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1896: ‘Tu Perds’

*James W.J. Bowden recounts Lord Aberdeen’s
Dismissal of the Tupper Government*

A Conservative Dynasty Falls

Sir John A. Macdonald famously denounced Sir Wilfrid Laurier and the Liberal Party’s call for reciprocity with the United States during the 1891 election — promoting his own long-standing National Policy (protectionism for Canadian manufacturing) with an appeal to patriotism: “A British subject I was born, and a British subject I will die!” The Conservative campaign made a virtue of his age and wisdom: “The Old Flag, the Old Policy, the Old Leader.” The Old Chieftain Macdonald, a great statesman in his own right who secured the Dominion of Canada’s counter-manifest destiny in North America and forged an iron link from Atlantic to Pacific, made good on the second half of that vow a mere six weeks after leading the Conservatives to their fourth consecutive parliamentary majority. He died in office on 6 June 1891.

None could match Macdonald’s feat of longevity, especially not any Conservative prime minister. Macdonald had served as Prime Minister of Dominion of Canada and Province of Canada combined for 28 years between 1856 and 1891 in four non-consecutive terms and deserves the honour of “longest-serving prime minister” — far more than Mackenzie King, the amorphous ghastly occultist who occupied the position for a mere three non-consecutive terms over the course of 21 years. Four subsequent Conservative Prime Ministers would resign or die in office from 1891 to 1896. Senator Sir John Abbott served only one year (16 June 1891 to 24 November 1892)

before resigning due to ill health; he died in October 1893. Sir John Thompson followed, from 5 December 1892 until his death by cardiac arrest while dining at Windsor Castle (after ascending to the cupola of St. Peter’s in Rome, against doctor’s orders) on 12 December 1894.¹ The Governor General, Lord Aberdeen, then appointed Senator Sir Mackenzie Bowell on 21 December 1894, and he lasted officially until 27 April 1896.

Short Tenure

BARRY WILSON’S fascinating account in *THE DORCHESTER REVIEW* (Vol. 9, No. 1, Spring/Summer 2019) described how Sir Mackenzie’s cabinet mounted a rebellion in January 1896 and demanded his resignation. While Bowell did not step down and make way for a successor until a few months later, the cabinet revolt was successful: Sir Charles Tupper became the Leader of the Government in the House of Commons and *de facto* Prime Minister from 15 January until the Governor General appointed him as Prime Minister *de jure* on 1 May 1896. Tupper and Bowell had struck a bargain which allowed Bowell to save face: they agreed that Bowell would continue serving as prime minister until the dissolution of parliament and that Tupper would take the premiership and lead the party in the election. Tupper explains in his autobiography:

Asked by the recalcitrant members of the Cabinet to assume the leadership, I refused, declar-

ing that I would not do so except at the request of the Premier, Sir Mackenzie Bowell. It was not until all efforts on his part at reconstruction had failed that he requested me to become leader of the party. I told him I would do so if he was prepared to receive back all of his colleagues, to which he assented. The Government was then reconstructed by my appointment as Secretary of State and leader of the party in the House of Commons until after the session was over, when, by arrangement, I was to succeed Sir Mackenzie Bowell as Prime Minister.²

What Tupper writes in plenty of grandiose bluster, badly disguised as self-effacing modesty, the historical record does corroborate.* The Privy Council Office's official *Guide to Ministries Since Confederation* records that Sir Charles Tupper joined the Bowell ministry on 15 January 1896 as "Secretary of State of Canada," and the *Hansard* for the last months of the 7th Parliament also refers to Tupper as "Leader of the Government in the House of Commons," since Prime Minister Bowell sat as a Senator. The 7th Parliament lasted the full five years and came within one day of its maximum lifespan, whereupon it would have dissolved automatically by efflux of time on 25 April 1896 under section 50 of the *British North America Act, 1867*.³ Governor General Lord Aberdeen finally dissolved it on ministerial advice on 24 April 1896. (Though both Aberdeen and Tupper in their correspondence stated that the 7th Parliament dissolved by efflux of time on 25 April 1896, it did, in fact, dissolve by proclamation on 24 April 1896, as the House of Commons *Debates* from the

8th Parliament record).⁴ Bowell then stepped down in accordance with the agreement that he and Tupper had reached in January, and Aberdeen appointed Tupper as Prime Minister on 1 May 1896, during the writ.

Tupper moved quickly to counteract what circumstances must have made a tenuous hold over his cabinet; after all, if ministers can betray one prime minister, then they could easily betray a second. Tupper issued

what would become the first of six iterations of an Order-in-Council pertaining to "The Special Prerogatives of the Prime Minister" over and above the rest of cabinet. Sir Wilfrid Laurier later in 1896 found this device useful and re-issued it, as did Sir Robert Borden in 1911, Arthur Meighen in 1920, R.B. Bennett in 1930, and, lastly, W.L. Mackenzie King in 1935. King tabled his iteration of the same memorandum in the House of Commons.

Overwrought political scientists of the late 20th century would breathlessly

implore their readers to believe that the centralisation of executive authority in the prime minister began, depending upon their predilection, with Pierre Trudeau, Jean Chretien, or Stephen Harper. In reality, this trend extends back to the 19th century, and the formal legal instrument for this implementation goes back to Sir Charles Tupper in 1896. Amongst other things, this memorandum established the quorum of cabinet, and thus for sending Orders-in-Council for the Governor General's signature, as four ministers. All iterations of this Order-in-Council reserve key appointments as "the special prerogative of the Prime Minister," including: Privy Councillors, Cabinet Ministers, Lieutenant Governors and Provincial Administrators, Speaker of the Senate, Chief Justices of all Courts, Senators, Sub-Committees of Council (which refers to cabinet committees), Deputy Heads of Departments, Librarians of Parliament,

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* According to Peter Waite, a Halifax newspaper in 1896 speculated that "the confrontational and avacious Charles Tupper derived his surname from ... 'tu perds', you lose." *Canada 1874-1896: Arduous Destiny*, p. 85.

and Crown Appointments in both Houses of Parliament.⁵

But this centralised prime ministerial instrument could not save Tupper from the superior authority of the Governor General, the Queen's representative in Canada, and the results of the general election. Even though the Conservatives won the popular vote, the Liberals secured a parliamentary majority on 23 June 1896; out of 213 seats, they won 117 compared to the Conservatives' 86.⁶ The other 10 seats went to vote-splitters and spoilers. Sir Charles Tupper resigned the premiership that he had so long sought on 8 July 1896,⁷ thus earning the ignominious distinction of being the only Prime Minister of Canada whose tenure coincided purely with the writ and the time before a new parliament met; it also stands as the shortest and least consequential premiership at only 69 days. Even John Turner and Kim Campbell managed to remain prime minister longer. Governor General Lord Aberdeen then appointed Sir Wilfrid Laurier as Prime Minister on 11 July 1896.⁸ And here the story might have ended save for some remarkable primary sources.

Official Correspondence

THE INVALUABLE CORRESPONDENCE between Aberdeen and Tupper provides historians with a fascinating insight into how constitutional conventions change over time and into the constitutional relationship between the Crown and the First Minister of the Crown. In fact, this series of letters would seem, in retrospect, to mark the precise moment where crucial interpretations of how what we now call the Caretaker Convention, or the Principle of Restraint,

and the rules governing the transition of power between governments congealed into something resembling their current form. The exchange also leaves no doubt that Aberdeen forced Tupper's resignation because he refused to implement his constitutional advice and sign off on summoning senators and appointing judges. As soon as the 1st session of the 8th Parliament met on 20



August 1896, Tupper asked that Laurier obtain Lord Aberdeen's permission to publish the correspondence. On 21 August, Laurier informed the House that His Excellency had agreed.⁹ Tupper later delivered a passionate soliloquy and apology (in the classical sense) for his defeated government on 21 September; it took up a staggering 48 columns in the *Debates*.¹⁰

This correspondence, shorn of any ambiguity, definitively illustrates the crucial constitutional conventions that underpin Responsible Government.

Responsible Government means that "Ministers of the Crown take responsibility for all acts of the Crown" and that the Governor General acts on and, save for exceptional circumstances, in accordance with, ministerial advice.¹¹ These acts include accepting responsibility for one's own appointment as Prime Minister, the dismissal of one's predecessor, and for summoning, proroguing, and dissolving parliament. Ultimately, this arrangement ensures balance; Responsible Government guarantees that one Prime Minister and Ministry or another will always take responsibility for all acts of the Crown before the Commons and the electorate. Responsible Government has thereby reconciled the medieval principle of royal infallibil-

ity with modern democratic self-government. The Governor General can only refuse to promulgate ministerial advice in exceptional circumstances because the consequence of exercising such discretionary authority is equally and proportionately exceptional: the Governor General thereby dismisses the Prime Minister and ministry which tendered the original constitutional advice and must appoint in their place a new Prime Minister and ministry which can then take responsibility for his decision to refuse advice and force the dismissal of their predecessors.¹² A ministry can only take responsibility for advice that it has offered, not for the contrary advice that it did not offer.¹³

The election of 1896 marked only the third time since Confederation that a transition between ministries would happen because one party won a majority over another in an election — and the first since 1878, eighteen years before. Alexander Mackenzie's Liberals formed a new government mid-parliament in 1873 after the Pacific Scandal forced Macdonald's resignation, and the Liberals went on to win a majority in their own right in a snap election in 1874. Macdonald then marked his triumphant return in the election of 1878 and led the Conservatives to further victories in 1882, 1887, and 1891. Since the 1870s, party discipline had strengthened in both Canada and the United Kingdom.

The *Sessional Papers* published at the end of 1896 contain eight letters and memoranda going back and forth between Aberdeen and Tupper between 4 July and 13 July 1896. The House of Commons petitioned on 28 August 1896 “for copies of all correspondence between His Excellency the Governor General and Sir Charles Tupper, respecting

certain proposed appointments and Orders in Council.”¹⁴

On 4 July, Governor General Lord Aberdeen sent a “Memorandum to the Prime Minister for Himself and His Colleagues” in which he outlined his objections to his outgoing prime minister's suggestion that he would like to fill up vacancies before leaving office. From the outset, Aberdeen took



A YOUTHFUL CHARLES TUPPER

the recent view which had developed in the United Kingdom in the 1870s and 1880s during the Disraeli-Gladstone era that an incumbent prime minister should resign *before* the first session of the new parliament meets if another party had won a parliamentary majority in the recent election. Taking full advantage of his Baghotian rights to be consulted, to advise, and to warn, Aberdeen made clear to Tupper and cabinet that “it is impossible for me to ignore the probability that that in the event of your deciding to

meet Parliament the present Administration will fail to secure the support of the House of Commons.” Undoubtedly, Canadian party discipline had become more rigid after the Pacific Scandal of 1873. Next, Aberdeen underscored the paramountcy of passing supply, which had run out on 30 June because the previous session of parliament had proven so unproductive and had become so bogged down in the Manitoba Schools Question that it had failed to pass a budget in the spring of 1896. This, in turn, supported the argument that the 8th Parliament should be convened as soon as possible — with Laurier at the helm. Aberdeen continued:

The supplies for the public service are already

entirely exhausted. This contingency was in view when the date of the meeting of Parliament was fixed. It is in the public interest that Parliament shall meet on as early a day as possible, and be able to proceed with business forthwith.

In addition, Aberdeen underscored that he wanted the outgoing Tupper ministry to limit itself only to matters both “urgent” as well as “in the public interest.” Aberdeen also argued that because he had appointed Tupper’s ministry during the writ and that it had therefore never held the confidence of any House of Commons, “the acts of the present Administration are in an usual degree provisional.” He imposed a clear limitation on Tupper akin to the Caretaker Convention:

And as the powers of an Administration undoubted full and unrestricted must surely always be used with discretion, their exercise would seem to be rightly limited under such circumstances as the present to the transaction of all necessary public business, with it is a further duty to avoid all acts which may embarrass the succeeding Government.

Aberdeen then strongly intimates that he will not accept Tupper’s advice to appoint new senators and judges, but in that subtle and polite British way that bullish colonials often misinterpret as an invitation for further debate.

On this ground I would ask your further consideration of some of the recommendations which we discussed incidentally on Thursday. On this ground, too, I felt obliged to withhold the expression of my acquiescence in your suggestion as the appointment of Senators and Judges. There are life appointments, and with them, under such circumstances as the present, it would seem proper to leave all other life appointments, and the creation of all new offices and appointments for the consideration of incoming Ministers, unless always such a course is shewn to be contrary to the public interest.

Governor General Lord Aberdeen articu-

lated a reasonable argument that outgoing ministries should exercise restraint and only make the necessary and routine appointments that *not* making would prove deleterious to the national interest. This exact premise underpins the Caretaker Convention today and applies both after the writ until a new government emerges, as in this case, and during the writ as well. Unfortunately, Tupper did not heed Aberdeen’s warning and attempted to press him further. Incidentally, Aberdeen also argued that the partisan standings in the Senate of Canada had already become too unbalanced in favour of the Conservatives, which implies that the Senate should remain more evenly divided between the two parties.

Tupper replied with a long-winded four-page “Memorandum” two days later on 6 July — so long, it probably did take the full two days to write — outlining a series of precedents from the 1850s, 1860s, and 1870s which, admittedly, did support his argument. Tupper quoted Aberdeen’s previous letter and attempted to rebut it point by point and also quoted from Sir Alpheus Todd’s treatise *Parliamentary Government in England*, first published in 1867. Interestingly, Tupper did not cite Todd’s companion work, *Parliamentary Government in the British Colonies*, which deals with Canadian precedents at length. But Tupper did not fully grasp or appreciate that the Spoils System had given way to the Principle of Restraint in the 1880s and 1890s and that Aberdeen insisted on enforcing the newer understanding: outgoing ministries should not unduly bind their predecessors and should not insist on meeting the new parliament only to suffer defeat on the Address-in-Reply and delay by several weeks the necessary change in government, which party discipline makes a foregone conclusion in majority parliaments. Instead, when the electorate has given a parliamentary majority to another party, the incumbent prime minister should resign well before meeting the new House of Commons so that the Crown can appoint a new prime minister who will then proceed with his own Speech from the

Throne and legislative program.

First, Tupper attempted to bluff Aberdeen into accepting the farcical premise that “the division of parties was very close and might be materially affected by the recounts which were to take place within a few days, as there were a large number of elections in which the parties had been declared elected by a very small margin.” The Liberals won the election with an absolute majority of 117 seats, versus the 86 seats that the Conservatives had retained. It would take an awfully large number of recounts indeed to reverse those fortunes. Second, Tupper inadvertently made the damning admission that, for practical purposes, the Bowell-Tupper administration had lost control of the *Order Paper* and thus the confidence of the House of Commons because it could neither pass the remedial bill on the Manitoba Schools Question nor even a budget. This admission in fact strengthened Aberdeen’s argument that Tupper should operate under the Principle of Restraint, given that Tupper never commanded the confidence of any House of Commons as Prime Minister.

Your Excellency is aware that the failure to pass the supplies in the usual manner for the now current [fiscal] year was due to the fact that the life of Parliament terminated on the 25th [of] April, and that the Opposition took advantage of that circumstance to pursue a course of unparalleled obstruction, which enabled them to prevent any legislation being carried through by the Government

Tupper cut his teeth in the debates over the grant of Responsible Government to Nova Scotia in the 1840s and resented what he saw as Lord Aberdeen’s unpardonable intrusion into Canadian autonomy and attempt to subject Responsible Government in Canada to a higher degree of vice-regal discretion and oversight than the Queen of the United Kingdom would exercise over her British ministers in London:

I should fail in my duty to Your Excellency as well as to the principles which govern the ad-

ministration of public affairs in Canada, where Parliamentary Government is carried on precisely as it is in England, if I did not draw your attention to the very serious consequences of the views which you have indicated as guiding your action on the present occasion.

Tupper then cites Todd, who supports the older tradition that Ministers can remain in office after an election in which another party won a majority and test the confidence of the new House of Commons, as well as some of Todd’s examples of this principle. Tellingly, however, most of these examples come from the United Kingdom in the 1850s and 1860s, and Tupper emphasises that *Parliament* did not attempt to interfere, making no mention of Queen Victoria. Tupper would have argued that since Her Majesty the Queen would not intercede in such cases in the United Kingdom, and since Canada inherited its system of government from the United Kingdom, the Governor General should likewise not attempt to interfere with filling up vacancies in Canada. Tupper notes the case of Lord Palmerston who, after tendering his resignation in 1858 (but before his successor took office) nominated three persons to the Order of the Garter, still the highest chivalric honour in England. In 1866, Lord Russell filled up vacancies after announcing his intention to resign. After his defeat in 1869, Disraeli likewise nominated the Earl of Mayo as Viceroy of India. Other examples abound. In 1852, Lord Derby led a single-party minority government to defeat in the House of Commons, 234 to 146, and secured a dissolution of parliament and fresh elections. Derby’s Tories suffered defeat in the election — but stayed on until the meeting of the next parliament, whereupon Derby did not resign until after defeated on a budget 305 to 286. Here Tupper did not mention that the 4th Earl of Aberdeen — the Governor General’s own ancestor — succeeded Derby as a Tory Prime Minister! In 1859, Lord Derby again led the Conservatives to defeat in the general election that year but met the next parliament and did not resign the premiership again until losing a vote of confidence in the House of Commons. Tupper cited a precedent from New Zealand

in 1891 where a defeated ministry advised the Governor General to appoint new Legislative Councillors.

Tupper concludes: "No question, therefore, can possibly arise as to the British constitutional practice in regard to the right of a defeated Ministry to carry on the public business until their successors are appointed, and to fill any vacancies that may exist." He also dismissed Aberdeen's concern that the Senate had already tilted too far in favour of the Conservatives against the Liberals, noting that "Lord Salisbury was not precluded from the creation of additional Peers, although the disparity between the Liberals and the Conservatives in the House of Lords was at least as great as that which exists in the Senate here." He added that even though the Conservatives held a majority of seats in the Senate throughout the premiership of Alexander Mackenzie from 1873 to 1878, the Senate only defeated two government bills. Tupper also made the contradictory claim that even though the House of Commons blocked the remedial bill for the Manitoba Schools Question and a budget in the final session of the 7th Parliament — which means that, in practice, he had lost of the confidence of the Commons — he still insists that he "had the support of a large majority of that House."

The strongest argument in favour of Tupper's position derives from the Canadian precedent of 1878, when Governor General Lord Dufferin approved 82 appointments submitted by outgoing Liberal Prime Minister Alexander Mackenzie, which included "a Deputy Minister, a Judge of the Supreme Court of Canada, four puisne Judges and a County Court Judge." Tupper did not mention that in 1873, Lord Dufferin had also agreed both to appointments made by outgoing Prime Minister Sir John A. Macdonald, who had just resigned in disgrace, and then subsequently approved of Prime Minister Mackenzie's cancellation of these same appointments.¹⁵ However, Aberdeen seems not to have found this argument convincing, though he never responded to the relevant precedent directly.

Toward the end of his main memorandum,

Tupper knew that he had to admit defeat, but before doing so, he admonished Lord Aberdeen one last time and accused him of undermining Canada's system of Responsible Government:

In conclusion, I may be permitted to say to Your Excellency that under the British constitutional system which Canada has the happiness to enjoy, the Queen's representative, like Her Majesty, is the executive head of the country, removed from the arena of public controversy, however fierce the conflict of parties may be; and in my judgement no more fatal mistake could be made than any interposition in the management of public affairs which would cause the Governor General to be identified with either one party or another.

Tupper might have added this comment ironically, given that Lord Aberdeen hailed from a Whiggish background and naturally sympathised with the Liberals.

Finally, Tupper's own unambiguous words should remove any doubt from my contemporaries that a Governor General or Lieutenant Governor who rejects ministerial advice on constitutional matters necessarily forces the resignation of the prime minister or premier.

Adhering respectfully but firmly to the opinions I have ventured to express in this memorandum, which I regret to find do not agree with those of Your Excellency, it remains only for me to tender the resignation of my colleagues and myself, and to ask that we may be relieved from our responsibilities as Ministers of the Crown at the earliest convenience of Your Excellency.

On 9 July, Lord Aberdeen wrote another short letter to Tupper. He did not state outright that he had accepted Tupper's resignation, but he evidently had. Aberdeen reiterated in this last official communication to Tupper his rationale for having refused to promulgate the appointments of the outgoing ministry:

My action at the present time has been guided solely by a regard for the following facts, namely, that —

Parliament expired on April 25th.

The result of the General Elections on June 23rd was the defeat of the Government.

The supplies for the public service came to an end on July 30th, and by the view that, pending the assembly of Parliament, the full powers and authority, unquestionably possessed by the Government, should be exercised in such directions only as are demanded by the exigencies of the public interest, and so as to avoid all acts which may tend to embarrass the succeeding Administration.

The 7th Parliament dissolved on 24 April, not 25 April, and the supply ran out on 30 June rather than 30 July, because the fiscal year in the British Empire started on 1 July. (Incidentally, this almost certainly explains why Confederation happened and the *British North America Act* entered into force on 1 July 1867).

But the general arguments made in points B2 and 3 stand. Here Aberdeen utterly rejects the old British tradition and insists that popular sovereignty must replace parliamentary sovereignty where the electorate has granted one party an absolute majority of seats in the House of Commons. This, in turn, allows the Governor General to assume the role of the Defender of Democracy against prime ministers who tried to defy the popular will by shamelessly filling up vacancies as a last gasp of the Spoils System. Aberdeen further reiterates that while the ministry possesses plenary legal authority, it should nevertheless observe the Principle of Restraint and not bind its successor with craven and

unnecessary patronage appointments. Aberdeen knew that he could afford to reject Tupper's constitutional advice because Laurier would sustain this dismissal and protect him as the Queen's representative.

The remaining letters to Tupper came from John Sinclair, Lord Aberdeen's Secretary. Aberdeen would no longer deign to communicate directly with his disgraced former prime minister. On 8 July, Sinclair informed Tupper and cabinet that His Excellency had approved 453 submissions dated from 23 June to 8 July but restated forcefully that Governor General would not approve certain classes of appointments:

The undersigned [i.e., John Sinclair] is directed by the Governor General to request that pending their further consideration by Council His Excellency's approval be withheld from all recommendations which involve —

The creation of new offices or appointments;

The filling of vacancies for which no provision has been made by Parliament and which have existed for more than one clear fiscal year; Superannuations (and the consequential appointments) for which application has not been received.

On 11 July, Sinclair sent a final letter back to the outgoing Tupper Ministry, though Lord Aberdeen had made his decision clear on 8 July.

The following Minutes of Council which have not yet received the signature of the Governor General are herewith returned to you.

Sinclair cited 17 rejections, which included four proposed appointments to the Senate, six Revising Officers, and three patronage appointments within the civil service.

The *Guide to Ministries Since Confederation* records that Tupper's resignation, and that of the 7th Ministry, became effective on 8 July 1896 and that Aberdeen commissioned

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Sir Wilfrid Laurier as Prime Minister on 11 July 1896. Laurier thus took responsibility for Tupper's dismissal. Furthermore, the 8th Parliament sustained Lord Aberdeen's decision to dismiss Sir Charles and appoint Sir Wilfrid by voting in favour of the Address-in-Reply to the Speech from the Throne. But Tupper would have argued that the House of Commons, not the Governor General, should have decided his fate. The incumbent Ministry, defeated in the previous election, should remain in office, test the confidence of the new House of Commons, and resign only after suffering a defeat on the Address-in-Reply or budget or a direct motion of non-confidence. Tupper argues throughout his correspondence with Aberdeen that this method both preserves and protects the partisan neutrality of the Crown and also recognises the supremacy of the House of Commons, as opposed to the electorate, in deciding who governs. This older mid-19th century view of British parliamentarism ironically corresponds more closely to post-War Continental European parliamentary government in countries like Belgium or Germany, where the King or President appoints a Prime Minister or Chancellor on the advice of the lower house of parliament itself as expressed in a confirmation vote. The devolved assemblies in Scotland and Wales date from the late 1990s in their current forms also use confirmation voting. In all these cases therefore, the incumbent prime minister remains in office until the new elected assembly meets and selects a successor. Throughout Canada, by contrast, the Governor General or Lieutenant Governor almost always appoints a new Prime Minister or Premier first, before the first session of the new Parliament or Legislature convenes. That has proven Tupper's most enduring legacy after 69 days in office.

Constitutional Conventions

THE SCOPE OF THE CARETAKER Convention has already expanded considerably since the advent of Responsible Government in British North America in the 19th century. That Convention started in the post-writ in the late

19th and early 20th centuries, broadened to include the period of the writ by the mid- to late 20th century, and in the 21st century has already encroached on the pre-writ period, as the elections in 2019 in Manitoba and at the federal level have demonstrated. Prior to the 1890s, the Spoils System reigned supreme, and the governor would promulgate the outgoing prime minister's appointments until the day he left office. Prior to 1896, even outgoing Canadian ministries would advise the Governor General to make significant appointments, including to the Supreme Court of Canada, mere days before the Governor General swore in a new prime minister and cabinet.¹⁶ In 1896, the Tupper Dismissal showed that the Caretaker Convention had begun to emerge and that it applied post-writ, that interregnum after a party suffered defeat in an election and another party had won a parliamentary majority, but before the meeting of the new parliament. By the mid- to late 20th century, precedent has established that the Caretaker Convention applied if the government lost a vote of confidence in the House of Commons and also during the writ — but not all prime ministers observed this convention. Prime Minister Joe Clark did in 1979 when he declined to sign a contract to procure the F-18 Hornet for Canadian Forces Air Command.¹⁷ But Prime Minister Kim Campbell acted with reckless abandon rather than sensible restraint when she decided to finalise a contract to privatise Terminals 1 and 2 of Pearson International Airport on 7 October 1993 — *during* the writ.¹⁸ As of 2019, the Privy Council Office now advises the following on the Caretaker Convention:

To the extent possible ... government activity following the dissolution of Parliament — in matters of policy, expenditure and appointments — should be restricted to matters that are:

- routine, or
- non-controversial, or
- urgent and in the public interest, or
- reversible by a new government without undue cost or disruption, or
- agreed to by opposition parties (in those cases where consultation is appropriate).

In determining what activity is necessary for continued good government, the Government must inevitably exercise judgement, weighing the need for action and the restraint called for by convention.¹⁹

This sounds strikingly similar to Lord Aberdeen's rationale from 1896.

In 1896, Tupper argued from a valid, though pedantic and time-consuming, constitutional position. Strictly speaking, any incumbent ministry could stay in office after any election — even if another party wins a parliamentary majority — could subsequently meet the new House of Commons, and, finally, need only resign after losing the vote of confidence on the Address in Reply to the Speech from the Throne. This convention from the early days of Responsible Government (1840s to 1870s) started to die out once the entrenchment of party discipline in the late 19th century rendered it inefficient and impracticable.

As Eugene Forsey and Graham Eglington have observed, this convention took shape in the United Kingdom amidst oscillations between the Liberal Gladstone and the Conservative Disraeli in the 1860s and 1870s; Gladstone set the instructive precedent after the election of 1868 when he decided to resign instead of meeting his inevitable defeat in the new House of Commons.²⁰ Queen Victoria approved of this development and regarded waiting for imminent defeat as “simply a waste of time.”²¹ The same convention had taken hold in British North America by the 1870s as well, and Tupper's rearguard action in 1896 succeeded only in putting the old conventions into abeyance.

After Aberdeen's dismissal of Tupper, it became universally accepted in Canada that the incumbent Prime Minister resigns within a few weeks after the election if another party wins a parliamentary majority, rather

than staying on and testing the confidence of the new House of Commons. In other words, the *electorate*, no longer the House of Commons, now in effect decides who governs in the case of majority parliaments. And majoritarian electoral systems facilitate majority parliaments.

*One cannot
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We Canadians accepted a key premise of popular sovereignty 140 years ago, but this concession to popular sovereignty can only work properly under majoritarian electoral systems and a strong two-party system. If either or both of those underlying conditions change, then the convention and default option would also have to change in kind. Ironically, if Canada adopted proportional representation and thereby made minority parliaments the norm, then Tupper's interpretation of government formation would become the default once more.

Even under our majoritarian electoral system, the old 19th century convention — the redoubt which Tupper sacrificed his premiership to defend — still exists in narrower form in minority parliaments where the incumbent government can remain in office and test the confidence of the new assembly. The government remains in office unless another force acts upon it — where either the Prime Minister chooses to resign before meeting the elected assembly or the Prime Minister chooses to resign after the elected assembly defeats his government on the Address in Reply, or else the Governor General would have to dismiss the defeated incumbent Prime Minister. If the incumbent Prime Minister chooses to remain in office and test the confidence of the new minority parliament, then the House of Commons should first reject the ministry before the Governor General dismisses the Prime Minister from office. This order of events best maintains the democratic role of the elected assembly and the neu-

trality of the office of the Governor General.

Premier Clark of British Columbia in 2017 and Premier Gallant of New Brunswick in 2018 both elected to remain in office and meet the new legislatures rather than resign beforehand, only to face defeat on the Address-in-Reply to the Speech from the Throne. Clark advised early dissolution; Lieutenant-Governor Guichon refused, thereby forcing Clark's resignation, and subsequently appointed John Horgan in her place. Gallant took the more honourable course and simply tendered his resignation to Lieutenant-Governor Roy-Vienneau who, in turn, appointed Blaine Higgs as the new premier. In both cases, one cannot help but think of Queen Victoria's observation that this method of dismissing and appointing governments, dragged out over several weeks, constitutes an enormous waste of time.

Time would be better spent poring over the correspondence between Aberdeen and Tupper and elucidating the principles which flow therefrom. ¶

Notes

1. Privy Council Office, *Guide to Ministries Since Confederation* (Ottawa: Queen's Printer, 8 January 2018).
2. Sir Charles Tupper, *Reflections on 60 Years* (Toronto: Cassell and Company, Limited, 1914), 308-309.
3. James W.J. Bowden, "When the Bell Tolls for Parliament: Dissolution by Efflux of Time," *Journal of Parliamentary and Political Law* 11, no. 1 (2017): 129-144.
4. Parliament of Canada, House of Commons, *Debates*, 8th Parliament, 1st Session, 19 August 1896, column 1.
5. Privy Council Office, Order-in-Council P.C. 1935-3374, 25 October 1935.
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