

COMMUNICATION,

FROM THE

HONORABLE THE EXECUTIVE COUNCIL,

TO

THE LIEUTENANT GOVERNOR

WITH HIS EXCELLENCY'S REPLY.



TORONTO :

R. STANTON, Printer to the King's Most Excellent Majesty.

COMMUNICATION, &c.

EXECUTIVE COUNCIL CHAMBER, AT TORONTO,
Friday, 4th March, 1836.

TO HIS EXCELLENCY SIR FRANCIS BOND HEAD, Knight
Commander of the Royal Hanoverian Guelphic
Order, Knight of the Prussian Military Order of
Merit, Lieutenant Governor of the Province of
Upper Canada, &c. &c. &c.

MAY IT PLEASE YOUR EXCELLENCY.

The Executive Council, impressed with the oath they have taken to discharge the duties necessarily resulting from their appointment “to advise the “King and His Representative in the Government of “this Province,” in the terms of the Constitutional Act, “upon the affairs of the Province,” deem it incumbent upon them most respectfully to submit the following representation :—

The Executive Council recognise the truth of the opinion expressed by LORD GLENELG, that “the present is an era of more difficulty and importance than “any which has hitherto occurred in the history of this “part of His Majesty’s dominions.” This unhappy condition they ascribe, in a very great degree, to the hitherto unconstitutional abridgment of the duties of the Executive Council. It appears from the proceedings of the House of Assembly, and from the reiteration of established opinion in the Country, that neither will public expectation be satisfied, nor contentment be restored, until the system of Local Government is

altered and conducted according to the true spirit and meaning of the Constitutional Act. The delay of this just and indispensable course has already excited in the great mass of the people, a lamentable jealousy and distrust, and has also induced the discussion of constitutional changes, the desire for which, unless speedily arrested, by affording the unrestricted operation of the 31st George 3, Chapter 31, will not only become more fixed, but rapidly increase to a greater and irretrievable extent.

The policy and measures which have led to the present condition, seldom passed under the review of the Executive Council, or were submitted for their advice. Nevertheless, its Members have been undeservedly subjected to the heaviest reproach throughout the country, from a prevalent belief that they have been called upon to fulfil the duty imposed upon them by the Constitution, as advisers upon public affairs. But amidst the obloquy thus thrown upon them, they have studiously avoided any attempt at exculpation, by disavowing, in their defence, any participation in the conduct of the affairs which they were erroneously supposed to have approved. The consequence of this silent endurance of political odium, has been the perpetuation of the misbelief that the Executive Council are conversant with the affairs of the Province, upon which they are appointed to advise : and although an opposite practice has generally prevailed between former Lieutenant Governors and their Council, yet it has ever been notoriously contrary to the state of things presumed by the community to exist.

Public opinion respecting the Executive Council and their duties, has been founded upon the terms of the 31 George III. chapter 31, to which Statute the people used to express a firm attachment, an attachment which the Council believe never would have been impaired had the Constitution been administered either according to its letter or its spirit.

In several clauses of 31 George III. chapter 31, the Executive Council is mentioned in general terms. In the 34th clause the terms are "together with such Executive Council as shall be appointed by His Majesty for the affairs of such Province," and not as it would otherwise have been expressed "together with such Executive Council as shall be appointed by His Majesty *for that purpose*." In the 38th clause the terms are "with the advice of such Executive Council as shall have been appointed by His Majesty, his Heirs or Successors, within such Province for the affairs thereof," and not, as it would otherwise have been expressed, "with the advice of such Executive Council as shall have been appointed by His Majesty, his Heirs or Successors, within the Province *for that purpose*."

The same may be said of similar terms used in the latter part of the seventh clause.

With respect to which clauses it may be further remarked, that had it been contemplated that the Executive Council were to act only in the matters therein specified, the words "on the affairs of such Province" might have been omitted, without in the least impairing the legal effect. In the construction,

therefore, of this Statute, the above expression can not be treated as surplussage, but must be taken to impose the duty which it imports.

From the language of this Statute, therefore, it appears—

Firstly,—That there is an Executive Council.

Secondly,—That they are appointed by the King.

Thirdly,—That they are appointed to advise the King, and his Representative, upon “*the affairs of the Province*,”—no particular affairs are specified : no limitation to any particular time or subject.

As the Constitutional Act prescribes to the Council the latitude of “the affairs of the Province,” it requires an equal authority of law to narrow those limits, or relieve the Council from a co-extensive duty.

Every Representative of the King, upon arriving from England to assume the Government of this country, is necessarily a stranger to it ; and the law has provided for a Local Council as a source of advice, which when given, is followed or not, according to his discretion.

In certain cases specified in the 38th Clause of the 31 Geo. 3, chap. 31, the concurrence of the Council is required to give effect to certain Executive Acts. But these exceptions prove the general rule, viz. :—that while the advice is to be given upon the affairs of the Province generally, it is only in the particular cases that it must harmonize with the pleasure of the Crown, to give that pleasure effect. Indeed, if the

Law could be construed to limit the advice to the particular cases, it would follow that the Council could not legally and constitutionally advise upon any others; a proposition which, besides its manifest repugnance to the terms of the Act, is contrary to received opinion and usage.

But while the Constitution has assigned to the Council this duty, it is only to a very subordinate and limited extent that they have heretofore had opportunity afforded them to perform it. It is submitted that the exigency of the Statute can only be answered by allowing the affairs of the Province to pass under their review for such advice as their consciences may suggest, preparatory to the final and discretionary action of the King's Representative, upon those affairs.

The Council meeting once a week upon Land matters, while the affairs of the Country are withheld from their consideration and advice, is as imperfect a fulfilment of the Constitutional Act, as if the Provincial Parliament were summoned once a year, to meet the letter of the Law, and immediately prorogued upon answering the Speech from the Throne. In both cases the true meaning and spirit of the Constitutional Act require, that the Parliament should have a general and practicable opportunity to Legislate, and the Executive Council to advise, upon the affairs of the Country. In the former case, the Representative of the King can withhold the Royal Assent from bills, and in the latter, reject the advice offered; but their respective proceedings can not be constitutionally circumscribed or denied because they need the

expression of the Royal pleasure thereon for their consummation.

The extent and importance of the affairs of the Country have necessarily increased with its population, wealth and commerce, and the Constitution has anticipated the difficulty, by a division of labour and responsibility, from the active attention of the Executive Council to their duties. With the exception of those matters of so weighty or general a character as not properly to fall under any particular department, and therefore fitted for the deliberation of the Council collectively, it is recommended, that the affairs of the Province be distributed into Departments, to the heads of which shall be referred such matters as obviously appertain to them respectively. Upon this principle (recognised by the existing Constitution of this Province and of the Mother Country) the people have long and anxiously sought for the administration of their Government, under the Representative of the King ; and the Council most respectfully, but at the same time earnestly represent, that public opinion upon the subject is so fixed, and becoming so impatient, as to preclude the possibility of denying or delaying the measure, without increasing public dissatisfaction, and leading to the final adoption of other views, as already too universally manifested, uncongenial to the genius of the Constitution, and most dangerous to the connection with the Parent State.

The remedy, it is feared, is now proposed too late for all the advantages desired ; but the longer it is withheld, the more alienated and irreconcilable will

the public mind become. The present comparative calm and thankfulness arise from a belief that the Council will second this exigency, in establishing a system of Government, according to the principles recognized by the Charter of the liberties of the country—an expectation which the Council are most anxious to realize.

Should such a course not be deemed wise or admissible by the Lieutenant Governor, the Council most respectfully pray that they may be allowed to disabuse the public from a misapprehension of the nature and extent of the duties confided to them.

(Signed,)

PETER ROBINSON.
GEORGE H. MARKLAND.
JOSEPH WELLS.
JOHN H. DUNN.
ROBERT BALDWIN.
JOHN ROLPH.

HIS EXCELLENCY'S REPLY.

F. B. HEAD.

THE Lieutenant Governor transmits to the Executive Council the following observations, in reply to the document, which, in Council, they yesterday addressed to him.

The Constitution of a British Colony resembles, but is not identical with, the Constitution of the Mother Country—for in England, besides the House of Commons, which represents the people, there exists a hereditary nobility, the honours and wealth of which, as well as the interests of the Established Church, are represented by a House of Lords, while the Sovereign (who, by law, can do no wrong,) is surrounded by a Ministry upon whom devolves the entire responsibility of the measures they suggest, and who are consequently removable at pleasure. But in the Colonial portion of the British Empire, which, however rising, is generally speaking thinly inhabited, the people are represented by their House of Assembly, which is gifted not only with the same command over the supplies, as in England, but which possesses within the Colony, most of the powers of the British House of Commons. The Legislative Council is intended, as far as the circumstances of a young Colony can permit, to resemble the British House of Lords; and if the Lieutenant Governor stood in the place of the Sovereign—and if, like His Majesty, he could do no wrong, it would evidently be necessary that a Minis-

try, Executive Council, or some other body of men should be appointed, who might be responsible to the country for their conduct.

This, however, is not the case. His Majesty delegates his Sovereign protection of his Colonies to no one, but he appoints a Lieutenant Governor, who is responsible to him for his behaviour, who is subject to impeachment for neglecting the interests of the people, and who is liable, like the English Ministry, to immediate removal—and the history of the British Colonies clearly shews, that there is no class or individual of His Majesty's subjects to whose representation, prayer or petition, the King is not most willing to attend.

The Lieutenant Governor is, therefore, the responsible Minister of the Colony, and as not only his character, but his continuance in office depend on his attending to the real interests of the people, it would be evidently as unjust towards him that he should be liable to impeachment for any acts but his own, as it would be unjust towards the people, that a responsibility so highly important to their interests, should be intangible and divided. It is true, his knowledge of the country is not equal to that of many intelligent individuals within it; but in Government, impartiality is better than knowledge, and it must be evident to every well constituted mind, that in an infant state of society, it would be impossible practically to secure a sufficient number of impartial persons to effect a change of Ministry, as often as it might be necessary for the interests of the people to do so.

This difference between the Constitution of the Mother Country and that of its Colony is highly advantageous to the latter—for, as in all small communities, private interests and party feelings must unavoidably be conflicting, it is better as well as safer, that the people should be enabled to appeal in person, or by petition, to the Lieutenant Governor himself, whose duty it is to redress their complaints, and who is liable to dismissal if he neglects them—than that they should appeal to a series of Provincial Ministries, composed of various individuals.

To enable the Lieutenant Governor to perform the arduous duties of his office, the Constitution has wisely provided him with an Executive Council, competent to supply him with that local knowledge in which he may be deficient, and to whom he may apply for counsel and advice.

Before he entrusts himself to these Gentlemen, they are by order of His Majesty required solemnly to swear, not only to give to the Lieutenant Governor their best counsel and advice, but they are also sworn to secrecy.

Their individual opinions can never be divulged, *even to the King*; and as a proof that His Majesty does not hold them responsible for the acts of his Lieutenant Governor, they can retain, and often do retain, their office of sworn advisers, although Governor after Governor may have been dismissed.

The advantage of such a Council to a Lieutenant Governor is so self-evident, that he must be weak and self-sufficient indeed who does not continually

have recourse to it ; but although it strengthens his judgment, and confers dignity on his proceedings, yet, in no way does it shield him from disgrace, should his acts be found contrary to the interests of the people. In such a case it would be vain, as well as unconstitutional, for a Lieutenant Governor to attempt to shield himself from responsibility, by throwing it upon his Council ; for by his oath he cannot even divulge which of his advisers may have misled him. Supposing, for instance, that with the concurrent advice of his Council, he was illegally to eject by military force an individual from his land, the Lieutenant Governor would be liable to arraignment, and whether he had acted by the opinion of the Law Officers of the Crown—by the advice of his Council—by information derived from books—or from his own erring judgment, it has been wisely decreed, that the injured subject shall look to him, and him alone, for retribution, and that he, and he alone, is answerable to His Sovereign for the act of injustice which has been committed.

Being therefore subject both to punishment and disgrace, it is absolutely necessary, as well as just, that the Lieutenant Governor of a Colony should have full liberty to act, (though at his peril) in every case, as he may think best for the interests of the people, according to the commands of His Majesty, and of His Majesty's Ministers. To consult his Council on the innumerable subjects upon which he has daily to decide, would be as utterly impossible as for any one but himself to decide upon what points his mind required, or needed not, the advice of his Council.

Upon their sterling fund he must therefore constitutionally draw whenever embarrassment requires it, and on their part, if they faithfully honour his bills, however often he may present them, they conscientiously fulfil to their Sovereign, to Him, to their Country, and to their Oath, the important duty which they have sworn in secrecy to perform.

Having concluded the above outline of the relative responsibility of the Lieutenant Governor and his Executive Council, as it regards His Majesty's Colonies in general, it may be observed with respect to this Province in particular, that when His Majesty, by conquest, first obtained possession of the Canadas, the Government thereof devolved upon the Military Commander, until by an Act passed in the 14th year of George 3, a Council was appointed "for the affairs of the Province of Quebec, to consist of such persons resident therein, (not exceeding twenty-three nor less than seventeen) as His Majesty, His Heirs and Successors, shall be pleased to appoint, which Council so appointed and nominated, or the major part thereof, shall have power and authority to make ordinances for the peace, welfare, and good government of the said Province, *with the consent of His Majesty's Governor.*"

This power of the Council was further restricted by certain important limitations, specified in clauses 13, 14, 15, 16, and 17, of the said Act; however, in the year 1791, a new Act was passed, commonly called the Constitutional Act, because it settled the constitution of the Canadas, which were then divided into the Upper and Lower Provinces.

By this Act, the Military domination of the General and his Council was changed for a new and better system ; and as evidently both could not exist together, the very first clause in the Act declared—
 “That so much of the late Act (14th Geo. 3rd) “as
 “in any manner relates to the appointment of a
 “Council for the affairs of the said Province of Quebec, or to the power given by the said Act to the
 “said Council, or to the major part of them, to make
 “ordinances for the peace, welfare, and good government of the said Province, with the consent of His
 “Majesty’s Governor, Lieutenant Governor, or Commander-in-Chief for the time being, *shall be, and*
“the same is REPEALED.”

The Act then proceeds to state, “That there
 “shall be within each of the said Provinces respectively, a Legislative Council and an Assembly,” the duties and privileges of which are minutely declared in thirty-three consecutive clauses ; but in no part of the said Act is an Executive Council directly or indirectly created ; nevertheless, a vestage of the ancient one is, for the purpose of a Court of Appeal, (vide clause 34) recognised, with an expression which seemed to intimate, that an efficient Executive Council would very shortly be created.

For instance, in section 38, the Governor is by authority of His Majesty’s Government, and with the advice of the Executive Council, “empowered to
 “erect Parsonages and Rectories,” but in section 39 no mention whatever is made of the Executive Council, but on the contrary, it is declared, that the Governor, or Lieutenant Governor, or person ad-

ministering the Government, should present the incumbent "to every such Parsonage or Rectory."

In the fifty clauses of the Act in question, the Executive Council, which in section 34 is merely described as "such Executive Council as *shall be appointed by His Majesty*," is scarcely mentioned, and as regards even its existence, the most liberal construction which can possibly be put upon the said Act, only amounts to this—That as an Executive Council was evidently intended to exist, the remnant of the old one ought not to be deemed totally extinct until its successor was appointed.

However, this latent intention of His Majesty to create a Council for each of the Provinces of His Canadian dominions, was soon clearly divulged in a most important document, commonly called "*the King's Instructions*," in which an Executive Council was regularly constituted and declared as follows:—

"Whereas we have thought fit that there should
 " be an Executive Council for assisting you, or the
 " Lieutenant Governor, or Person Administering the
 " Government of the said Province of Upper Canada
 " for the time being, we do by these presents nominate and appoint the undermentioned persons to be
 " of the Executive Council of our said Province of
 " Upper Canada," &c. &c. &c.

In subsequent clauses it was equally precisely defined upon what affairs of the Province the Lieutenant Governor was to act, "*with the advice of the Executive Council*," but with the view distinctly to

prevent the new Council being what the old one had been (which indeed under the new Constitution was utterly impossible,) in short, to set that question at rest for ever, it was declared in section 8, “that to the end that our said Executive Council may be assisting to you in all affairs relating to our service, you are to communicate to them *such and so many* of our instructions *wherein their advice is mentioned to be requisite*, and likewise all such others from time to time as you SHALL FIND CONVENIENT for our service to be imparted to them.”

The Lieutenant Governor having now transmitted to the Executive Council his opinion of their duties, in contradistinction to that contained in their communication to him of yesterday’s date, will not express the feelings of regret with which, under a heavy pressure of business, he unexpectedly received a document of so unusual a nature, from Gentlemen upon whom he had only recently placed his implicit and unqualified reliance.

But he feels it incumbent upon him frankly and explicitly to state, that to the opinions they have expressed, he can never subscribe—on the contrary, that so long as he shall continue to be Lieutenant Governor of this Province, he will never allow his Executive Council officially to assume that heavy responsibility which he owes to his Sovereign, as well as to the people of this Province, to whom he has solemnly pledged himself “*to maintain the happy*

*“ Constitution of this country inviolate, but cautiously,
 “ yet effectually to correct all real grievances.”*

The Lieutenant Governor maintains that the responsibility to the people (who are already represented by their House of Assembly,) which the Council assume, is unconstitutional,—that it is the duty of the Council to serve *him*, not *them*; and that if upon so vital a principle they persist in a contrary opinion, he foresees embarrassments of a most serious nature—for as power and responsibility must, in common justice, be inseparably connected with each other, it is evident to the Lieutenant Governor, that if the Council were once to be permitted to assume the *latter*, they would immediately, as their right, demand the *former*; in which case, if the interests of the people should be neglected, to whom could they look for redress? For in the confusion between the Governor, and an oligarchy composed of a few dominant families, shielded by secrecy, would not all tangible responsibility have vanished?

The Council cannot have forgotten, that previous to their first meeting in the Council Chamber, which happened only a few weeks ago, the Lieutenant Governor had assured them in a note, (which was even publicly read in the House of Assembly,) that although he had no preliminary conditions to accede to, or to require, it was his intention to treat them with implicit confidence; and the Council must also remember how willingly they approved of the very first suggestion he made to them, namely, that no important business should be commenced in Council, until they as

well as the Lieutenant Governor himself, had become mutually acquainted with their respective duties.

The Lieutenant Governor assures the Council, that his estimation of their talents and integrity, as well as his personal regard for them, remain unshaken, and that he is not insensible of the difficulties to which he will be exposed, should they deem it necessary to leave him. At the same time, should they be of opinion that the oath they have taken requires them to retire from his confidence, rather than from the principles they have avowed, he begs, that on his account, they will not for a moment hesitate to do so.

Government House, }
Toronto, March 5th, 1836. }

