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**Compilation of primary documents to assist  
in interpreting Provincial Executive Power in Section 65  
of the *Constitution Act, 1867***

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*65. 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, or Canada, were or are before or at the Union vested in or exerciseable 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 are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant Governor of Ontario and Quebec respectively, with the Advice or with the Advice and Consent of or in conjunction with the respective Executive Councils, or any*

SECTION 65, EXECUTIVE POWER (PROVINCIAL)

*Members thereof, or by the Lieutenant Governor 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 respective Legislatures of Ontario and Quebec.*<sup>1</sup>

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**Summary of Section 65**

Section 65 is 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. Like Section 12, it essentially contains two similar 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. Unlike Section 12, however, this provision only applies for the newly created Provinces of Ontario and Quebec. New Brunswick and Nova Scotia are not mentioned here since their executive authority continues as it existed pre-confederation, while new provinces were created out of the Province of Canada with Ontario and Quebec. Located in “Part V. Provincial Constitutions: Executive Power” of the *Constitution Act, 1867*, this provision settles the constitutional basis for the executive power for Ontario and Quebec.

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<sup>1</sup> On the Justice website (<https://laws-lois.justice.gc.ca/eng/const/FullText.html#end33>), 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

## SECTION 65, EXECUTIVE POWER (PROVINCIAL)

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 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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**PART 2:**

**Section 65 in Successive Drafts,  
from the Quebec Resolutions, 1864 to the  
*Constitution Act, 1867***

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**The Quebec Resolutions (1864)<sup>2</sup>**

**October 26, 1864: Working Draft No. 1**

That it shall be competent for the Local Legislatures to make Laws respecting: --

[...]

19. The power of respiting, reprieving, commuting and pardoning Prisoners convicted of crimes, and of remitting of sentences in whole or in part, which belongs of right to the Crown, shall be administered by the Lieutenant Governor of each Province in Council, subject to any instructions he may from time to time receive from the General Government, and subject to any provisions that may be made in this behalf by the General Legislature.

(Source: John A. Macdonald, Drafts of the Quebec Resolutions, Working Draft No. 1, October 26th, 1864, MG 26 A, Vol. 46, pp. 18164-18168. The text is found on p. 18166-18167. Click [HERE](#).)

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

That it shall be competent for the Local Legislatures to make Laws respecting:—

[...]

*[renumbered to 40]* ~~19~~. The power of respiting, reprieving, commuting and pardoning Prisoners convicted of crimes, and of remitting of sentences in whole or in part, which belongs of right to the Crown, shall be administered by the Lieutenant Governor of each Province in Council, subject to any instructions he may from time to time receive from the General Government, and subject to any provisions that may be made in this behalf by ~~the General Legislature~~ *[Parliament]*.

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<sup>2</sup> 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 65, EXECUTIVE POWER (PROVINCIAL)

(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 p. 18151. Click [HERE](#).)

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### October 27, 1864: Working Draft No. 3

The power of respiting, reprieving, commuting and pardoning Prisoners convicted of crimes, and remitting of sentences in whole or in part, which belongs of right to the Crown, shall be administered by the Lieutenant Governor of each Province in Council, subject to any instructions he may from time to time receive from the General Government, and subject to any provisions that may be made in this behalf by Parliament.

(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

[44.] ~~That~~ the power or respiting, reprieving, ~~commuting~~ and pardoning Prisoners convicted of crimes, and of [commuting and] remitting of sentences in whole or in part, which belongs of right to the Crown, shall be administered by the Lieutenant Governor of each Province in Council, subject to any instructions he may from time to time receive from the General Government, and subject to any provisions that may be made in this behalf by [the General] Parliament.

(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 Montreal<sup>3</sup>

The power or respiting, reprieving, commuting and pardoning Prisoners convicted of crimes, and of remitting of sentences in whole or in part, which belongs of right to the Crown, shall be

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<sup>3</sup> *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* (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."

## SECTION 65, EXECUTIVE POWER (PROVINCIAL)

administered by the Lieutenant Governor of each Province in Council, subject to any instructions he may, from time to time, receive from the General Government, and subject to any provisions that may be made in this behalf by Parliament.

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

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

44. The power of respiting, reprieving, and pardoning Prisoners convicted of crimes, and of commuting and remitting of sentences in whole or in part, which belongs of right to the Crown, shall be administered by the Lieutenant Governor of each Province in Council, subject to any instructions he may, from time to time, receive from the General Government, and subject to any provisions that may be made in this behalf by the General Parliament.

(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 p. 18214. Click [HERE](#).)

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

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

44. The power of respiting, reprieving and pardoning Prisoners convicted of crimes, and of commuting and remitting of sentences in whole or in part, which belongs of right to the Crown, shall be administered by the Lieutenant Governor of each Province in Council, subject to any instructions he may from time to time receive from the General Government, and subject to any provisions that may be made in this behalf by the General Parliament.

(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. 18187. Click [HERE](#).)

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

44. The power of respiting, reprieving, and pardoning prisoners convicted of crimes, and of commuting and remitting of sentences in whole or in part, which belongs of right to the Crown, shall be administered by the Lieutenant Governor of each Province in Council, subject to any

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<sup>4</sup> The relevant newspaper is found on the second to last page of the PDF.

## SECTION 65, EXECUTIVE POWER (PROVINCIAL)

instructions he may from time to time receive from the General Government, and subject to any provisions that may be made in this behalf by the General Parliament.

(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. 18179. Click [HERE](#).)

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

44. The power of respiting, reprieving, and pardoning prisoners convicted of crimes, and of commuting and remitting of sentences in whole or in part, which belongs of right to the Crown, shall be administered by the Lieutenant Governor of each Province in Council, subject to any instructions he may from time to time receive from the General Government, and subject to any provisions that may be made in this behalf my the General Parliament.

(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. 18205. Click [HERE](#).)

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### **December 28, 1866: Final Version**

43. The power of respiting, reprieving, and pardoning prisoners convicted of crimes, and of commuting and remitting of sentences in whole or in part which belongs of right to the Crown, shall, except in capital cases, be administered by the Governor of each Province in Council, subject to any instructions he may from time to time receive from the General Government, and subject to any provisions that may be made in this behalf by the General Parliament.

(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. 107. Click [HERE](#).)

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## [Constitution Act, 1867](#)

### **n.d.: Local Constitutions Drafts Early Package**

LOCAL GOVERNMENT.

[...]



## SECTION 65, EXECUTIVE POWER (PROVINCIAL)

3. All powers and authorities expressed in this Union Act, Sect. 50 Act to be given to the Governor of each Province, shall be exercised by such Governor in conformity with and subject to such orders, instructions, and directions as the General Government shall from time to time see fit to make or issue.

4. The power of respiting, reprieving and pardoning prisoners convicted of crimes, and of commuting and remitting of sentences in whole or in part which belongs of right to the Crown, shall, except in capital cases, be administered by the Governor of each Province in Council, subject to any instructions he may from time to time receive from the General Government, and subject to any provisions that may be made in this behalf by the General Parliament.

[...]

### **LOCAL GOVERNMENT AND LEGISLATURE OF LOWER CANADA AND UPPER CANADA.**

13. All powers, authorities, and functions Union Act, sec. 45 which by any Act passed by the Imperial Parliament, or by any Act passed by the Legislature of the Provinces of Lower and Upper Canada respectively, or by the Legislature of the Province of Canada, were or are vested in or authorised or required to be exercised by the respective Governors or Lieutenant-Governors of Canada, or of Lower Canada or Upper Canada, 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 shall, in so far as the same are not repugnant to or inconsistent with the provision of this Act, be vested in and may be exercised by the Governor of Lower and Upper Canada respectively, with the advice or with the advice and consent of or in conjunction, as the case may require, with such Executive Council, or any Members thereof as may be appointed for the affairs of Lower Canada and Upper Canada, or by the Governor of Lower Canada or Upper Canada respectively, individually and alone, in cases where the advice, consent, or concurrence of the Executive Council is not required.

The Governor of each Province may appoint, under the Great Seal of the Province, and to hold office during pleasure, the following officers, that is to say:—The Attorney General, the Solicitor General, the Secretary of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, and may, by and under Order in Council from time to time, prescribe the duties of such officers and of the several departments over which they shall preside, or to which they shall belong, and of the officers and clerks thereof; and may also appoint other and additional officers to hold office during pleasure, and may from time to time prescribe the duties of such officers, and of the several departments over which they shall preside, or to which they shall belong, and of the officers and clerks thereof; and all rights, powers, duties, or authorities now vested or imposed in or upon any such officer by any Law, Statute, or Ordinance of the former Provinces of Lower and Upper Canada, or of the Province of Canada, and not repugnant to this Act, shall be vested in or imposed upon any officer to be appointed by the Governor, unless and until, and in such case in so far only as such rights, powers, duties or authorities be varied, altered, amended or repealed by the [Illegible].

The Executive Council of the Provinces of Lower and Upper Canada shall be composed of the Attorney General, the Secretary of the Province, the Treasurer of the Province, the Commissioner

## SECTION 65, EXECUTIVE POWER (PROVINCIAL)

of Crown Lands and the Commissioner of Public Works, and of any other persons who may at any time or from time be appointed to the office of Executive Councillor by instrument under the Great Seal, and to hold office during pleasure, and the Speaker of the Legislative Council of Lower Canada shall be a Member of the Executive Council of Lower Canada.

No person accepting or holding any office, commission, or employment, permanent or temporary, at the nomination of the Crown, in either of the Provinces of Lower or Upper Canada, to which an annual salary, or any fee, allowance, emolument or profit of any kind or amount whatever from the Crown is attached, shall be eligible as a Member of the Legislative Assembly of either Province, nor shall he sit or vote as such; but nothing in this section shall render ineligible as aforesaid any person being a Member of the Executive Council of either of the said Provinces, or holding any of the following offices, that is to say, of Attorney General, Solicitor General, Secretary of the Province, Treasurer of the Province, Commissioner of Crown Lands, or Commissioner of Public Works, or shall disqualify him to sit or vote in the House for which he is elected, provided he be elected while holding such office and not otherwise disqualified.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – Local Constitutions Drafts Early Package, n.d. (MG 26, A, Vol. 49/2, pp. 19451-19461). This text is found on pp. 19451 & 19454-19455. Click [HERE](#).)

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### **n.d.: Local Constitutions Drafts Early Package with Reilly's Notes**

#### **REVENUES, &c.,**

*[Renumbered 95] 21-109.*—From and after the Union, such portions of the duties and revenues, over which the respective Legislatures of the said Provinces, before the period thereof, had power of appropriation, which are by this Act reserved to the Local Governments or Legislatures; and all duties and revenues by them hereafter raised in [... missing the rest].

*[Illegible].*—All *[Illegible]* authorities, and functions which by any Act passed by the Imperial Parliament, or by any Act passed by the Legislatures of the Provinces of Lower and Upper Canada respectively, or by the Legislature of the Province of Canada, were or are vested in or authorised or required to be exercised by the respective Governors or Lieutenant-Governors of Canada, or of Lower Canada or Upper Canada, 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 shall, in so far as the same are not repugnant to or inconsistent with the provisions of this Act, be vested in and may be exercised by the Lieutenant-Governors of Ontario and Quebec respectively, with the advice or with the advice and consent of or in conjunction, as the case may require, with such Executive Council, or any Members thereof as may be appointed for the affairs of Ontario and Quebec, or by the Lieutenant-Governor of Ontario or Quebec respectively, individually and alone, in cases where the advice, consent, or concurrence of the Executive Council is not required.

SECTION 65, EXECUTIVE POWER (PROVINCIAL)

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – Local Constitutions Drafts Early Package with Reilly’s Notes, n.d. (MG 26, A, Vol. 49/2, pp. 19462-19480). This text is found on pp. 19468-19469. & Click [HERE.](#))

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**n.d.: Local Constitutions Drafts Revised Package**

*[Illegible comments in both columns]*

[12 ½]

86.—The ~~Lieutenant-Governor~~ *[General]* of ~~each Province~~ may assign, depute, substitute, and appoint any person or persons jointly or severally, to be his deputy or deputies within any part or parts of ~~such Province~~, *[Canada]* and in that capacity to exercise, perform and execute, during the pleasure of the said ~~Lieutenant-Governor~~ *[General]*, such of the powers, functions and authorities as may under this Act be vested in or exercised by the ~~Lieutenant-Governor~~ *[General]* as the ~~Lieutenant-Governor~~ shall deem to be necessary or expedient, but the appointment of a Deputy or Deputies as aforesaid shall not abridge, alter, or in any way affect the power or authority of the ~~Lieutenant-Governor~~ *[General]* of the Province.

87.—All powers, authorities, and functions which by any Act passed by the Imperial Parliament, or by any Act passed by the Legislature of the Provinces of Lower and Upper Canada respectively, or by the Legislature of the Province of Canada, were or are vested in or authorised or required to be exercised by the respective Governors or Lieutenant-Governors of Canada, or of Lower Canada or Upper Canada, 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 shall, in so far as the same are not repugnant to or inconsistent with the provision of this Act, be vested in and may be exercised by the Lieutenant-Governors of Ontario and Quebec respectively, with the advice or with the advice and consent of or in conjunction, as the case may require, with such Executive Council, or any Members thereof as may be appointed for the affairs of Ontario and Quebec, or by the Lieutenant-Governor of Ontario or Quebec respectively, individually and alone, in cases where the advice, consent, or concurrence of the Executive Council is not required.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – Local Constitutions Drafts Revised Package, n.d. (MG 26, A, Vol. 49/2, pp. 19500-19518). This text is found on pp. 19500-19501. & Click [HERE.](#))

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**n.d.: Local Constitutions Drafts Revised Package, Copy 3**

*[Illegible comments in left column]*

86.—The Lieutenant-Governor of each Province may assign, depute, substitute, and appoint any person or persons jointly or severally, to be his deputy or deputies within any part or parts of such

## SECTION 65, EXECUTIVE POWER (PROVINCIAL)

Province, and in that capacity to exercise, perform and execute, during the pleasure of the said Lieutenant-Governor, such of the powers, functions and authorities as may under this Act be vested in or exercised by the Lieutenant-Governor as the Lieutenant-Governor shall deem to be necessary or expedient, but the appointment of a Deputy or Deputies as aforesaid shall not abridge, alter, or in any way affect the power or authority of the Lieutenant-Governor of the Province.

*[Illegible comments in left column]*

87.— All powers, authorities, and functions which by any Act passed by the Imperial Parliament, or by any Act passed by the Legislature of the Provinces of Lower and Upper Canada respectively, or by the Legislature of the Province of Canada, were or are vested in or authorised or required to be exercised by the respective Governors or Lieutenant-Governors of Canada, or of Lower Canada or Upper Canada, 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 shall, in so far as the same are not repugnant to or inconsistent with the provision of this Act, be vested in and may be exercised by the Lieutenant-Governors of Ontario and Quebec respectively, with the advice or with the advice and consent of or in conjunction, as the case may require, with such Executive Council, or any Members thereof as may be appointed for the affairs of Ontario and Quebec, or by the Lieutenant-Governor of Ontario or Quebec respectively, individually and alone, in cases where the advice, consent, or concurrence of the Executive Council is not required.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – Local Constitutions Drafts Revised Package, Copy 3, n.d. (MG 26, A, Vol. 49/2, pp. 19538-19556). This text is found on pp. 19538-19539. Click [HERE](#).)

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### **n.d.: Local Constitutions Drafts Revised Package, Copy 4**

*[Clause 86 is missing from this draft]*

*[Transpose to miscellaneous clauses for Ontario + Quebec] [checkmark added in left column]*

87.— All powers, authorities, and functions which by any Act passed by the Imperial Parliament, or by any Act passed by the Legislature of the Provinces of Lower and Upper Canada respectively, or by the Legislature of the Province of Canada, were or are vested in or authorised or required to be exercised by the respective Governors or Lieutenant-Governors of Canada, or of Lower Canada or Upper Canada, 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 shall, in so far as the same are not repugnant to or inconsistent with the provision of this Act, be vested in and may be exercised by the Lieutenant-Governors of Ontario and Quebec respectively, with the advice or with the advice and consent of or in conjunction, as the case may require, with such Executive Council, or any Members thereof as may be appointed for the affairs of Ontario and Quebec, or by the Lieutenant-Governor of Ontario or Quebec respectively, individually and alone, in cases where the advice, consent, or concurrence of the Executive Council is not required.

SECTION 65, EXECUTIVE POWER (PROVINCIAL)

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – Local Constitutions Drafts Revised Package, Copy 4, n.d. (MG 26, A, Vol. 49/2, pp. 19576-19594). This text is found on pp. 19576-19577. Click [HERE](#).)

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**n.d.: Local Constitutions Drafts Revised Package, H.B. Morse's Copy**

[transfer to local list?]

[12 ½] 86. — The ~~Lieutenant-Governor~~ *[General]* of each ~~Province~~ may assign, depute, substitute, and appoint any person or persons jointly or severally, to be his deputy or deputies within any part or parts of ~~such Province~~ *[Canada]*, and in that capacity to exercise, perform and execute, during the pleasure of the said ~~Lieutenant-Governor~~ *[General]*, such of the powers, functions and authorities as may under this Act be vested in or exercised by the ~~Lieutenant-Governor~~ *[General]* as ~~the Lieutenant-Governor~~ shall deem to be necessary or expedient, but the appointment of a Deputy or Deputies as aforesaid shall not abridge, alter, or in any way affect the power or authority of the ~~Lieutenant-Governor~~ *[General]* of the ~~Province~~.

[illegible comment in left column]

87. — All powers, authorities, and functions which by any Act passed by the Imperial Parliament, or by any Act passed by the Legislature of the Provinces of Lower and Upper Canada respectively, or by the Legislature of the Province of Canada, were or are vested in or authorised or required to be exercised by the respective Governors or Lieutenant-Governors of Canada, or of Lower Canada or Upper Canada, 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 shall, in so far as the same are not repugnant to or inconsistent with the provision[s] of this Act, be vested in and may be exercised by the Lieutenant-Governors of Ontario and Quebec respectively, with the advice or with the advice and consent of or in conjunction, as the case may require, with such Executive Council, or any Members thereof as may be appointed for the affairs of Ontario and Quebec, or by the Lieutenant-Governor of Ontario or Quebec respectively, individually and alone, in cases where the advice, consent, or concurrence of the Executive Council is not required.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – Local Constitutions Drafts Revised Package, H.B. Morse's Copy, n.d. (MG 26, A, Vol. 49/2, pp. 19595-19613). This text is found on pp. 19595-19596. Click [HERE](#).)

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

*No clause.*

## SECTION 65, EXECUTIVE POWER (PROVINCIAL)

(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). Click [HERE](#).)

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### **January 23, 1867: 23rd January Draft**

*No clause.*

(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: 1<sup>st</sup> Draft**

*No clause.*

(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). Click [HERE](#).)

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### **January 31, 1867: 2<sup>nd</sup> Draft**

*No clause.*

(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). Click [HERE](#).)

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### **n.d. (between Jan. 31 & Feb. 2, 1867): 3<sup>rd</sup> Draft, Early Copy**

*No clause.*

(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). Click [HERE](#).)

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### **February 2, 1867: 3<sup>rd</sup> Draft, Revised Copy**

*No clause.*

## SECTION 65, EXECUTIVE POWER (PROVINCIAL)

(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). Click [HERE.](#))

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### **n.d. (1867): 4<sup>th</sup> Draft, Early Version**

*No clause.*

(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). Click [HERE.](#))

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### **n.d. (1867): 4<sup>th</sup> Draft, Later Version**

*No clause.*

(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). Click [HERE.](#))

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### **n.d. (1867): 4<sup>th</sup> Draft, Later Version, Revised Copy**

99[6].— All powers, authorities, and functions which by any Act passed by the Imperial Parliament, or by any Act passed by the Legislature of the Provinces of Lower and Upper Canada respectively, or by the Legislature of the province of Canada, were or are vested in or authorised or required to be exercised by the respective Governors or Lieutenant-Governors of Canada, or of Lower Canada or Upper Canada, 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 shall, in so far as the same are not repugnant to or inconsistent with the provisions of this Act, be vested in and may be exercised by the Lieutenant-Governors of Ontario and Quebec respectively, with the advice or with the advice and consent of or in conjunction, as the case may require, with such Executive Council, or any Members thereof as may be appointed for the affairs of Ontario and Quebec, or by the Lieutenant-Governor of Ontario or Quebec respectively, individually and alone, in cases where the advice, consent, or concurrence of the Executive Council is not required.

(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 pp. 19437-19438. Click [HERE.](#))

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### **n.d. (1867): 4<sup>th</sup> Draft, Final Version**

## SECTION 65, EXECUTIVE POWER (PROVINCIAL)

96.—All powers, authorities, and functions which by any Act passed by the Imperial Parliament, or by any Act passed by the Legislature of the Provinces of Lower and Upper Canada respectively, or by the Legislature of the Province of Canada, were or are vested in or authorised or required to be exercised by the respective Governors or Lieutenant-Governors of Canada, or of Lower Canada or Upper Canada, 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 shall, in so far as the same are not repugnant to or inconsistent with the provisions of this Act, be vested in and may be exercised by the Lieutenant-Governors of Ontario and Quebec respectively, with the advice or with the advice and consent of or in conjunction, as the case may require, with such Executive Council, or any Members thereof as may be appointed for the affairs of Ontario and Quebec, or by the Lieutenant-Governor of Ontario or Quebec respectively, individually and alone, in cases where the advice, consent, or concurrence of the Executive Council is not required.

(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 pp. 19651-19652. Click [HERE](#).)

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

Powers to be exercised by Lieutenant Governor of Ontario or Quebec with Advice or alone.

65. 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, or Canada, were or are before or 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 are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant Governor of Ontario and Quebec respectively, with the Advice or with the Advice and Consent of or in conjunction with the respective Executive Councils, or any Members thereof, or by the Lieutenant Governor 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 respective Legislatures of Ontario and Quebec.

(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. 19683. Click [HERE](#).)

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**PART 3:**

**Debates on Section 65 in the  
*Confederation Debates in the Province of  
Canada (1865-1866)***

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**[Province of Canada \(1866\)](#)<sup>5</sup>**

**July 13, 1866: John A. Macdonald (click [HERE](#) to view the debates, then scroll to p. 46)**

**John A. Macdonald [Kingston, Attorney-General West and Minister of Militia] – [...]**  
The Attorney-General East [George-Étienne Cartier] would address the House in explanation of the resolutions referring particularly to that section of the Province. In Upper Canada it had been concluded after mature consideration to have only one Legislative Chamber. The executive in both Provinces would be the same; a governor appointed by the general government, holding office during pleasure, which should not except for good reasons be exercised until after the expiration of five years.

**Local Resolutions, p. 47**

*The resolutions were then read the first time, —*

[...]

2. That under and subject to the Constitution of the Federated Provinces, the executive authority of the Lieutenant Governor of Lower Canada and Upper Canada respectively shall be administered by each of such Officers according to the well understood principles of the British Constitution.

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**July 27, 1866: Matthew Cameron, John A. Macdonald, George Brown, and George-Étienne Cartier (click [HERE](#) to view the debates, then scroll to p. 62)**

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<sup>5</sup> 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, you may click the links provided in this report and then go to “Click here to view the original document (PDF)” located in the “Document Information”.

## SECTION 65, EXECUTIVE POWER (PROVINCIAL)

**Matthew Cameron [Ontario North]** found no provision made in those resolutions for a Local Executive Council. He should like to know whether the government intended to make any change, so that this might be remedied. The resolutions did not actually provide for Local Government, only for a Local Governor. Now a government, as he understood it, consisted of Governor and Executive Council.

**John A. Macdonald [Kingston, Attorney-General West and Minister of Militia]** explained that the general terms of the well understood principles of the British Constitution were sufficiently explicit to define the necessity for a constitutional Ministry. But the number of departments had been left to be determined by the Local Parliaments.

**George Brown [Oxford South]** thought that with the experience, an ability which the House possessed it ought to prepare as many of the details of the Local Constitutions as possible. [The union act of '41](#)<sup>6</sup> had provided that the heads of the Departments, should form the executive, and we thought that some provision should be made for a Local Executive. If the point were left to the Local Parliaments, there would be a great temptation to multiply offices to too great an extent.

**George-Étienne Cartier [Montreal East, Attorney-General East]** defended the resolutions as framed and argued that the Local Executive was sufficiently provided for by the general declaration of the principle of government. The resolutions upon which the Union Act had been founded, did not make any exact definition as to the Executive Council.

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**August 2, 1866: George Brown, John A. Macdonald, J.S. Macdonald, Joseph Cauchon, Christopher Dunkin, William McDougall, & Alexander Galt (click [HERE](#) to view the debates, then scroll to p. 71)**

### LOCAL CONSTITUTIONS<sup>7</sup>

*The debate on the Local Constitutions was then resumed, the question being on the concurrence or third reading of the resolutions providing for the same.*

**George Brown [Oxford South]** opened the discussion. His own idea had been that some scheme could have been devised to bring the Executive into direct responsibility to the people, which would have been more economical and more perfect than the one now before the House. The period chosen for the duration of Parliament, four years, was too long. A period of Parliament elected for three years, with an Executive, composed of heads of Department, without seats in the House, would better tend to avoid the difficulties which had to be set the Government of Canada, then the plan proposed. He should have liked to have seen the Local Executive placed under the law, instead of controlling the Legislature. Then with regard to the distribution of seats—was it the intention of the government to place its control in the hands of the Local or the General Government?

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<sup>6</sup> [The Union Act, 1840 \(U.K.\)](#). Brown refers to it as the 'union of 1841', which refers to the year it was proclaimed, 1841.

<sup>7</sup> This title has been added by the editors of the current edition (2022).

## SECTION 65, EXECUTIVE POWER (PROVINCIAL)

**John A. Macdonald [Kingston, Attorney-General West and Minister of Militia]** stated that the General Parliament would determine the distribution of any future increase of representation in the General Legislature. But the Local Parliament of Upper Canada would be fully empowered to limit the number of its own members, without reference to its representation in the General Parliament.

**George Brown [Oxford South]** said the 12th resolution<sup>8</sup> bore an entirely different construction. On reading at the inference was playing that the Constituencies would continue to be identical, both for the Local and General Governments. Some provisions ought to be made restricting the identity of the constituencies to the first general election, or until the next census. Another point was the limit as to the time when the Parliament should be called after the issue of the proclamation putting the new constitution in force.

**John A. Macdonald [Kingston, Attorney-General West and Minister of Militia]**—Had already stated that the issue of the proclamation would be immediately followed by the issue of the writs for the general election. But the question was not now one regarding the general government, but only as to principles of the Local Constitutions. He would assure the hon. member that so far as the government would have any influence in the matter they would use it in favor of having the Parliament called at once.

**John Sandfield Macdonald [Cornwall]** stated that by the terms of the [Quebec resolutions](#), the Legislative Councillors would be nominated by the Provisional Governor and his advisers, before a single election could be held under the Local Constitution<sup>9</sup>. It was clear that the Local Parliaments could have no control under these important appointments by the plan proposed.

**John A. Macdonald [Kingston, Attorney-General West and Minister of Militia]** said the Provisional-Governor, on his appointment, would at once choose his Secretary, and issue the writs under the Great Seal, for the general election. The Local Parliament would then meet and he must have his responsible advisors before he can assume the discharge of any of those duties depending on the advice of the Executive.

**Joseph Cauchon [Montmorency]** said the Legislative Council of the General Government would be appointed before the Local Governors were appointed at all; their nomination would be made by the existing government.

**Some Hon. Members**—Hear, hear.

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<sup>8</sup> The 12<sup>th</sup> resolution of the Local Resolutions reads in full, “12. That the Legislative Assembly of Upper Canada shall be composed of eighty-two Members, to be elected to represent the eighty-two constituencies in Upper Canada, such constituencies being identical, whether for representation in the Local Legislative Assembly or for representation in the House of Commons of the Federated Provinces, and which constituencies shall consist of the divisions and be bounded as is provided in the schedule hereto annexed, marked A.” First introduced to the Legislative Assembly on Jul. 13, 1866. [Journals, p. 142.](#)

<sup>9</sup> The following debate surrounds the first appointments of what would become the Senate. The clause in dispute (Quebec Resolution 14) reads, “The first selection of the Members of the Legislative Council shall be made, except as regards Prince Edward Island, from the Legislative Councils of the various Provinces so far as a sufficient number be found qualified and willing to serve; such Members shall be appointed by the Crown at the recommendation of the General Executive Government, upon the nomination of the respective Local Governments, and in such nomination due regard shall be had to the claims of the Members of the Legislative Council of the opposition in each Province, so that all political parties may, as nearly as possible, be fairly represented.” [The Quebec Resolutions which were agreed to by the Legislative Assembly can be found on Mar. 13, 1865, pp. 1027-1032.](#)

SECTION 65, EXECUTIVE POWER (PROVINCIAL)

**Joseph Cauchon [Montmorency]**—This point was made clear by the clause in the Quebec resolutions, providing the first members of the Council should be chosen from the existing Local Legislative Councils. It was well understood that the Government of Canada stood in the place of the Local Governments of Upper and Lower Canada at the present time, and must make the first selection which would afterwards fall upon the Local Governments.

**Christopher Dunkin [Brome]** said if the hon. member for South Oxford [George Brown] had not reopened the discussion on the Quebec Resolutions then this debate was very much misplaced. He proceeded to read them, to elucidate the point whether the existing Legislature could be construed as the Local Legislature, according to the meaning of the resolutions. He said he might congratulate himself now, since he had frequently complained of their ambiguity, that the member for South Oxford [George Brown], who had been one of their authors, and who had insisted on their being accepted without a word being changed, appeared now not to be able to understand them. He had been of the opinion that it would be the duty of the existing Legislatures to appoint the members of the Legislative Council of the general Government, but upon the construction now put on [the 144th clause](#)<sup>10</sup> the Local Parliament would have to meet before the nominations to the Confederate Legislative Council could take place.

**Alexander Galt [Sherbrooke, Minister of Finance]** said the point was quite clear, and had been fully explained by the member for South Oxford [George Brown], during the debate.

**George Brown [Oxford South]**—Hear, hear.

**Alexander Galt [Sherbrooke, Minister of Finance]**—The understanding of [the fourteenth clause](#)<sup>11</sup> had been explained then precisely in the meaning now given to it by the member for Montmorenci [Joseph Cauchon].

**George Brown [Oxford South]**— Quite so.

[...]

**George Brown [Oxford South]**—The mode was a very simple and in his mind a very fair one, simply that the Reform members of the Cabinet should consult their supporters, the Conservatives theirs, and having had a fair understanding as to who were acceptable on each side, then to nominate alternately from both the parties. He still believed that every justice would be done to all parties in that selection. With regard to the Local Executives, he regretted very much that the amendment submitted by the member for North Ontario [Matthew Cameron] had not been accepted, because he considered it exceedingly desirable that the number of the Executive should be limited.

- (p. 72)

**Alexander Galt [Sherbrooke, Minister of Finance]** said these resolutions only provided the machinery of the Local Constitution by which the Local Governments might be set in order, and it

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<sup>10</sup> This seems to be a misprint. Dunkin is referring to [Resolution 14](#).

<sup>11</sup> [ibid.](#)

## SECTION 65, EXECUTIVE POWER (PROVINCIAL)

was desirable to frame them with as few restrictions as possible, for the very reason that, according to the [Quebec resolutions](#)<sup>12</sup>, the Local Parliaments would have power to alter or amend them as they might see fit.

**John Sandfield Macdonald [Cornwall]** *addressed the house, but his remarks were imperfectly heard in the Gallery.*

**William McDougall [Lanark North, Provincial Secretary]** expressed the gratification of the government with the debate, that as yet no very strong point has been made against the outline of the Local Constitution now before the House. He thought the member for South Oxford [George Brown] might have put his suggestions in a more definite shape; he might have submitted them by way of amendment, that the house might have had an opportunity of considering. He had suggested the framing of some possible system, with an executive appointed for three years, would have been better for Upper Canada than the plan submitted, but he had not put it in any very definite way. The reply of the government to that point was that after due consideration it had been deemed proper that the system should be retained, with the working of which the people of these provinces had become familiar. He objected to the hon. member for South Oxford [George Brown] sending it fourth before the country that a better scheme might have been devised if more talent and patriotism had been devoted to its consideration.

**George Brown [Oxford South]**—Said the Provincial Secretary [William McDougall] had no right to have put such a construction upon his (Mr. B.'s) remarks. He contemplated nothing of the kind, and he was sure his words would bear no such construction. He asked him why he did not introduce his own plan to this House. His reason for so doing was that since it was the general feeling of this house to give the constitutions provided by these resolutions a fair trial, there was no need of putting two schemes before the country to create useless discussion. The Provincial Secretary [William McDougall] ought to be the last man to object to his (Mr. B.'s) views, as up to this time he had been their warm advocate.

*The first resolution was carried, and the debate adjourned until the second sitting of the House to-day.*<sup>13</sup>

### Local Resolutions, p. 72

#### LOCAL CONSTITUTIONS<sup>14</sup>

*The debate on the Local Constitutions was resumed.*<sup>15</sup>

*And the Question being put, That this House doth concur in the First Resolution:—*

<sup>12</sup> [Quebec Resolution 42](#), which reads in full, “*The Local Legislature shall have power to alter or amend their Constitution from time to time.*”

<sup>13</sup> The editors are unsure whether the first resolution was carried before the resumption of debate or after. The *Scrapbook Debates* have it carried twice—once before adjournment and once after. The debates on Local Constitutions resume later in the day, where it is carried again. For clarity, we have it being carried further down the page (p. 72) with the other resolutions when the debate is resumed.

<sup>14</sup> This title has been added by the editors of the current edition (2022).

<sup>15</sup> Directly following this line was the line “*The first, second and third resolutions were carried on division.*” This line has been removed. Inserted in its place are the procedural motions, including the resolutions in full from the *Journals* (1866). The motions are mostly from when they were originally presented on [Jul. 13, 1866, pp. 141-145](#). The procedural phrases and amendments are from the day itself on [Aug. 2, 1866, pp. 274-281](#).

## SECTION 65, EXECUTIVE POWER (PROVINCIAL)

That by the 38th paragraph of the Resolution of this House passed on the third day of February, 1865, for presenting an humble Address to Her Majesty, praying that She may be graciously pleased to cause a measure to be submitted to the Imperial Parliament, for the purpose of uniting the Colonies of Canada, Nova Scotia, New Brunswick, Newfoundland and Prince Edward island, in one Government, with provisions based on the Resolutions which were adopted at a Conference of Delegates from the said Colonies, held at the City of Quebec, on the 10th of October, 1864, it is provided that “for each of the Provinces there shall be an Executive Officer, styled the Lieutenant Governor, who shall be appointed by the Governor General in Council, under the Great Seal of the ‘Federated Provinces, during pleasure; such pleasure, not to be exercised before the expiration of the first five years, except for cause; such cause to be communicated in writing to the Lieutenant Governor immediately after the exercise of the pleasure as aforesaid, and also by Message to both Houses of Parliament, within the first week of the first Session afterwards;” and that by the 41st paragraph of the same Resolution it is provided that “the Local Government and Legislature of each Province shall be constructed in such manner as the existing Legislature of each such Province shall provide.

And it is further now resolved, that in the opinion of this House, the appointment of the first Lieutenant-Governor should be provisional, and that he should hold office strictly during pleasure.<sup>16</sup>

—*It was resolved in the Affirmative.*

*The second Resolution, being again read, as followeth:—*

That under and subject to the Constitution of the Federated Provinces, the executive authority of the Lieutenant Governor of Lower Canada and Upper Canada respectively shall be administered by each of such Officers according to the well understood principles of the British Constitution.<sup>17</sup>

*On motion of **John A. Macdonald [Kingston, Attorney-General West and Minister of Militia]**, seconded by **George-Étienne Cartier [Montreal East, Attorney-General East]**, The said Resolution was amended,*

By inserting the words “provisions of the” after the word “the,” where it occurs the first time.<sup>18</sup>

*And the Question being put, That this House doth concur in the said Resolution;*

That under and subject to the provision of the Constitution of the Federated Provinces, the executive authority of the Lieutenant Governor of Lower Canada and Upper Canada respectively shall be administered by each of such Officers according to the well understood principles of the British Constitution.<sup>19</sup>

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<sup>16</sup> This is the reconstituted resolution that combines both the original resolution and the amendment, which was agreed to. See [Legislative Assembly \(Jul. 31, 1866\), p. 67](#).

<sup>17</sup> [Journals, p. 141](#). Added for completeness.

<sup>18</sup> [Journals, p. 275](#). The *Journals* say that the resolution was amended, but it skips the usual division on the amendment. The Resolution, in its final passage, on Aug. 11, 1866 ([Journals, p. 362](#)), also reverts back to the original, pre-amended form. It’s unclear whether the amendment was never formally accepted or whether the Aug. 11 resolutions contain a mistake.

<sup>19</sup> Added for clarity. This is a combination of the resolution and the amendment which had just been agreed to.

SECTION 65, EXECUTIVE POWER (PROVINCIAL)

| —*the House divided:—And it was resolved in the Affirmative.*

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## PART 4

# Secondary Sources on Section 65

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

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.



## SECTION 65, EXECUTIVE POWER (PROVINCIAL)

(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

### p. 313

65. 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

[Page 314]

Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, or Canada, were or are before or 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 are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant-Governor of Ontario and Quebec respectively, with the advice or with the advice and consent of or in conjunction with the respective Executive Councils, or any members thereof, or by the Lieutenant-Governor 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 respective Legislatures of Ontario and Quebec (ii).

(i) See notes to section 12. *ante*. p. 250; and see also chapter III., p. 48, *et seq.* The powers here referred to are statutory powers. No such provision is made in reference to Nova Scotia and New Brunswick, nor in the Orders in

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Council admitting Prince Edward Island and British Columbia to the Dominion. Owing to the division of (Old) Canada into Ontario and Quebec, it was necessary to provide for the exercise of the powers, etc., which had theretofore been exercised by the Governor or Lieutenant-Governor of the old provinces; and by section 12, *all* such powers are vested in the Governor-General, so far as the same are capable of being exercised in relation to the government of Canada, while, by this section, the very same powers, in their entirety, are vested in the Lieutenant-Governors of Ontario and Quebec respectively. The two sections, taken together, effect no division of power, but provide simply for the exercise of the same powers in the different spheres of authority created by the B. N. A. Act. In *Gibson v. McDonald* (d), Mr. Justice O'Connor, referred to a slight difference in the wording of this section, as compared with section 12,—the words " as far as the same continue in

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existence," which appear in the 12th section, being omitted from this 65th section—indicating, in his opinion, that some powers continued to exist in relation to the Dominion, and were vested therein, which did not continue to exist in relation to the provinces. It is difficult to imagine what idea in the mind of the draftsman led to this difference in phraseology. The governments of the Dominion and of the provinces of Ontario and Quebec were all, in a sense, new creations. The exercise of these powers, etc., in relation to the government of the Dominion cannot be said to be a *continuation* of them, while, in a sense it may be so spoken of in relation to the governments set up by the B. N. A. Act, in Ontario and Quebec. It is impossible to assign any difference in meaning to the two sections, owing to this difference in phraseology. Their effect is sufficiently clear, that all these powers, etc., are to be vested in the executive head of the Dominion and of each provincial government, so far as they are capable of

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being exercised in relation to those governments respectively.

The fact that the B.N.A. Act does effect a clear division of the "sphere of authority," seems not to have been appreciated in *Regina v. Amer (dd)*, where Mr. Justice Wilson treats these two sections as vesting the same power in the Governor-General and a Lieutenant-Governor *in reference to the same subject matter*. In view of the subsequent discussions which have taken place in reference to the scheme of the B.N.A. Act, the words which we have italicized, would seem to be an incorrect construction of these two sections.

In *Attorney-General for Quebec v. Reed* (8 S.C.R. 408, affirmed on appeal, 10 App. Cas. 141), it was contended that the Quebec Act, 43 & 44 Vic. c. 9, which imposed a duty, to be paid in stamps, upon every "exhibit" filed in court in any action depending therein, might be supported under C.S.L.C., c. 109, section 32, which gave to the government of (Old) Canada, power to impose by Order in Council such a duty on exhibits. This contention is thus disposed of in the judgment of the Judicial Committee of the Privy Council:

"With regard to the third argument, which was founded upon the 65<sup>th</sup> section of the Act, it was one not easy to follow, but their Lordships are clearly of opinion that it cannot prevail. The 65<sup>th</sup> section preserves the pre-existing powers of the Governors or Lieutenant-Governors in Council to do certain things not there specified. That however was subject to a power of abolition or alteration by the respective legislature of Ontario and Quebec, with the exception of course of what depended on Imperial legislation. Whatever powers of that kind existed, the Act with which their Lordships have to deal neither abolishes nor alters them. It does not refer to them in any manner whatever. It is said that among those powers, there was a power, not taken away, to lay taxes of this very kind upon legal proceedings in the courts, not for the general revenue purpose of the

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province, but for the purpose of forming a special fund called "The Building and Jury Fund," which was appropriated for purposes connected with the administration of justice. What has been done here is quite a different thing. It is not in aid of the Building and Jury Fund. It is a legislative Act, without any reference whatever to those powers; if they still exist, quits collateral to them; and, if they still exist, it is capable of being exercised concurrently with them."

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See further as to this case, section 92, sub-section 2. The power of the Lieutenant-Governor to impose, by Order in Council, such tax as was in question in *Attorney-General v. Reed*, has been entirely abrogated by the limitation of provincial powers of taxation to direct taxation; a limitation which, it is submitted, applies to all the revenue producing powers of provincial governments. This point is referred to, but not decided in *Attorney-General v. Reed*; see 10 App. Cas. at p. 145. A reference to the judgment of Gwynne, J., in the Supreme Court—see 8 S. C. R., at p. 432—will show that, in his view, this limitation does so apply. See, also, the decisions of the Manitoba Courts referred to in the notes to sub-section 2 of section 92, *post*.

In *Lenoir v. Ritchie* (3 S. C. R. 575) the question of the power of the Nova Scotia Provincial Assembly to authorize the Lieutenant-Governor to appoint Queen's Counsel, and to assign precedence, as between those Queen's Counsel and those appointed by the Dominion Government, was under consideration. Before Confederation, the question was not regulated by any statutory enactment, but the Governors and Lieutenant-Governors of the various provinces had been in the habit of exercising the prerogative of the Crown in this regard. After Confederation, the government of the Dominion claimed that the Governor-General, as representative of Her Majesty in Canada, was alone entitled to exercise this prerogative. It was treated as falling within the class of prerogatives vested in the Crown as the fountain of honour treated so to speak as a prerogative-at-large, not connected with any particular

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department of executive government. If this be its proper position, it is hard to see how any colonial officer can exercise such prerogative. All the other prerogatives which fall within this category are treated as prerogatives pertaining to *matters of Imperial concern*, such as, for instance, the appointment of knights, baronets, etc., etc. If, on the other hand, the prerogative is one connected with the administration of justice, it would appear that it is one proper to be exercised both by the Governor-General and the Lieutenant-Governors of the various provinces—by the former in relation to courts of Dominion creation, by the latter in connection with provincial courts. It is laid down in all the books that members of the Bar are "officers" of the courts, and the assignment of precedence to certain of those members, would seem to be a matter relating either to the organization of the courts or to procedure therein. In *Lenoir v. Ritchie*, it was not necessary to the determination of that case to decide whether or not a Lieutenant-Governor is entitled to exercise this prerogative the question there involved being as to the precedence given to provincial over Dominion Queen's Counsel. At the same time, some of the judges, both in the Nova Scotia courts and in the Supreme Court of Canada, expressed very decided views against the right of the Lieutenant-Governor to exercise the prerogative in any case. The question is now standing for argument before the Court of Appeal for Ontario. Subject to the assignment of this prerogative to its proper place in connection with executive government—to defining the subject matter within which it properly falls—the general principle which must govern in regard to all these questions of "prerogative" would now seem to be authoritatively stated in the judgment of the Privy Council in *Liquidators of Maritime Bank v. Receiver-General of New Brunswick*. See notes to section 58, *ante*.

(ii) "*Subject to be abolished or altered by the respective legislatures of Ontario and Quebec.*"—See notes to section 12, *ante*, p. 257; also to section 129, *post*. The decision

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in *Dobie v. Temporalities Board*, 7 App. Gas. 136, is directly applicable to the interpretation of these two sections, 12 and 65. All the various subject matters in respect to which, before Confederation, these "powers, authorities, and functions" could be exercised, are, by the effect of these sections, divided, and, in relation to each division, *all* these powers, etc., are vested in the executive head of the Dominion and of each province respectively. But in respect to each division, the Dominion parliament or the provincial legislative assembly may abolish or alter these powers in such fashion, and to such extent, as may be thought necessary to the proper government of the Dominion or the province, as the case may be. The holding in *Dobie v. Temporalities Board* is thus expressed in the head-note :

"The powers conferred by the B. N. A. Act, 1867, section 129, upon the provincial legislatures of Ontario and Quebec to repeal and alter the statutes of the old parliament of Canada, are precisely co-extensive with the powers of direct legislation, with which those bodies are invested by the other clauses of the Act of 1867."

See further as to this section, *Attorney-General (Canada) v. Attorney-General (Ontario)*, 20 O. R. 222: affirmed in appeal, 19 O. A. R. 31

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67. The Governor-General in Council may from time to time appoint an administrator to execute the office and functions of Lieutenant-Governor during his absence, illness, or other inability (i)

(i) With this section compare section 14, *ante*, which (coupled with the Letters Patent) empowers the Governor-General to appoint a Deputy Governor-General. This section, it will be noticed, conveys no such power to a Lieutenant-Governor, and as to him, therefore, the maxim *delegatus non potest delegari* applies. We do not overlook the rule of law that a colonial legislature has as full power to alter and mould *the lex prerogativa* in the colony as has the Imperial parliament in Great Britain ; but, on the other hand, (the provisions of section 92, sub-section 1, must not be overlooked. See notes to that sub-section, which expressly prohibits a provincial legislature from amending the provincial constitution "as regards the office of Lieutenant-Governor."

Reference has already been made to *Attorney-General (Can.) v. Attorney-General (Ont.)* (e), in which there arose for discussion the question of the power of a provincial assembly to vest in the Lieutenant-Governor powers in connection with the Executive government of the province other than those expressly vested in him by section 65 of the B. N. A. Act. See *ante*, p. 305. The language of the various judges who delivered opinions in that case supports the view that there is the power in a provincial assembly to use the phrase of Boyd, C. to impose upon a Lieutenant-Governor any executive functions "germane to the office." In view of the recent decision of the Privy Council already noted, the legislation impugned in this case would appear to have been, as Mr. Justice Burton considered it, unnecessary. A somewhat different question is suggested by this

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section 67, taken in connection with sub-section 1 of section 92, conferring upon provincial legislatures power to amend the provincial constitution "except as regards the office of Lieutenant-Governor."

During the last illness of the late Lieutenant-Governor Campbell, an Order in Council was passed appointing a Deputy Lieutenant-Governor, and this action on the part of the provincial government gave rise to considerable discussion. It is understood that the Attorney-General of Ontario prepared a "state paper" in support of this action of his government, but this we have not seen. A Lieutenant-Governor—standing as he does in the same relation to the government of a province as the Governor-General does in relation to the government of the Dominion—has vested in him the appointment of all subordinate executive officers throughout the province, but we do not see how this could extend to authorize the appointment of a deputy. Under the B. N. A. Act this would seem to be clear, that the executive head—the person carrying on the government—of a province is to be one link in the chain of federal connection between the provinces and the Imperial government, and his tenure of office is (section 59) during the pleasure of the Governor-General, subject to certain restrictions upon the exercise of the power of removal, already adverted to. This would seem to be one of those essentials in connection with the office of a Lieutenant-Governor which a provincial legislature cannot alter, under section 92, sub-section 1. By section 62 (*ante*, p. 310) the provisions of the B.N.A. Act relating to a Lieutenant-Governor apply also to "other the chief executive officer or administrator for the time being carrying on the government of the province, *by whatever title he is designated*," and the express provision of this section 67 was hardly needed to negative the power of a Lieutenant-Governor to appoint a deputy to "carry on the government" of the province during the absence, etc., of the Lieutenant-Governor.

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We have not seen the commission to the Deputy Lieutenant-Governor, and it may possibly be that it is nothing more than the appointment of a subordinate officer to perform certain of the executive functions of the Lieutenant-Governor (such, for instance, as to perform the ceremony of opening the session, and others which might be named), and is not in truth the appointment of a deputy in the proper sense of that term. There are, however, some of the duties of a Lieutenant-Governor which the B. N. A. Act expressly provides are to be performed by him, and any general delegation of the duties of his office to a deputy, would seem contrary to both the spirit and the terms of the B. N. A. Act.

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**A.H.F. Lefroy, *A Short Treatise on Canadian Constitutional Law* (Toronto: Carswell Company, Limited, 1918), pp. 130-132. ([HERE](#))<sup>20</sup>**

11. 'The incorporation of companies with provincial objects.' This subsection of section 92 of the Federation Act is concerned with the incorporation of private companies with objects outside the exclusively Dominion matters. As to other kinds of corporations, the creation of municipal corporations would fall under No. 8 of section 92; of charitable and other similar corporations

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<sup>20</sup> This text contains footnotes, which can be seen by consulting the source linked above.

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under no. 7 (*supra*, p. 127); of what may, perhaps, be called Governmental corporations, such as the Hydro-Electric Power Commission of Ontario, under No. 1, No. 4 or No. 14 (*supra*, pp. 124-7; *infra*, p. 1370: and of educational under section 93 (*infra*, pp. 143-9). "Incorporation" includes "the constitution of the company, the designation of its corporate capacities, the relation of the members of the company to the company itself, the powers of the governing body. How much more it would include may be left to be determined in each concrete case in which the point arises"; but "you cannot by any permissible process infer from the language of No. 11 any limitation upon the jurisdiction of the provinces in relation to companies not within No. 11 in regard to matters which do not fall within the strictly limited subject of 'incorporation.'" 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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