

After the American Revolution and the influx of the United Empire Loyalists it was apparent that a French type of government was no longer adequate throughout the whole of Canada. In 1791 the Constitutional Act was passed by the British parliament, separating Canada at the Ottawa river into two parts, each with its own government. By virtue of this act Upper and Lower Canada came into being. Lower Canada, chiefly French, retained the old system of laws, that is French civil law and English criminal law. Upper Canada had English law in both civil and criminal fields. In Lower Canada there was to be a legislative council of not less than fifteen members appointed for life by the governor, acting on the authority of the king and an assembly of not less than fifty members, elected on a property holding franchise. Upper Canada was provided with a legislative council of not less than seven members appointed by the governor and an elective assembly of not less than fifteen. As the chief executive officers and the direct representatives of the Crown, a governor and a lieutenant-governor were provided for each province. The governor and lieutenant-governor could convoke or dissolve their legislatures, refuse assent to bills or reserve them for the pleasure of the Crown. All acts of the colonial legislatures could be disallowed by the home government within a period of two years.

In 1838 Lord Durham was sent to govern both Canadas with instructions to inquire into the political situation made precarious by the Papineau rebellion in Lower Canada and the Mackenzie rebellion in Upper Canada and to make recommendations on the form of government to be granted to the colony.

He recommended the union of the two Canadian provinces at once, the ultimate union of all British North America and the granting of full self government.

In 1840 the Act of Union was passed to carry out the initial recommendation of the Durham report. The law provided for the union of Lower and Upper Canada under a single government to consist of a governor, a legislative council and an assembly. The governor and the legislative council of not less than twenty members were appointed by the Crown, the members of the council to hold office for life. The Lower House or House of Assembly consisting of eighty-four members was to be chosen by popular suffrage, forty-two members from each of the old provinces. This equal division temporarily gave the advantage to Upper Canada which at that time had a smaller population than the sister province.

The most important omission from the Act of Union was the fact that the law did not deal with the executive principle at all, and that no reference whatsoever was made to responsible government, the crux of the Papineau and Mackenzie trouble in 1837. So far as the executive principle was concerned the law showed no advance over the constitutional legislation of 1791.

The germ from which responsible government developed is to be found in Lord John Russell's dispatches of September 7 and October 16, 1839 rather than in the Act of Union. The latter instructions contained the significant sentence "The importance of maintaining the utmost possible harmony between the policy of the legislature and of the executive government admits of no question, and will of course be your anxious endeavor to call to your councils and to employ in the public service those persons who by their position and character have obtained the general confidence and esteem of the inhabitants of the province." A long struggle was necessary before the responsible government became fixed as one of the fundamental customs of the Canadian constitution.