according to which government must be carried on according to the well-understood wishes of the people.

Walter McCrea [Western, elected 1862]—As expressed by their representatives.

David Reesor [King's, elected 1860]—As expressed, my honorable friend says, by their representatives. Very well; we must remember that those who constitute the Government of this country have brought down here a very curious scheme, and have held out to you the inducement that if you support it you have a chance of being appointed for life to the seat you occupy; and there is thus a probability of your being blinded to what you owe to the people, of your ignoring the constituencies that sent you here, and of your forgetting the duty you owe to the country.

[...]

David Reesor [King's, elected 1860]—It is said that, as you have a responsible government, the Government of the day will be held responsible to the people, through their representatives [...]

Étienne Pascal Taché, p. 345

Étienne Pascal Taché [Canada East, appointed 1848, Premier, Minister of Militia, and Receiver General]—Then the hon. member from DeLorimier [Jacques-Olivier Bureau] found a great deal of fault with the manner—I must say the able manner in which the gallant Knight (Hon. Sir N. F. Belleau) explained the action of responsible government in this country. The honorable Knight [Narcisse Belleau] shewed how responsible government protected the French Catholics in Lower Canada under Confederation, saying that if ever an act of flagrant injustice was to be attempted in the Federal Government, the whole of the Lower Canadians would join as one man, and by uniting

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with the minority against the Government—because honorable gentlemen must know that there always will be minorities—by means of thus strengthening the minority any Administration could be ousted out of their places in twenty-four hours. My honorable friend stated this, and he stated it justly; he said so, well aware of what he was saying.

[...]

Étienne Pascal Taché [Canada East, appointed 1848, Premier, Minister of Militia, and Receiver General]—The honorable gentleman made out no case at all, and he could not have studied parliamentary history since 1841 correctly. Had he done so, he would have found that at that period what was called responsible government was not worked out. Sir Charles Bagot, it is true, had lent himself to the views of his advisers, and responsible government had been going on perfectly under him; but then he died here, and honorable gentlemen must understand that Lord Metcalfe was opposed to responsible government.

Jacques-Olivier Bureau [De Lormier, elected 1862]—Still we had responsible government.

Étienne Pascal Taché [Canada East, appointed 1848, Premier, Minister of Militia, and Receiver General]—You had it in name only, but not in practice; otherwise Hon. Mr. Baldwin and Hon. Mr. Lafontaine would never have left the Cabinet. They resigned their seats in Council because they held themselves responsible to Parliament, while Lord Metcalfe chose to appoint persons to office without consulting them, as his constitutional

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advisers. Well, then, I assert that the case the honorable gentleman has cited to show that my honorable friend on the other side was wrong, is no ease at all. It is not applicable in any respect to present circumstances, because, I repeat it again, we had not responsible government at that time.

Jacques-Olivier Bureau [De Lormier, elected 1862]—We have not responsible government yet, then.

Étienne Pascal Taché [Canada East, appointed 1848, Premier, Minister of Militia, and Receiver General]—How does the honorable gentleman make that out?

Jacques-Olivier Bureau [De Lormier, elected 1862]—The honorable gentleman has stated that since the death of Lord Bagot we have not had responsible government.

Étienne Pascal Taché [Canada East, appointed 1848, Premier, Minister of Militia, and Receiver General]—The honorable gentleman cannot surely have understood me. I think I said that under Lord Metcalfe there was responsible government in name but not in deed. And if the honorable gentleman will study our parliamentary history a little closer, he will admit that such was the case. The consequence was, as I have already stated, the resignation of Hon. Messrs. Lafontaine and Baldwin. Still the Lower Canadian party was unbroken. It is true the new advisers of Lord Metcalfe coquetted much with that majority to obtain adhesion; but it was in vain. They remained firm to the last, until the general election of 1848 brought back the parties to Parliament in much about their natural strength. I have already stated that I have destroyed my notes, and I am ready to await the verdict of this honorable House.

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Some Hon. Members—*Applause.*

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February 24, 1865: Matthew Cameron, speaking in the Legislative Assembly of Canada (click [HERE](#) to view a PDF of the 1865 edition of the Confederation Debates, then scroll to p. 451)

Matthew Cameron [Ontario North]—In 1841 the people of this country obtained responsible government, and it was declared to them then that they should have a controlling voice in the affairs of the country—that no important change, in fact, should take place without their having an opportunity of pronouncing upon it. And yet hon. gentlemen now disclaim the right of appeal to the people, and arrogate to themselves an amount of wisdom to suppose that the tens of thousands of people of this province have not the capacity to understand the meaning or the magnitude of this question. They exclude from these men the right of pronouncing an opinion; and are it not singular that it is the people of the province of Canada who are treated in this way? It is not so in the Lower Provinces. New Brunswick, for instance, dissolves its House, and goes to the people. And why should New Brunswick do that which is denied to Canada? Why should the people of New Brunswick be treated as more able and more capable of understanding and pronouncing an intelligent opinion than the people of Canada?

Some Hon. Members—Hear, hear.

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February 27, 1865: Christopher Dunkin, speaking in the Legislative Assembly of Canada (click [HERE](#) to view a PDF of the 1865 edition of the Confederation Debates, then scroll to p. 502)

Christopher Dunkin [Brome]— But, sir, whether our local legislatures are to be of one house or two, or however otherwise

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any of our provinces may experiment, in the way of variation, in framing their constitutions, at least there must everywhere be some attempted approach, in principle, to one or other of the two great divergent systems—the British on the one hand, with its responsible Cabinet—the American, on the other, without. That you cannot work the problem on the former of these two plans, I will show presently. For the latter, Mr. Speaker, in the States, it is always carried on with two elective houses, never with one, and with an elective governor; and all are chosen for terms that are not long.

It could not be made to work otherwise. An appointed governor, holding independently, for a term not short, and above all, with only one House, is an experiment as new and unpromising as need

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be. For a moment, before going further, I revert to the principle on which the Federal Executive is to be constituted. We are promised there a cabinet, responsible after the British model, and strangely and anomalously as we have seen that it will have to be organized, in sections to represent our provinces, we must understand that the British principle of its joint responsibility is to be and will be carried out.

But it is of the essence of responsible government, that with its responsibility such government should have power. No ministry can be answerable for the entire government of a country, unless it has the power to control in some way or other, and to the requisite extent, the course of affairs. If we are going to build up or suffer in the country any power too strong for it to deal with, it will cease to be responsible. [...]

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February 28, 1865: Christopher Dunkin, speaking in the Legislative Assembly of Canada (click [HERE](#) to view a PDF of the 1865 edition of the Confederation Debates, then scroll to p. 519)

Christopher Dunkin [Brome]—[...] In the old days, before responsible government was thought of, in the days when casual and territorial revenues gave provincial governments all they wanted, or a little more, provincial legislatures had mighty little to do with government, and, if they complained of a grievance, were little likely to be listened to. It was even the same long before at home. When the English Crown had its abundance of resources, English kings cared little for their parliaments.

But when their resources were exhausted and they could not borrow easily, and had to ask for taxes, then the House of Commons began to acquire power, and, in course of time, became the body it is now. I shall be surprised if we do not find, in the event of this Confederation taking place, that for some time our provincial legislatures, whether they consist of one chamber or of two, will be less powerful for good than many would wish to have them, that the machine of state will not be altogether driven by their moans.

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[Province of Canada \(1866\)](#)

July 13, 1866: John A. Macdonald & George Brown, speaking in the Legislative Assembly of Canada (click [HERE](#) to view a PDF of the 1866 edition of the Confederation Debates, then scroll to p. 46)⁸

John A. Macdonald [Kingston, Attorney General West and Minister of Militia]—The second resolution provides for the administration of the local governments according to the well understood principles of the British Constitution. Some hon. gentleman might remember how in Upper Canada, before the union, the system of log rolling had been carried on until the statute

⁸ *Supra* footnote 7. For the original p. 46, scroll to the second PDF page in the link above.

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book was loaded with appropriations which, the revenue could not meet. This state of affairs was happily swept away by the union, which establish the principle of responsible government, and provided against the appropriation of a single dollar without a message from the Crown. The duration of local parliaments was to be four years.

George Brown [Oxford South]—Did not understand that such was the case. The point was discussed but not decided on.

John A. Macdonald [Kingston, Attorney General West and Minister of Militia] had an impression that such, at all events, was the understanding. [...]

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August 15, 1866: Viscount Monck, speaking in the Legislative Council of Canada (click [HERE](#) to view a PDF of the 1866 edition of the Confederation Debates, then scroll to p. 94)⁹

His Excellency the Governor General [Viscount Monck]—[...] In bringing to a close the last session likely to be held under the Act for the Union of the two Canadas, I congratulate the Parliament which that law called into existence on the retrospect afforded by the events of the last quarter of a century in this province

You can mark during that period, the firm consolidation of your institutions, both political and municipal, the extended settlement of your country—the development of your internal resources and foreign trade—the improvement and simplification of your laws—and, above all, the education which the adoption of the system of responsible government has afforded to your statesman in the well-tried ways of the British Constitution.

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⁹ *Supra* footnote 7. For the original p. 94, scroll to the third PDF page in the link above.

PART 4

Post-Confederation Debates on Section 12

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March 13, 1879, Auguste-Charles-Philippe-Robert Laundry in the House of Commons. To read the entire debate, Click [HERE](#) to view a PDF of the Debate as recorded in *Hansard*. The debate starts on p. 338.

Mr. Landry: [...] Under the Constitution, Canada, divided in the first place into four Provinces, now counted seven, without counting the vast territories of the North-West to which the Parliament of Canada had given, a few years previously, a separate organisation. Canada had its Constitution, and each of the Provinces entering the Union had also the benefit of a special Constitution. These Constitutions should be compared together in order to fully understand the questions now before the House and the difference that existed between the working of the Federal Constitution and that of the Provincial Constitutions. It would be seen from the British North America Act that it was to the Queen herself that were attributed the Government and the Executive power of Canada, and that the Queen moreover formed part of the Parliament of Canada. She had the entire Executive power and had an essential part in the Legislative power. But our gracious Sovereign could not come here in person to govern Her loyal Canadian subjects, nor to exercise, in common with the Senate and the House of Commons, her legislative attributions. The 10th section of the Imperial Act made provision for this by delegating this power to the Governor-General, who was the representative of our august Sovereign, the personification of Royal Authority. What was the first duty of the Governor? He was to summon Privy Councillors who were to be his advisers. The King reigned but did not govern: such was the *rôle* of the Governor. A man who had been Governor of Canada, the noble Earl of Dufferin, had himself marked out, in unequivocal terms, this first and imperative duty. He had said:

"My only guiding star in the conduct and maintenance of my official relations with your public men is the Parliament of Canada. In fact, I suppose I am the only person in the Dominion whose faith in the wisdom and the infallibility of Parliament is never shaken. Each of you, gentlemen, only believe in Parliament so long as Parliament acts according to your wishes and convictions. I, gentlemen, believe in Parliament no matter which way it votes—and to those men alone whom the deliberate will of the confederated Parliament of the Dominion may assign to me as my responsible advisers can. I give my confidence. Whether they are the heads of this party or of that party must be a matter of indifference to the Governor-General. So long as they are maintained by Parliament in their position, so long is he bound to give them his unreserved confidence, to defer to their advice, and loyally to assist them with his counsels. Whenever, in the vicissitudes of party warfare, they are replaced by others, he welcomes their successors with an equally open and loyal regard. Such private friendships as he may

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have formed he may have a right to retain. As a reasonable being he cannot help having convictions upon the merits of different policies, but these considerations are abstract, speculative and devoid of practical effect in his official relations. As the head of a constitutional State, as engaged in the administration of parliamentary government, he has no political friends;

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still less need he have political enemies. The possession, or even to be suspected of possessing either, destroys his usefulness."

He quoted the 12th section of the British North America Act, which enumerated the powers that the Governor possessed, whether he acted under the advice of his Council, or on his own responsibility, and pointed out that there was nothing plainer than this section, which pointed out clearly the very sources whence were derived the diverse powers granted to the Governors of Canada, and which were not mentioned in the British North America Act. The first source of power that was found in looking over the past, was the very Act that the British North America Act had replaced in 1867. He spoke of the Union Act, passed in 1840, by the British Parliament, which provided that all powers, authorities and functions, which were previously vested in the respective Governors or Lieutenant- Governors of the Provinces, with the advice, or with the advice and consent of the Executive Council of such Provinces respectively, or in conjunction with such Executive Council, or with any number of the members thereof, or by the said Governors or Lieutenant-Governors individually and alone, should, insofar as the same were not repugnant to, or inconsistent with, the provision of that Act, be vested in the Governor of the Province of Canada, with the advice, or with the advice and consent of, or in conjunction, as the case might require, with such Executive Council, or any members thereof, or by himself, individually and alone, in cases where the advice, consent, or concurrence of the Executive Council was not required. This section was completed by the following one, which indicated, in express terms, the manner in which the Governor was to act on his own responsibility, in case the advice of his Ministers should not be required, and provided that all the power and authority vested in him, should be exercised in conformity with, and subject to, such orders, instructions and directions as Her Majesty might, from time to time, see fit to make or issue. The 45th section of the Union Act referred to a former Act passed under George the Third, in the thirty-first year of his reign. This Act of 1791 was none other than the Constitutional Act that was granted to Canada by England, twenty-eight years after the Treaty of Versailles. He had read it attentively, and he had failed to discover therein aught that gave to the Governors of Canada other powers than those already specified by the Union Act of 1840, and the British North America Act of 1867. On the contrary, he found that in those days the powers of the Governors were much more restrained than they were now. The Governor could do nothing without, having a special authorisation from the reigning Sovereign, who granted it under his own hand. The appointment of Legislative Councillors, the summoning and prorogation of the Houses, could not take place without an authorisation given under the Sovereign's own hand. That was the nature of the Constitutional Act of 1791, and it would convince all those who were acquainted with the present working of responsible government how greatly the powers and initiative of the Governor were at that time limited. He was speaking from the standpoint of the Statute. But there was another Act to be consulted. By going back to the fourteenth year of the reign of George III, it would be found that during the seventh Session of the thirteenth Parliament of Great Britain, in 1774, an Act had been passed, the 83rd of the Statutes at that time, which was entitled: "An Act for making more effectual provision for the Government of the Province of Quebec in North America." But in this Act, as in the one that replaced it, nothing was found that gave to the Governors other powers than those already mentioned. The Act of 1867, by which a Constitution was granted to Canada, defined the powers of the Governors, and referred to the Act of 1840. The Act of 1840 referred, in its turn, to the Act of 1791, and the Act of 1791 to that of 1774. These three latter Acts did not confer on the Governors of Canada any other powers than those he now possessed

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under the Act of 1867; this Act, on the contrary, going further, in this respect, than the preceding ones. The Act of 1867, the British North America Act, was the veritable charter of Canadian liberties; it was the fruitful source from which flowed the rights and powers of the Canadian people, and those whom the Royal authority sent to preside over the destinies of one of the most beautiful of her colonies were obliged to draw from this source the spirit of their duties, and the Royal Instructions, showed in the most conclusive manner, that the source of the Governor's power was the British North America Act. He was still speaking from the standpoint of the Statute, but it was time to distinguish between two things that were not to be confounded, and to study, in the distribution of the Governor's functions and in the exercise of his duties, what he would define as the double character and the double action of a Governor. According to his idea, there were two persons in a Governor. There was the representative, the delegate of our beloved Queen, what he would call the personification of Royal authority; there was also the public servant, appointed by the British Crown to protect and defend, in a far-off land, the interests and the glorious prestige of this Crown, whence his authority was derived. King and servant, — King in the colonies, servant of the Mother Country, — not responsible to this House for any of his acts, whatever they might be, but responsible to the British Parliament. The most competent writers on constitutional law confirmed this doctrine. In his work upon Responsible Government, Lord Grey said: —

"But there was this most important difference between a Colonial Governor and an English Sovereign of the Houses of Plantagenet or Tudor, that the former was responsible to a distant and, generally, an impartial authority, to which the colonists could always appeal to relieve them from a Governor who abused his power."

Hearn said: —

"Although he is the first subject in the colony over which he presides, and is entitled to all the consideration which the great confidence reposed in him by his Sovereign demands, he is in strict law merely an agent of the Queen, exercising in her name and on her behalf under certain strict instructions some of the Royal prerogatives. His authority is derived and is strictly limited. He, like every other agent, has, from the very nature of the case, a double relation, one to his principal, another to the party with whom he transacts the affairs of his principal."

Grey, he thought, summarised the question: —

"The Governor is the King's servant. His commission came from him and he has only to execute the powers conferred upon him by this commission, to wit, to execute the laws of Minorca, subject to the instructions of the King in Council.

He believed that by these extracts he had shown, in a manner not to be refuted, that the powers of a Governor were limited, and that, in present cases, the Governor had no other authority than that conferred on him by the British North America Act, or that which he held under the commission of the Queen herself. This principle being admitted — and no one could deny it — it remained to be shown that a Lieutenant-Governor had no other authority than that conferred upon him by the same British North America Act, or that he might receive from the Governor-General who granted him his commission. For him, as for the Governor-General, there were two sources whence he derived his authority, the law and his commission. By the British North America Act, all powers, authorities and functions which, under any Imperial or Canadian Act, were, before or at the Union, vested in or exercisable by the respective Governors, or Lieutenant-Governors, of the Provinces were, so far as the same were capable of being exercised after the Union, in relation to the Government of Ontario and Quebec respectively, rested in the Lieutenant-Governors of Ontario and Quebec respectively, with the advice, or with the advice and consent of, or in conjunction with

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the respective Executive Councils, or any members thereof, or by the Lieutenant-Governor individually, as the case required. [...]

David Mills, p. 367

Mr. Mills: [...] He would ask the attention of the House to the views of Earl Grey, who was for many years Colonial Secretary under the Administration of Lord John Russell. In his work on Parliamentary Government, pages 4 and 5, after pointing out that the theory that the Executive power belongs wholly to the Crown, while the power of legislation is vested jointly in the Sovereign and the two Houses of Parliament, has ceased to be correct unless it is understood as applying only to the legal and technical distribution of power; after pointing out that the power belonging to the Crown is always exercised through responsible Ministers, and that in then the Executive and Legislative power are virtually united in the same bonds, he said:

"The exercise of this high authority is also placed under the check of a strict responsibility and control, and its possession made to depend on the confidence placed by the representatives of the people in the Ministers to whom it is committed. There is a further safeguard against abuse, in its being requisite that the Ministers of the Crown should obtain its direct sanction for all their most important measures."

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PART 5

Secondary Sources on Section 12

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Edward Blake, *The Executive Power Case: The Attorney-General of Canada vs. The Attorney-General of Ontario* (Toronto: Press of the Budget, 1892), p. 19. ([HERE](#))

Then I come to section 65, which is the parallel of section 12 to which I have referred, dealing with the powers, authorities and functions. The same words are used as to the powers, authorities and functions vested in the Lieutenant-Governors, as were used with reference to those vested in the Queen's immediate representative, the Governor-General. The division of power is accomplished by the use of the same language—save of course that which describes the division—the same language in the one case as in the other; the power is of the same quality, of the same nature, in the one case as in the other: the executive authority as well as the Legislative authority is of the same nature; and not merely is it of the same nature as that of the old Provinces; but I ask your Lordships to determine that the executive authority of the Provinces is of the same nature as the executive authority of the Dominion; that the whole body of executive authority was divided; and that the portion assigned to the Provinces came from the same source, was of the same nature, and was of an even higher antiquity, in the case of the Provinces to which it was in substance continued, than it was in the case of the Dominion to which it was, necessarily for the first time, by the Act ascribed.

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J.E.C. Munro, *The Constitution of Canada* (Cambridge: Cambridge University Press, 1889), p. 8. ([HERE](#))

In the constitution of the Executive the English Constitution has been followed. The executive power is vested in the Sovereign, who carries on the work of administration through a Governor-General, assisted by a body of ministers known as the Canadian Privy Council. The Governor-General is appointed by the Crown, and the ministers are appointed by the Governor-General. But in accordance with the principle of "responsible government" the Governor-General is by constitutional practice required to select as his ministers those members whose policy obtains the confidence of the House of Commons. The position of a minister is therefore similar to that of a member of the Cabinet; but whilst the English Cabinet is "unknown to the law," the Union Act makes express provision for the constitution of the Canadian Privy Council.

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W.H.P. Clement, *The Law of the Canadian Constitution* (Toronto: The Carswell Co. Ltd., 1892), pp. 256-258. ([HERE](#)).

SECTION 12, EXECUTIVE POWER

12. (i) All powers, authorities and functions (ii) which under any Act (iii) of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of those Provinces, with the advice, or with the advice and consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any number of members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in and exercisable by the Governor-General, with the advice or with the advice and consent of or in conjunction with the Queen's Privy Council for Canada, or any members thereof, or by the Governor-General individually as the case requires, subject nevertheless

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(except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) (iv) to be abolished or altered by the Parliament of Canada (v).

(i) We have already had occasion to treat with some fullness of this section and its companion section (65); see chapter III., pp. 48, *et seq.*

(ii) "*All powers, etc.*"—Compare the language of section 65, which vests these same "powers, etc.," so far as they are capable of being exercised in relation to the government of Ontario and Quebec, in the Lieutenant-Governors of those provinces respectively. The B. N. A. Act affects no division of these powers, but of the field for their exercise merely.

(iii) "*Under any Act.*"—This section 12, refers only to statutory powers and does not touch the common law "prerogatives of the crown." The vast majority of the powers exercisable by the Governor-General are statutory powers, that is to say, are vested in him under Canadian legislation. See chapter VIII. *ante*, p. 163, *et seq.*, where this question is fully discussed.

(iv) "*Except with respect, etc.*"—There are no Imperial Acts conferring powers, authorities, and functions on colonial governors generally : as to Canada, see the Constitutional Act, 1791, and the Union Act, 1840. All the powers, etc., conferred by those Acts—and more—are included in the B.N.A. Act, which at the present time is the only Imperial statute which in any way defines the duties of the Governor-General or of the Lieutenant-Governors of the various provinces.

(v) "*To be abolished or altered by the parliament of Canada.*" This of course is limited to the abolition or alteration of these powers, etc., so far as they are exercisable in

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relation to the government of Canada. See section 65, which confers like power on the provincial legislative assemblies, so far as these powers are exercisable in relation to the government of the provinces of Ontario and Quebec. See also notes to section 129, *post*, with particular reference to *Dobie v. Temporalities Board*, L. R. 7 App. Cas.136

SECTION 12, EXECUTIVE POWER

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A.H.F. Lefroy, *A Short Treatise on Canadian Constitutional Law* (Toronto: Carswell Company, Limited, 1918), pp. 130-132. ([HERE](#))¹⁰

[...] The contentions which have arisen over this clause have centred round the words 'with provincial objects,' contentions which appear to have been finally set at rest by the Privy Council in the recent case of *Bonanza Creek Gold Mining Co. v. The King*. The majority of the judges of the Supreme Court of Canada had adopted the view that the introduction of the words "with provincial objects" imposed "a territorial limit on legislation conferring the power of incorporation so completely that by or under provincial legislation no company could be

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incorporated with an existence in law that extended beyond the boundaries of the province. Neither directly by the language of a special Act, nor indirectly by bestowal through executive power, did they think that capacity could be given to operate outside the province, or to accept from an outside authority the power of so operating." The Privy Council, however, hold that, by virtue of section 65 of the Federation Act, which in conjunction with section 12 makes a distribution of executive power between the Dominion and the provinces corresponding to the distribution which it makes of legislative power, there was in the Lieutenant-Governor, that is, in the provincial executive, a power to incorporate companies with provincial objects, but with an ambit of vitality wider than that of the geographical limits of the province. The powers of incorporation which the Governor-General or Lieutenant-Governor possessed before the Union must be taken to have passed, by virtue of section 65, to the Lieutenant-Governors so far as concerns companies with this class of objects; and there can be no doubt that prior to 1867 the Governor-General was for many purposes entrusted with the exercise of the prerogative power of the Sovereign to incorporate companies throughout Canada. Under sections 12 and 65 the continuance of the powers thus delegated to the Governor is made by implication to depend on the appropriate legislature not interfering; and in the case of Ontario (under whose Companies Act the Bonanza Creek Mining Company had been incorporated, and which Act expressly recognizes as supporting the charters granted under it, any powers with which the Lieutenant-Governor might be vested in respect to granting charters of incorporation apart from its

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provisions), such powers had not been interfered with. [...]

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¹⁰ This text contains footnotes, which can be seen by consulting the source linked above.